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CASES

DECIDED IN

THE COURT OF SESSION, COURT OF JUSTICIARY,

AND

HOUSE OF LORDS,

FROM JULY 20, 1875, TO AUGUST 15, 1876,

REPORTED BY

MIDDLETON RETTIE, DONALD CRAWFORD, G. F. MELVILLE
A. E. HENDERSON, D. GILLESPIE, AND H. JOHNSTON,
ESQUIRES, ADVOCATES.

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OF THE

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* Lord Rutherfurd Clark was appointed in November 1875.

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Lord Chancellor, Lord CAIRNS,

Lords CHELMSFORD, HATHERLEY, PENZANCE,
O'HAGAN, and SELBORNE.

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* Lord Neaves having resigned his commission as a Lord of Justiciary, Lord Craighill was appointed in March 1876.

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ERRATA.

P. 494, line 15 from foot, *for* difference as its differences, *read* difference as to its consequences.

P. 613, line 4, *for* Watson and Company, *read* Watson and Campbell.

P. 968, line 11 from foot, *delete* (*supra*, p. 604).

P. 974. At the beginning of the report of Dudgeon v. Thomson and Donaldson, *supply* (*supra*, p. 604).

P. 967. *Transpose* reference to Dig. 44, 7, 21, from line 35 to line 18.

P. 45 of House of Lords Cases, line 19 from foot, *for* opinion of the Lord Chancellor, *read* opinion of Lord Chelmsford.

CASES

DECIDED IN

THE HOUSE OF LORDS.

1876.

No. 1.

Feb. 28, 1876.
Muir v. Thompson.

JOHN GEORGE MUIR (Defender), Appellant.—*Robertson.*
JOSEPH THOMPSON (Pursuer), Respondent.—*Southgate, Q.C.*—*Shiress Will*—*Badenach Nicolson.*

***Mandate*—*Writ*—*Erasure.*—*Held* (*aff.* judgment of the Second Division) (1) that mandates, bearing to be granted for a meeting of a parochial board to be held on 2d August, "or any subsequent date to which such meeting may be adjourned, for the election of an inspector of poor in room of," &c., were validly tendered, and ought to have been admitted at a meeting of the board held for that purpose on September 5th, although no meeting had been held on the 2d August; (2) that mandates bearing to be for a meeting to be held on August 16th were valid, although the figure "6" was printed on an erasure, from which the figure "5" had been removed.

(IN the Court of Session Nov. 30, 1871, 10 Macph. p. 178, 44 Scot. Jur. 107.)

Ld. Chancellor (Cairns).
Ld. Chelmsford.
Ld. Hatherley.
Ld. O'Hagan.

Joseph Thompson brought this action of declarator and reduction against the Parochial Board of Inveresk, and against John George Muir, who had been declared duly elected inspector of poor and collector of poor-rates for that parish, concluding, *inter alia*, for declarator that the pursuer was duly elected inspector of poor and collector of poor-rates of said parish from and after the 5th September 1870, the date of a meeting of the parochial board at which he was duly and legally elected.

The pursuer, Thompson, maintained that the scrutiny committee had erroneously disallowed twelve votes tendered on his behalf on 5th September 1870, because the mandates were granted for a meeting to be held on 2d August 1870, or on any subsequent date to which said meeting might be adjourned. These mandates were partly written and partly printed, and were in the following terms:—"Sir,—You are hereby authorised to attend, vote, and act for me at a meeting of the parochial board of the parish of Inveresk, to be held on the 2d of August 1870, or any subsequent date to which said meeting may be adjourned, for the election of an inspector of poor and collector of poor-rates, in room of the late Mr Andrew Symons, with the same powers as belong to,—Sir, your most obedient servant,

"To ——"

In the course of a proof an objection was taken by the defender Muir to thirty-three mandates which had been used in favour of the pursuer, on

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the ground that the date of the meeting for which they bore to be granted was partly printed on an erasure. These mandates, which were printed, described the meeting as called for the election of an inspector of poor on 16th August, but the figure "6" had been printed on an erasure, from which the figure "5" had been removed.

The Lord Ordinary (Mackenzie) assoilzied the defenders.

The pursuer having reclaimed, the Second Division gave effect to the pursuer's objection to Muir's election, and at the same time repelled the defender's objection to the thirty-three mandates above given, and found that the pursuer had been duly elected.

Muir appealed to the House of Lords.

LORD CHANCELLOR.—There was an election to the office of inspector of poor in the parish of Inveresk, and the question arose in consequence of that election, whether the appellant (Muir) had been properly elected, his election being challenged by the respondent. Various objections were made to mandates tendered for the pursuer, and two have now fallen to be considered by your Lordships. Those two objections concern, one of them twelve mandates and proxies, and the other thirty-three mandates, given by certain persons qualified to vote at that election.

The objection to the twelve mandates was this: They were granted in point of form authorising the mandatary to attend, vote, and act for the person giving the mandate, "at a meeting of the parochial board of the parish of Inveresk, to be held on the 2d of August 1870, or any subsequent date to which the said meeting may be adjourned, for the election of an inspector of poor and collector of poor-rates in room of the late Mr Andrew Symons, with the same powers" as belonged to the person signing the mandate. My Lords, the persons holding twelve of these mandates attended a meeting for the election of an inspector of poor and collector of poor-rates in the room of Symons, in 1870; they attended the only meeting held for that purpose in that or any other year, and they voted at that meeting. But the meeting was not held and was not intended to be held upon the 2d of August 1870, and therefore it could not be adjourned from the 2d August to any subsequent day. It was held upon a subsequent day in August. It was adjourned to a day in September, and the business was concluded in September. The objection is that the mention of the date of the 2d August 1870 being an error, made it impossible for the mandatary to exercise his powers on the right day in August on which the meeting was held.

I have no doubt that when any case comes before your Lordships or any Court in Scotland in which any departure from a mandate, in anything which is essential or can alter the rights of the parties, is shewn, it will be held that such a departure invalidates the use which has been made of the mandate. But the question here is, Is there any departure from the mandate in anything which can be essential? Your Lordships invited the learned counsel at the bar to point out any matter in respect of which this error of date could have led to any evil consequence. I submit to your Lordships that this is an instance of what is termed in law *falsa demonstratio*. There is an error in the date which is corrected by the other parts of the mandate—the mandate pointing out in a way which could not be mistaken what the meeting was to be held for, and what the business was which the meeting was to transact. The object of the meeting was such that only one meeting could be held for the purpose.

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There could therefore be no doubt or uncertainty as to the meeting at which the mandatary was to act. If that is so, if there is what Lord Bacon, I think, calls *præsentia corporis* as it were, the collateral error is immaterial; the certainty is gained by the description of the purpose for which the meeting was to be held. If that is so, I think your Lordships may well reject any error, if it be an error, in regard to the date, and hold that there is a certainty of the meeting, and that in point of fact the mandate was exercised at the meeting at which it was intended to be exercised.

The other thirty-three mandates were subjected to an objection of a different kind. They were mandates in print, and the printer had, in the first instance, printed them with the date of, I think, the 15th of August 1870. That was an error of date; it ought to have been the 16th, and the figure 5 was erased by some process, and over and on the space where the 5 stood there was printed by type 6 in the place of 5. Now, my Lords, if it stood there without any evidence—that is to say, if your Lordships had had to deal with a case where there were a number of mandates all in print, and all with the same alterations made in this way upon them—I should myself have been clearly of opinion that the reasonable and natural presumption was that that alteration was made before the documents issued from the printer's hands, and before therefore they were used—before the person giving the mandate handed it to the mandatary. That, I think, would be the natural conclusion to be drawn under the circumstances. If you have got a document in print which has been altered afterwards in writing, inasmuch as writing may be placed upon it at any time, it may be doubtful at what time the writing was put there, and the presumption may perhaps be that it was put there after the document left the printer's hands. But it is quite different where you find that the alteration is a typographical alteration, as to which the more natural presumption is that it was made in the place where alone types are to be found, namely, at the printer's.

But your Lordships need not decide that question here, for you have the evidence of the printer, and the printer tells you that it was he who made the alteration, and that he made it as part of the business or job with which he was charged, and that after having made it he gave out the mandates to be used. Therefore your Lordships have nothing more than this: A printed document in which there has been an alteration in print made before the document has been used, or as we say, executed, before the person putting it in circulation handed it to the mandatary. That being so, my Lords, I am at a loss to conceive what possible vice there is in the fact of an alteration having been made under these circumstances.

I therefore think that the Court below were perfectly right in the conclusion they arrived at, as well with regard to the thirty-three as to the twelve mandates, and that there is no ground whatever for this appeal, which I am bound to say is so minute in its nature, and proceeds upon a point of so little foundation, that one cannot but regret that such a case has been brought to your Lordships' House.

Lord Chelmsford, Lord Hatherley, and Lord O'Hagan concurred.

Judgment affirmed, and appeal dismissed, with costs.

Andrew Gillman, Westminster—W. K. Thwaites, S.S.C.—Connell & Hope, Westminster—Gillespie & Paterson, W.S.

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Stephen, &c.

WILLIAM AITON (Respondent), Appellant.—*Southgate, Q.C.—Murphy, Q.C.*
WILLIAM STEPHEN AND OTHERS (Complainers), Respondents.—
Cotton, Q.C.—Pearson, Q.C.—W. A. Brown.

Property—Harbour—Statute—Private Act—Right to Beach Boats.—The fishermen of the sea-coast village of B had from time immemorial laid up their boats for the winter on certain ground belonging to the proprietor of the village, to whom they paid a rent (which from an early period was £1, 17s. 6d.), for their houses and certain other privileges, the right of laying up the boats not being specified in the agreements. In 1845 the proprietor obtained an Act of Parliament for the improvement of the harbour of the village, which authorised him to levy dues on all vessels entering the harbour,—and "on all boats laid up at B for the winter season, 5s." He subsequently charged 5s. from each fisherman on that account, the rent being diminished to that extent. The same system was for some years continued by a new proprietor who purchased the estate in 1865. In 1874 he asserted a right to exclude the fishermen from the ground. In a suspension and interdict brought against him by the fishermen, *held* (aff judgment of the First Division) that they were entitled to the use of the ground for laying up their boats on payment of 5s. until the proprietor provided them with another safe and suitable place, in respect that the Act, in authorising the proprietor to levy dues, had by implication imposed a corresponding obligation to provide accommodation for the fishermen laying up their boats.

Ld. Chancellor (Cairns).
Lord Chelmsford.
Ld. Hatherley.
Ld. O'Hagan.

(IN the Court of Session 27th February 1875, *ante*, vol. ii., p 470.)

This was a suspension by William Stephen and others, fishermen, residing in Boddam, a village on the coast of Aberdeenshire, as individuals, and also as a committee elected by the fishermen of Boddam for transacting the fishing affairs of the village of Boddam, against William Aiton of Boddam. The prayer, as amended in the Inner-House, was to interdict the respondent "from troubling, molesting, or interfering in any way with the complainers and the other fishermen belonging to the village of Boddam, in laying up for the winter season, beaching, or taking their boats above high-water mark at or near the harbour of Boddam, upon the ground coloured blue and green in the plan or sketch herewith produced, . . . on payment of five shillings for each boat," in terms of schedule A appended to the Act 8 and 9 Vict., cap. xxv.

The complainers averred that prior to 1845 the fishermen of Boddam had been from time immemorial in use to beach their boats on the ground in question, and that their right to do so was expressly recognised by an Act of Parliament passed in that year for the improvement of the harbour of Boddam, and that the proprietor now refused to allow boats to be beached on the ground in question,

They pleaded;—(1) The acts complained of being a violation of the rights possessed by the complainers at common law and enjoyed by them for immemorial time they are entitled to suspension and interdict as craved. (2) The complainers are entitled to be protected in the exercise of their right to beach their boats on the ground in question in respect of the provisions of the Act 8 and 9 Vict., c. xxv.—(local and personal Acts declared to be public, and to be judicially noticed).

A proof was led the import of which is given in the opinion of the Lord Chancellor.

The Lord Ordinary (Curriehill), on 10th December 1874 refused the suspension.

The complainers having reclaimed the First Division pronounced this interlocutor:—"Recall the said interlocutor: Find that the complainers are entitled to the use of the ground in dispute for laying up or beaching their boats in the winter season on payment to the respondent of 5s. for each boat so laid up or beached, and this so long as the respondent

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shall not have provided other safe and suitable accommodation for that purpose, either within the limits of the works proposed to be executed or completed by him under the Act of Parliament 8 and 9 Victoria, chapter xxv., or elsewhere at Boddam; and to this extent and effect sustain the first and second pleas in law for the complainers: Interdict, prohibit, and discharge, in terms of the prayer of the note of suspension and interdict as amended, and decern: Find the complainers entitled to expenses," &c.

The respondent appealed.

LORD CHANCELLOR.—In the year 1845 the village of Boddam, on the east or north-east coast of Aberdeenshire, was owned by the Earl of Aberdeen. It had previously belonged to a Mrs Robertson Gordon, and before her to a Mr Robertson. It was a small fishing village, where a small but increasing herring fishery had been carried on. The herring fishery was carried on by fishermen who lived in the cottages composing the village, and your Lordships find that these cottages were let during the time of Mr Robertson on leases for twenty-one years, by which Mr Robertson agreed to let for twenty-one years the houses and yards possessed by the fishermen whose names were subscribed, "as presently possessed by them, and also of the scalps within the flood-mark for laying down their mussels and other bait, and also with the privileges of roads and accesses and of the rocks for laying down and winning their fish, as presently enjoyed by them." Then, under the second head there was a provision that the rent was to be £1, 5s. a-year for the first ten years, and £1, 7s. 6d. "for the next eleven years, in name of rent or tack-duty," "and in the event of the herring fishery being carried on at Boddam during the said lease they agree to pay for each boat employed on the said fishery the one half the same rates and duties as may be payable at the time for the herring boats employed at Peterhead."

Later than this the lease for twenty-one years was extended by Mrs Robertson Gordon, who appears to have succeeded Mr Robertson. In the extended leases a term or holding of seven years was added to the original term, and a rent was laid upon the fishermen of 10s. in addition to the £1, 7s. 6d. which had been imposed by the first lease, so that the total rent became £1, 17s. 6d. And the third head of that tack ran in these words—"The said fishermen shall have right during the currency of the said lease to use the said pier or breakwater, and harbour and beach enclosed thereby, as well as the present harbour at Boddam, for the purpose of the herring fishing as well as for the white fishing, as occasion may require, without any dues being chargeable on them for their herring boats and other boats employed at the said fisheries at Boddam, and the said fishermen shall also have power to land thereat any description of goods and merchandise which they may have occasion to import, each for his own domestic purposes;" so that your Lordships observe that the rent being raised to £1, 17s. 6d. there was a stipulation for the use of the "harbour and beach enclosed thereby," whatever that might mean, "as well as the present harbour," that is, any additional harbour as well as the present, for the purposes of herring fishing, the sum stipulated to be paid, namely £1, 17s. 6d., being made to include any dues chargeable upon the fishermen for their herring boats and other boats employed in the fisheries. That was the state of things upon the second instrument of tack or lease which is before your Lordships.

Then, Lord Aberdeen became, as I have said, the owner, and the habit and use at this time of the fishermen is described in the evidence in the case. I will refer your Lordships to one witness, whose evidence will be sufficient for

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the present purpose, Andrew Stephen, who seems to be one of a family of Stephen brothers who are fishermen at Boddam. He is referred to a map upon which two spaces of ground coloured blue and green are marked, which are the spaces of ground in dispute in the present proceedings. He says—"I see them;" "as far back as I remember there was no road there, and we beached our boats both on the blue and green ground." Lower down he says—"From the earliest time I remember we have been in the habit of drawing up our boats both on the blue and the green." Then further on he says—"I have never known the green and blue spaces used for any other purpose except beaching boats."

Now, that being the state of things—a herring fishery existing at Boddam, where the fishermen are provided with residences in and about the village, and hold those residencces under tacks which fix a certain rent, to include all dues connected with the fishery, and their habit and use being to beach their boats in the winter season, when their boats cannot be left in the water, but must be beached somewhere, upon the two pieces of ground coloured blue and green—that, I say, being the state of things in 1844 and 1845, your Lordships will now turn to what took place in the latter of those years. In the year 1845 the Earl of Aberdeen came to Parliament for the purpose of obtaining an Act, which, in the first instance, assumed the shape of a private bill, but which was the foundation of an Act declared to be public, and which must be judicially noticed as such, and must have all the operation of a public Act. In truth, when your Lordships look at this public Act, you find that it is an Act of the most comprehensive kind, establishing a public harbour, authorising tolls to be taken, and containing every clause which would be enacted with reference to the largest harbour in the kingdom. It provides for the entrance of foreign vessels, the dues to be taken from foreign vessels, the respecting, with regard to foreign vessels, of the rights and obligations of our treaties with foreign states; it authorises by-laws to be made and penalties levied; and in fact, as I have said, it forms a complete code for the regulation of a public harbour.

The preamble or introduction of that Act stated that Lord Aberdeen was the heritable proprietor of the village of Boddam, and "of the harbour or port of Boddam, and the piers and works therewith connected," and that "it would be of great advantage to the public, and especially to those using the said harbour, if the same were to be improved by deepening and enlarging the said harbour and the entrances and approaches thereto, and by extending the said pier and forming a breakwater; and whereas the said Earl and his predecessors, proprietors of the said village, have from time to time expended considerable sums in erecting the present piers and otherwise forming the said harbour," and the Earl was willing to make the improvements at his own expense, and in consideration of the expense which the Earl had already incurred and would incur in making these improvements, it was reasonable "that the Earl and his successors should receive the tolls, rates, and dues hereinafter mentioned." Then it stated that a map or plan had been deposited "describing the lines, levels, and situation of the harbour and the proposed breakwater and other works, and of the lands" on which they were to be executed. Where works had to be executed, of course it was necessary to describe them and to indicate the land upon which they were to be executed. The third section provided that it should be lawful "for the Earl and his heirs and successors upon the lands described in the said plan and book of reference, and according to the provisions herein contained, at such times and in such manner as he and they may judge proper, to make and

execute the improvements and works in the said harbour, and erect and construct the pier and breakwater therein according to the lines delineated on the plan, "together with the excavations and all other works connected therewith, and also to make, build, alter, repair, and maintain within the limits aforesaid such quays, shores, piers, jetties, landing-places, and other works, and such approaches, roads, retaining-walls and embankments, and other works therewith connected, as he or they may think necessary for the purposes of said harbour." Therefore there was power given, not merely to execute particular works where the face of nature had to be changed, but also to connect with those structural changes conveniences and approaches, and such other accommodation as might be found to be necessary for the purpose in view. And then the 7th section provided that the Earl might "demand and receive for every vessel which shall enter within the limits of the harbour any sum not exceeding the several rates and duties on tonnage specified in the schedule (A)." When your Lordships turn to schedule (A) you find that it is divided into two or three parts,—the first relating to "tonnage duties," which are specially mentioned; the second relating to "herring boats"—"For all herring boats engaged at the fishery at Boddam for the period of their fishing season, in lieu of all tonnage duties payable for such herring boats," so much. And then the third head is—"For all boats laid up at Boddam for the winter season, 5s."

Now, my Lords in the first place, some question was raised with regard to the meaning of the words "laid up," but I think your Lordships cannot be of opinion that any controversy is possible as to the meaning of those words. In the first place, there is no evidence whatever that they have any meaning other than that which is assigned to them by the respondents here, namely, beached. In the second place, you have the admission of the appellant himself that it is impossible that herring-boats can be safely dealt with during the winter months except by "beaching." Therefore the laying up for the winter would mean beaching. But in addition to that your Lordships have the best possible testimony, *ante litem motam*, both from Lord Aberdeen and from the appellant himself. In the case for Lord Aberdeen you find that in the conditions he issued to the tenants he used the term beaching as a term which properly described the work of laying up for which the toll or duty of 5s. was to be exacted. Therefore your Lordships will read the schedule as if it provided a fee of 5s. for the beaching of every boat that should be beached at Boddam in the winter season.

That being the nature of the Act of Parliament, and the provision it contains with regard to toll, what is the consequence of it? Your Lordships have this state of things,—There was at the time the Act passed a herring fishery at Boddam; it was conducted by fishermen living in cottages provided by the proprietor, and paying a gross, or as it is termed a "slump sum," for the cottage and for all the privileges which they had as fishermen. Then you have the Act of Parliament, which takes notice of that state of things, indicating the advantage to be derived from improving the harbour for, among other things, the purpose of the herring fishery; and then you have the person who is willing to undertake that work, who appeals to the Legislature for power to levy tolls as a remuneration for the work he was about to undertake—you have him stating that he asks for permission to charge a duty upon every herring boat engaged in the fishing for the privilege of passing in and out of the harbour, and also another duty of 5s. for every boat of that kind beached for the winter season; and he is the proprietor of the beach, and on that beach there are two places

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which at that very time were used for the purpose of beaching the boats of these herring fishermen. My Lords, is it to be heard that after this that person, who has obtained this Act of Parliament, or any person claiming under title from him, is to come before a Court of law and say—It is true that I obtained these powers; it is true that I made this representation to Parliament; it is true that the herring fishery cannot be conducted unless the fishermen have the accommodation of laying up their boats upon the beach during the winter; it is true that I represented to Parliament that if the Leglislature would allow me to charge 5s. for every boat beached I would maintain this station as a herring fishery; but now I claim to continue to charge during the herring season a toll for a boat coming in and out of the harbour, but I refuse to allow that boat that which I admit is an indispensable condition of its existence as a boat pursuing the herring fishery, namely, the accommodation of beaching itself upon the beach which belongs to me, and for which beaching I was authorised by Parliament to take a particular toll? My Lords, if that can be done, the whole Act can be overthrown. The same person may say—I will not allow any boat to come into the harbour; or he may say, I will allow boats of a particular tonnage or belonging to a particular nation to come in; I will pick and choose; I will take such toll out of these mentioned in the Act as is convenient to me, and I will refuse any other accommodation mentioned in the Act; and I will contend that, provided I do not exact any other toll, I have no obligation to allow any other service to be given. My Lords, I apprehend that that would be quite fatal to the principle of an Act of this kind, and that your Lordships will lay down and maintain this rule—that any person soliciting an Act giving these high powers of charging tolls, does it upon the faith of having represented to the Legislature that he will provide the accommodation mentioned in the Act, and that while he exacts the toll, or is in a position to exact the toll, he cannot refuse the accommodation which is pointed out by the Act.

A question might arise, but does not arise in this case, as to how far the tolls might be charged if the works, or those of them which would cost money, had not been actually executed as contemplated in the Act. That does not apply to the present case. Your Lordships have here to deal with a case where no work requires to be executed—where nothing requires to be done but to afford that amount of accommodation which the fishermen actually possessed at the time when the Act passed.

I need hardly add, although it fixes perhaps more distinctly the state of things which was in the contemplation of every one when this Act passed, that Lord Aberdeen himself after the Act passed, and after he had received from Parliament that which he had not before—a right of exacting a particular due for a particular service—addressed himself to altering the mode of paying the rent of £1, 17s. 6d. which before that time had been paid by these fishermen as a gross sum. He divided it in this way—he assigned £1, 2s. 6d. of it as the rent of the cottage which the fishermen occupied, and he assigned the residue of it as the equivalent of the duty, as made up of the various items of duty which he was authorised by the Act to exact. That only makes it more clear what Lord Aberdeen intended, and the opinion which he formed of his rights and obligations under the Act. He was of opinion that he was bound to supply the fishermen with the accommodation they had previously enjoyed for the purpose of beaching their boats, and that, on the other hand, he was armed by this Act of Parliament with the power of charging them the 5s. for the beaching,

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and that that 5s. was nothing more than what had previously been included in the gross sum which the fishermen had paid to him.

I therefore submit to your Lordships that the interlocutor of the Court of Session is entirely right. It fixes the obligation on the owner of the *locus in quo* of allowing the fishermen to use this ground for beaching their boats as long as he provides no other convenient and safe place for that purpose. It does not prevent his using this land for any other purpose if he provides another place which will be equally safe and convenient for the fishermen. I therefore move your Lordships that the interlocutor appealed from be affirmed, and the appeal dismissed, with costs.

LORD CHELMSFORD, LORD HATHERLEY, and LORD O'HAGAN concurred.

JUDGMENT affirmed, and appeal dismissed, with costs.

GRAHAMES & WARDLAW, Westminster—AULD & MACDONALD, W.S.—HOLMES & Co.—ALEXANDER MORISON, S.S.C.

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Mar. 9, 1876.
Hutton, &c. v. Harper, &c.

REV. ROBERT SHAW HUTTON AND OTHERS (Pursuers), Appellants.—*Lord-Adv. Gordon—Cotton, Q.C.*

REV. ALEXANDER HARPER AND OTHERS (Defenders), Respondents.—*Fitzjames Stephen, Q.C.—Gloag.*

Church—Parish Quoad Sacra—Marriage—Proclamation of Banns.—Held (*aff.* judgment of the Court of Session) that the proclamation of banns was prescribed by the Church as a preliminary to the celebration of marriage *in facie ecclesiæ*, and that such proclamation was one of the functions and duties of the office of minister of a church erected into a parish church under the Act 7 and 8 Vict. c. 44, for the district attached thereto as a parish *quoad sacra*.

(IN the Court of Session July 7, 1875, *ante*, vol. ii. p. 893.)

Ld. Chancellor (Cairns).
Ld. Chelmsford.
Ld. Hatherley.
Ld. O'Hagan.

The present action was raised by the Rev. R. S. Hutton, the minister of the parish of Cambusnethan, and other members of the kirk-session of that parish, and the session-clerk, "against the Rev. Alexander Harper, M.A., minister of the *quoad sacra* parish of Wishaw, and others, constituting or claiming to constitute the kirk-session of the said *quoad sacra* parish of Wishaw," concluding for declarator "that the defenders are not, and that none of them is entitled to make proclamations of banns of marriages in the church of the *quoad sacra* parish of Wishaw, or to cause or permit proclamations of banns of marriages to be made in the said church, or to demand, exact, or receive dues or fees in respect of such proclamations made in the said church, and that proclamations of the banns of marriages made in the church of the said *quoad sacra* parish of Wishaw have not been and are not legal or valid, but are, on the contrary, illegal and invalid."

On 30th January 1875 the Lord Ordinary (Mackenzie) pronounced an interlocutor finding that the defenders were not entitled to make proclamations of banns in the church of the *quoad sacra* parish of Wishaw.

The defenders having reclaimed, the Second Division, with three consulted Judges (the Lord President, Lord Ardmillan, and Lord Mure), unanimously recalled the Lord Ordinary's interlocutor, and sustained the defences.

The pursuers appealed.

LORD CHANCELLOR.—My Lords, I cannot say that the very elaborate argument which your Lordships have heard at the bar has raised any doubt whatever in my mind as to the correctness of the decision of the Court of Session. I would remind your Lordships that we have here the unanimous opinion of the seven consulted Judges who met together to consider what should be the interlocutor

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of the Second Division of the Court of Session. No doubt the Lord Ordinary, for whom we entertain great respect, was of a different opinion, but I repeat that there was no dissension whatever between the seven consulted Judges.

The question is simply this: The district of Wishaw was disjoined from the parish of Cumbusnethan, and was constituted under an Act of Parliament, to which I shall have to refer, "a parish" or "district" "*quoad sacra.*" I am using the words which are found in the Act of Parliament. The question is, Where are the banns of marriage to be published under these circumstances? If persons within the disjoined district are about to be married, and desire to have their banns published, are they to have them published in the kirk of the old parish, or in the kirk of the disjoined district? That depends upon the exact meaning to be given to the word "parish" and the other terms used in the Act of Parliament; but of course your Lordships cannot overlook the strong *a priori* probability that if persons are about to treat marriage as a religious ceremony (of course in Scotland it is not necessary that it should be so treated, but if they are about so to treat it), and comply with those regulations which prescribe publication of banns, any arrangement for the disjoining of a district would have carried with it the power and right to have banns under those circumstances published in the kirk where the persons who were about to be married were in the habit of attending, and the district where they resided.

But, we must put aside the *a priori* probability, and look exactly to what the Act of Parliament has said. Now, the Act of Parliament has provided that where the necessary preliminaries, which I shall not refer to, have taken place the Commissioners of Teinds are authorised to erect the new church "into a parish church in connection with the Church of Scotland, and to mark out and designate a district to be attached thereto *quoad sacra*, and to disjoin such district *quoad sacra* from the parish or parishes to which the same or any part thereof may have belonged or been attached, and to erect such district into a parish *quoad sacra* in connection with the Church of Scotland." My Lords, if the Act stopped here of course we should have to inquire what is the proper meaning to be assigned to those words "parish *quoad sacra.*" But the Act does not stop there; it goes on to say, "and it shall and may be lawful for the minister and elders of such parish to have and enjoy the status, and all the powers, rights, and privileges of a parish minister and elders of the Church of Scotland." Now, the minister and the elders constitute together the kirk-session of the parish, and it is admitted that the disjoined parish is to have a kirk-session. The kirk-session therefore is to have all the powers, rights, and privileges which a parish minister and elders of the Church of Scotland have. These words of course must mean not with reference to the whole of Scotland, but with reference to the disjoined parish, and therefore your Lordships have here an enactment that the disjoined parish shall have a kirk-session, and that that kirk-session shall have in the disjoined parish all the rights of any parish minister and elders of the Church of Scotland in any parish.

It is not denied, even if we stopped here, that one of the rights and one of the duties of a kirk-session is to require the publication of banns, and by the discipline of the Church to insist upon and enforce the publication of banns. Therefore your Lordships have to ask this question, in the face of the general words which I have read, and in the face of an Act of Parliament which says that the parish minister and elders of this disjoined parish shall have all the rights of the parish minister and elders of a parish in Scotland—What reason is

there for taking out of those general words the right connected with the enforcing of the publication of banns, and for saying, that whereas the Act of Parliament says that the kirk-session shall have all rights, your Lordships are to interpret that Act as meaning that the kirk-session shall have all rights minus this important right of enforcing the publication of banns?

But let me go a step further, and ask your Lordships whether the publication of banns does not come under the words *quoad sacra*, and is not one of the rights which in Scotland would be termed *inter sacra*. Now, your Lordships have not here to consider by any abstract standard what things should be called *sacra* and what things profane. What we have to inquire is, what has been considered in the Kirk of Scotland *inter sacra*? And let us put aside altogether any question of civil enactment and turn to the law of the Kirk alone, commencing from the earliest times—commencing with the Book of Discipline as it is called, although we might commence earlier. Commencing with the Book of Discipline of the year 1560, and going down from the Book of Discipline through the different Acts of Assembly, your Lordships have a regular course of Church legislation requiring publicity with regard to marriages, requiring the publication of banns through the medium of the kirk-session, and visiting with the discipline of the Church those persons, whether laity or ministers, who should disregard the discipline of the Church in that respect. My Lords, if that be so—if, putting aside all questions of civil enactment, your Lordships find the enactments of the Church consistent throughout the period to which I have referred in requiring the publication of banns—I ask, is not the publication of banns part of the discipline of the Church? The Church went on also to require originally the marriage to be celebrated by a minister of the Established Kirk. That requirement, at all events as regards the effect of neglecting it, was afterwards modified by civil enactment, to which I shall afterwards refer; but, in the first instance, your Lordships have the consistent law of the Church requiring the publication of banns and the marriage by the minister. It appears to me impossible to say after that that the publication of banns is not part of the discipline of the Church, and if it be part of the discipline of the Church is it not a thing which comes under those words used in the language of the Church "*inter sacra*"? It appears to me that it is clearly to be considered as part of those things which have been called *inter sacra* by the Church.

Then, my Lords, it is said that the publication of banns has been regulated or in some way dealt with by civil enactments. But, my Lords, in what way has it been dealt with? The Act of 1661—the Act of Charles the Second—states by way of preamble that "Our Sovereign Lord and the Estates of this present Parliament, considering how necessary it is that no marriage be celebrated but according to the laudable order and constitution of this Kirk," that is to say, of the Kirk of the realm, and yet that persons "do procure themselves to be married and are married either in a clandestine way, contrary to the established order of the Kirk, or by Jesuits, priests," "or any other not authorised by this Kirk," therefore His Majesty, upon the advice of the Estates, "ordains that whatsoever person or persons shall hereafter marry or procure themselves to be married in any clandestine and inorderly way, or by Jesuits, priests, or any other not authorised by this Kirk, that they shall be imprisoned." Therefore your Lordships observe that the civil enactment refers to the order and the discipline of the Church, and brings to bear the weight of civil authority, not in support of some independent enactment of its own, but of that which at that time is recognised and referred to as the law and the order of the Kirk.

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It might have been said—it might be said at the present day—the state will recognise in Scotland no marriage but a marriage performed by a religious ceremony, and according to the order either of the Kirk of Scotland or any religious denomination in Scotland. But, my Lords, if the state thought fit to say so, would that alter the nature of the marriage? Would it make it cease to be a religious cermony? Clearly not. On the contrary, it would be the strongest affirmation by the state that it was a religious ceremony. And so here your Lordships have the Act of 1661 pointing to the religious ceremony and that which preceded it, the marriage according to what then was the order of the Kirk, and the publication of the banns, which was required as a preliminary, as that which was to be complied with and to be enforced through this Act of Parliament. My Lords, it appears to me that neither this Act nor any which followed it in the slightest degree alters the nature of the publication of the banns by merely enacting that the law of the Church shall be complied with.

My Lords, that really is the whole of this case. But for the elaborate argument which your Lordships have heard, I should have been well content to say that I concur with every word which has been expressed in the Court below, and I particularly refer to the very concise and pointed judgment of the Lord Justice-Clerk,* which appears to me to exhaust entirely the whole of the case.

* The following is the opinion of the Lord Justice-Clerk referred to:—

"I have arrived at the same conclusion, upon two simple grounds. The first is, that a parish erected *quoad sacra*, under 7 and 8 Vict. c. 44, has within itself all that is necessary pertaining to the government, order, and discipline of the Church of Scotland within that territory. A parish *quoad sacra* has its own kirk-session, and within the territory of the parish they have the full powers of discipline of any other kirk-session in any other parish. Independently of that general rule, the terms of the Act of Parliament are quite precise that the minister and elders of the *quoad sacra* parish shall have and enjoy the status, powers, rights and privileges of a parish minister and elders of the Church of Scotland.

"Now, this is not a matter in which it is necessary at all to draw the line between civil and spiritual matters, but what is clear is that the right of discipline and the obligation to look after the discipline of the Church within the territory is devolved upon the kirk-session of a *quoad sacra* parish in the same way and to the same effect as upon any other kirk-session of the Church.

"The next and only real question is—Is the proclamation of banns part of the discipline of the Church? On that matter, either on principle or historically, there is not the smallest doubt. If the proclamation of banns be prescribed by the authority of the Church, and the object for its prescription be the discipline of the parish, then there can be no question that this is a matter which devolves on the kirk-session of a *quoad sacra* parish as it does on the kirk-session of any other parish.

"Now, I do not mean to say that the proclamation of banns in itself is a matter either ecclesiastical or spiritual. It is in itself a matter indifferent. It would be no breach of the distinction between civil and spiritual if the Legislature were to pass an Act regulating the matter of the proclamation of banns absolutely as a civil arrangement, just as they have passed an Act regulating the registration of births, although there was before and by the very same authority a very precise provision for the registration of baptisms by the kirk-session. These are matters, I say, indifferent in themselves. But the question is, whether the proclamation of banns was prescribed by the Church for the purpose of discipline, and not merely enacted by it for purposes of social order? The first Book of Discipline is quite precise on this matter. That was the very first statement of the principles of the Reformed Church of Scotland, and Knox himself was a party to it. It was followed by a complete succession of Acts of Assembly, going through the whole of the seventeenth and part of the eighteenth centuries, the last of which was the Act of 1784, putting an end to the abuse of the session-

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I therefore submit to your Lordships that the interlocutor appealed against should be affirmed, and the appeal dismissed, with costs.

LORD CHELMSFORD.—The question upon this appeal is—Whether the parish of Wishaw, having been regularly erected as a *quoad sacra* parish, the minister and elders thereof are entitled to make proclamations of banns of marriages in the church, and to receive dues or fees in respect of such proclamations.

By the 7th and 8th Vict. c. 44, sec. 8, it is enacted that the minister and elders of a *quoad sacra* parish shall have and enjoy all the powers, rights, and privileges of a parish minister and elders of the Church of Scotland. The House has therefore to determine what is the power of a minister and elders of a parish in Scotland in respect to the publications of banns of marriage. The duty of publishing banns is attached to the office of clerk of the kirk-session, and the due publication of the banns must be certified by him, his certificate not being traversable. The question is, whether all this is done by the sole authority of the clerk of the kirk-session, and without his requiring any sanction enabling him to perform these duties.

The Lord Ordinary, answering the argument of the defenders, is of opinion that they are mistaken in supposing that the power to proclaim banns is one of the rights and privileges of the minister and elders of a *quoad sacra* parish. I may observe that the question is not here quite accurately described, as the important word "powers" is omitted, and it is confined to the other words "rights and privileges." The Lord Ordinary thinks it is "no part of a parish minister or an elder's duty to make proclamation of banns. It is the duty of the session-clerk of the parish to do so, or to get this done by the precentor."

The Lord President expresses his surprise at this part of the note of the Lord Ordinary, and says—"It is quite true, so far, that a certificate by the clerk of the kirk-session is the proper legal evidence of the proclamation having been

clerk making proclamations without sufficient communication with the kirk-session. Whether the proclamation of banns be or be not part of the discipline of the Church is, I think, a matter that admits of no dispute. It does not relate in any way in words or in substance to the constitution of the contract of marriage. It refers to the solemnisation or celebration of the marriage, and that is a matter in which the Church takes an interest, and in which the Church prescribes the necessary rules. Stewart of Pardovan says, upon the 18th article of the 13th chapter of the 'Scotch Church Discipline,' which is very frequently referred to in his work, 'Those who live in places where the usual exercise of religion is not established may cause their banns to be published in Romish Churches, inasmuch as the matter is part of the political nature.' And the reason of that is quite plain. It has nothing in itself spiritual, but is of a political nature. And, apparently, the French Church were willing to accept proclamation of banns in Popish Churches where there were no Protestant Churches where it could be made. That does not in the least interfere with the discipline of the Church. On the marriage of Scotch persons in England and Ireland banns are proclaimed in Scotland, else the marriage will be against the order of the Kirk, and Pardovan says the parties should be rebuked. 'There is no doubt that they should be rebuked as unnecessary transgressors of a very comely and rational church order.' I do not think that the nature of the thing can be better expressed. As to the statute 1661 I read it in an opposite sense altogether from that adopted by Pardovan. Instead of being a superseding of the Church in the matter of proclamation of banns it gives it a stronger confirmation by attaching penalties to the disregard of it. Therefore, upon the whole matter, I concur in the result at which your Lordship has arrived, that the interlocutor reclaimed against should be altered, and the defender assoilzied."

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made, but that is because he is the servant of the kirk-session and acting under their authority and direction, and particularly acting under the authority and direction of the moderator of the kirk-session, with whom this matter is left by the only existing law on the subject. The minister is the party who is to authorise the proclamation of banns to be made." "And therefore I am humbly of opinion that everything is under the control and direction of the minister as regards the proclamation of banns."

According to the view which I have taken of the case it seems to me not essential to determine whether the publication of banns is *inter civilia* or *inter sacra*, because, whether it belongs to the one or other class, it is in my opinion equally within the power of the minister and the elders. But taking, as I do, the opinion of Lord Ardmillan as a correct description of the nature and character of the publication of the banns, it is clear that it must be regarded as a matter of ecclesiastical regulation. He says—"The proclamation of banns is a step of orderly procedure in the celebration of marriage by which religious sanction is given to the marriage." "It is not, I think, a step of civil procedure in the constitution of marriage, but a step of discipline in the orderly ecclesiastical procedure by which the Church gives sanction, seriousness, and solemnity to marriage as the most important and abiding of all human contracts."

But suppose it should be regarded as a mere civil proceeding, this would not advance the case of the appellants. At an early stage of the argument I put the question to the Lord Advocate, whether the clerk of the kirk-session could publish the banns by his own authority without the direction of the ministers and elders? and I received, as I expected, an answer in the negative, and this seemed to me at once to conclude the case against the appellants.

The correctness of the answer is proved by the Act of the General Assembly of 1784. By that Act the General Assembly resolved—"That no session-clerk in this Church proclaim any persons in order to marriage until he give intimation to the minister of the parish in a writing dated and subscribed by him, of the names, designations, and places of residence of the parties to be proclaimed, and obtain the said minister's leave to make the said proclamation." It follows that it is by the authority and direction of the minister, or of the minister and elders, that proclamation of banns can be made. Therefore this must be one of the powers possessed by the ministers and elders of the *quoad sacra* parish of Wishaw under the provisions of the Act of the 7 and 8 Vict. c. 44.

I agree that the interlocutor appealed from should be affirmed.

LORD HATHERLEY concurred.

LORD O'HAGAN.—In my opinion the decision of the Court of Session ought to be affirmed.

Under the statute a parish *quoad sacra* has been erected, and the first question is, Whether the publication of banns is to be considered as *inter sacra*, so as to put it under the direction of the ecclesiastical authorities of the parish so erected. I have no doubt that it is. The institution of banns was purely of ecclesiastical origin at an early period of the history of the Christian Church, and at that time, at all events, there could have been no question that it was to be held *inter sacra*. The civil state had nothing to do either with the creation or with the regulation of it. It has continued throughout Christendom always under Church control; and in Scotland we have it clearly shewn that it has remained so till the present hour. The obligation to publish was not cast upon the contracting parties by

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any statute of the realm, and its enforcement is effected by ecclesiastical censures, assisted to some extent by the civil power. The publication does not concern the constitution of the marriage, but it is made by ecclesiastical authority a proper preliminary to it for the avoidance of clandestinity and the prevention of fraud, and those who disobey it are properly described in a book of much authority as "transgressors of a very comely and rational Church order." All this being so, it seems to me plain that the usage so established and so kept in action is a part of the ecclesiastical discipline of the Scottish Kirk and must be numbered *inter sacra*, and that the parishioners of Wishaw must therefore publish their banns in there own parish church and not in any other.

On this view alone the judgment we are considering is sufficiently sustainable. But even if that view were doubtful, the terms of the Act of the 7th and 8th Vict. c. 44, seem to me decisive of the question. When a parish *quoad sacra* is erected under that statute, the provision of the 8th section is—that "it shall and may be lawful for the minister and elders of such parish to have and enjoy the status and all the powers, rights, and privileges of a parish minister and elders of the Church of Scotland." Surely it is amongst the "powers, rights, and privileges" of the minister and elders of a Scottish parish to require and compel the parishioners to publish the banns of marriage according to the law of their Church. It is also amongst their duties and liabilities which their ecclesiastical superiors will oblige them to fulfil. The words of the section are general, and have no limitation either in any other portion of the Act or in the provisions of any code of discipline, or in the reason of the thing. And on this second ground, even if I doubted, as I do not, with reference to the first, I think the appellants' contention cannot be supported.

The argument from inconvenience is not to be lightly entertained, and never when construing a statute which is clear in its terms, and indicates unmistakeably the purpose of the Legislature. When the terms are obscure, and the purpose therefore more or less doubtful, it may help to a right understanding of them; and in the present case the respondents might fairly resort to it in aid if, on the points to which I have already adverted, their case was not impregnable. It is difficult to conceive that the object of the publication of banns being, in the words of Mr Erskine (Principles, i. 6), "to prevent bigamy and incestuous marriages," and to prevent them by inviting objections, which may prevent or defeat fraud and misrepresentation, it could have been intended to direct it in a parish other than that in which the contracting parties are resident, and where evidence might most easily be found of their actual status and relations with their neighbours. To require it to be made in a strange parish would be in opposition to the very object of the institution, and would nullify altogether its beneficial operation. To the parties it would be a hardship to be obliged to resort to a church other than that in which the marriage is to be celebrated; and to the public it would be a mischief, by depriving the subsequent celebration of the security and lawfulness which it would have derived from full local notice of the proposed contract, such as has been wisely contemplated by various denominations of the Christian Church.

My Lords, on these grounds I am clearly of opinion that the appeal should be dismissed.

JUDGMENT affirmed, and appeal dismissed, with costs.

GRAHAMES & WARDLAW, Westminster—RONALD, RITCHIE, & ELLIS, W.S.—WILLIAM ROBERTSON, Westminster—W. & J. BURNESS, W.S.

No. 4. ALEXANDER BRAND'S TRUSTEES (Defenders), Appellants.—*Pearson, Q.C.*—*Mackintosh.*

Mar. 16, 1876. Brand's Trustees v. Brand's Trustees. ROBERT BRAND Junior's TRUSTEES (Pursuers), Respondents.—*Cotton, Q.C.*—*Bryce.*

Heritable and Moveable—Principal and Accessory—Lease—Heir and Executor.—Held (rev. judgment of the Second Division, and *aff.* judgment of Lord Shand) that when the tenant of minerals under a lease of ordinary duration erects upon the land fixed machinery for the purpose of working the minerals, such fixtures become *partes soli*, and pass with the subjects to the possession of the tenant's heir succeeding to the lease, in whom also the power of severance is vested during his tenancy.

Observations on the case of Fisher v. Dixon, March 6, 1843, 5 D. 775, 15 Scot. Jur. 394; H. of L., June 26, 1845, 4 Bell's App. 286, 17 Scot. Jur. 568.

Ld. Chancellor (Cairns). Ld. Chelmsford. Ld. O'Hagan. Ld. Selborne.

(IN the Court of Session Dec. 19, 1874, *ante*, vol. ii. p. 258.)

Robert Brand senior, coalmaster, Wishaw, died on 26th January 1873, leaving a trust-disposition and settlement by which he directed his trustees to manage and preserve the whole residue of his estate, heritable and moveable, for the use of his only son, Robert Brand junior, until he attained majority, when the whole residue was to be conveyed over to him.

The truster's son, Robert Brand junior, who was a minor at the date of his father's death, only survived his father a few months, and died unmarried on 3d July 1873, without having attained majority. He had, however, on 28th June 1873, executed a trust-disposition and settlement disposing of his whole means and estate to certain trustees.

Robert Brand junior was not served heir to his father.

The property of which Robert Brand senior died possessed included a nineteen years' lease of the coal and fire-clay on the estate of Coltness, of which eleven years still remained to run at his death, and the plant and machinery used in connection with the coal-pits which he had opened in the course of the lease, including the rails laid down for the conveyance of the minerals.

The heir of Robert Brand senior and Robert Brand junior, at the date of the death of the latter, was Alexander Brand, who, after completing a title by service to both, claimed the heritable property of Robert Brand senior, including the lease of the minerals on Coltness. Alexander Brand died on 5th November 1873, leaving a trust-disposition and settlement of his whole estate in favour of trustees.

The trust-settlement of Robert Brand junior having been executed by him in minority, and he having died without attaining majority, was ineffectual to convey heritage.

On 15th November 1873 the trustees of Robert Brand senior raised this action of mutiplepoinding to have all the questions arising out of the succession of Robert Brand senior settled.

An agreement was entered into between the trustees of Robert Brand senior, of the first part, the trustees of Alexander Brand, of the second part, and the trustees of Robert Brand junior, of the third part, whereby it was agreed (1) that the whole heritable property, including the mineral lease, should be made over to Alexander Brand's trustees; (2) that the residue of the moveable estate should be made over to Robert Brand junior's trustees; (5) that the whole plant and machinery of the colliery be made over to Alexander Brand's trustees, on the condition that if it should be found in the multiplepoinding that any portion thereof was moveable, and, as such, belonged to Robert Brand junior's trustees, the value thereof should be paid to them by Alexander Brand's trustees.

On 4th August 1874 the Lord Ordinary (Shand) pronounced the follow-

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ing interlocutor in the competition between Alexander Brand's trustees and Robert Brand junior's trustees:—"Second, In regard to the machinery and plant, including rails, which belonged to the deceased Robert Brand senior, and were used by him at or in connection with the colliery held on lease by him from Mr Houldsworth, finds that the machinery and plant, and those parts thereof, are heritable, and belong to the trustees of the late Alexander Brand, which were attached, either directly or indirectly, by being joined to what is attached to the ground for use in connection with the working and carrying away of the minerals, though they may have been fixed only in such a manner as to be capable of being removed, either in their entire state or after being taken to pieces without material injury, including those loose articles which, though not physically attached to the fixed machinery and plant, are yet necessary for the working thereof, provided they be constructed and fitted so as to form parts of the particular machinery, and not to be equally capable of being applied in their existing state to other machinery of the kind."

Both parties reclaimed.

The Second Division pronounced this interlocutor:—"Recall the second finding of said interlocutor, and in lieu thereof find that all the machinery therein referred to is to be considered as moveable in a question as to the tenant's succession: *Quoad ultra* adhere to the said interlocutor, and remit the cause to the Lord Ordinary to proceed with the same: Find the claimants, Alexander Brand's trustees, liable in expenses since the date of the Lord Ordinary's interlocutor, and decern."

Alexander Brand's trustees appealed.

LORD CHANCELLOR.—Your Lordships have now to dispose of this appeal, which was argued before your Lordships a few days since with very great ability; and I will, in the first instance, take the liberty of reminding your Lordships exactly how the question which has to be considered arises.

Robert Brand, the elder, was the lessee during his life of a colliery at Cambusnethan; he held it on a lease for nineteen years, beginning in 1867. When I say it was a lease of a colliery, it was in point of fact a lease of certain seams of coal, with a right of the ordinary description to occupy such portions of the surface as from time to time he might find necessary for the purpose of working the colliery; and then as he occupied portions of the surface, they were to be taken into account and rent paid for them at so much an acre.

Robert Brand, the lessee, died in 1873, having made a trust-disposition under which all his heritable and moveable property went to Robert Brand the younger, his son; and the lease being, as your Lordships are aware, by the law of Scotland, a heritable subject, would pass under the category of property which was heritable. Now, this Robert Brand the younger in his turn died, and he died under the age of twenty-one years. He made a disposition which, according to the law of Scotland, it has been assumed would carry his moveable property, but would not carry the heritable subjects. The appellants represent the heir of this Robert Brand the younger; the respondents, on the other hand, represent the trustees under the disposition to which I have referred.

The precise issue which arises in the present suit between these two parties is stated in certain articles of agreement which they entered into upon the various subjects which were in litigation between them. It was agreed, for a settlement ment of questions which had arisen between them, "first, that the whole heritable property, including the foresaid lease of the Greenhead Colliery, shall be assigned, conveyed, and made over by the first parties as trustees foresaid to the

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second parties as trustees foresaid,"—that is, it was agreed to assign and make over to the appellants the whole heritable property. In deciding under this agreement what is the heritable property, the question arose as to certain fixed machinery which had been set up by Robert Brand the elder, the original lessee. It was machinery of a description necessary for working the colliery, and it may be described for the present purpose, without going into further particulars, by saying that it was of the class ordinarily termed trade fixtures.

The Lord Ordinary (Lord Shand), before whom the case first came, held that this machinery, which he described in a way to which I shall refer, passed along with the heritable subject, namely, the lease, to Robert Brand the younger as heritable, and therefore could not be alienated by him during his minority, and that in consequence it now belongs to the appellants. The manner in which Lord Shand describes this machinery your Lordships will find in his interlocutor:—"In regard to the machinery and plant, including rails, which belonged to the deceased Robert Brand senior, and were used by him at or in connection with the colliery held on lease by him from Mr Houldsworth, finds that the machinery and plant, and those parts thereof, are heritable, and belong to the trustees of the late Alexander Brand, which were attached either directly or indirectly by being joined to what is attached to the ground for use in connection with the working and carrying away of the minerals, though they may have been fixed only in such a manner as to be capable of being removed, either in their entire state or after being taken to pieces without material injury, including those loose articles which, though not physically attached to the fixed machinery and plant, are yet necessary for the working thereof, provided they be constructed and fitted so as to form parts of the particular machinery, and not to be equally capable of being applied in their existing state to other machinery of the kind." My Lords, these words are in fact taken from an order of your Lordships' House, made some time since in a case which came by appeal from Scotland, namely, Fisher v. Dixon,[1] and it may be assumed that they are words which correctly describe the character of fixed machinery, if the appellants are entitled to machinery of that kind.

From the decision of Lord Shand there was a reclaiming note, and the Second Division of the Court of Session recalled the interlocutor of the Lord Ordinary, and held in substance that this machinery did not belong to the appellants, but belonged to the respondents as trustees of the deed executed by the minor, upon the footing of the machinery being personalty or moveables. The Lords of Session having heard counsel, "recall the second finding of the said interlocutor, and in lieu thereof find that all the machinery therein referred to is to be considered as moveable in a question as to the tenant's succession;" that is to say, in the question as between the representatives of the tenant, the heir, on the one hand, and the executor on the other.

It is between those two different views that your Lordships have now to decide, and the argument before your Lordships has divided itself naturally into two parts. In the first place, there is the question whether this matter is not already covered by decision? and secondly, if not covered by decision, what, upon principle, ought to be the view taken of it by your Lordships?

With regard to decision, it was contended at your Lordships' bar, and it appears to have been the opinion of the Court of Session, that the case I have already mentioned, the case of Fisher v. Dixon, decided the question. Now, I

[1] *Supra*, p. 16 (rubric).

have looked very carefully into that case, and I am certainly of opinion that it cannot be accepted as a decision upon this point. With regard to the issue in that case, and the decision upon it in the Court of Session, the question stands thus—There was a very large claim made as between the heir and executor of a certain person who owned very large property, upon which he had put up fixed machinery for the purpose of trade. No doubt the great question in the case was that which I have thus described, whether the heir of that person should have the machinery, or whether the executor should have it. But there was a further question, which appears in point of magnitude and the value of what was involved to have been comparatively a very minute one, as to what should be said of machinery upon certain property which the deceased had not been the owner of but had taken upon lease; and with regard to the machinery upon the property which was taken on lease there is no doubt that the decision of the Court of Session was in form, that it formed part of his executry, that is, it did not go to the heir.

But when your Lordships examine the circumstances under which the decision in Fisher v. Dixon was arrived at in the Court of Session your Lordships will find this remarkable fact. There was very great difference of opinion expressed upon the subject by the learned Judges. It did not form the staple and the principal part of their judgments, but the matter was referred to in a subsidiary part of the opinions which they expressed, and upon it, as I have said, there was very considerable difference of opinion. The finding of the Court of Session was in these terms:—"With regard to the 7th class in the said report" (which was the class of machinery upon the leasehold property), "erections made on subjects under leases by the late Mr Dixon, and which have been removed by the representatives at the termination of the said leases, find that these are moveable and subject to the claim of legitim on the part of the claimants." It appears, therefore, from this interlocutor, that the machinery had actually been removed by the respondents, the executors, at the termination of the leases, and at the time of the litigation it would seem to have been in their possession. Still, no doubt that finding would appear to have decided that the machinery was lawfully their property. But when your Lordships examine the case a little further you find in the opinion of the consulted Judges this important statement.[1] "And further, in so far as regards such subjects under lease, on which the late Mr Dixon, being the tenant only, made erections which he was entitled to remove at the end of the lease, which the respondent also admits may be included in the executry, we are of opinion that the Judges of the Second Division may now dispose of the two articles in the appendix to Mr Smith's report, articles 6 and 7, having regard to our former opinion, without farther opinion from us."

Looking, on the one hand, to the great divergence of opinion expressed by the Judges, and on the other to the final result of their deliberations as expressed in the opinion of the consulted Judges to which I have referred, I am quite unable to accept this as a deliberate decision of the Court of Session, that under the circumstances of the case the machinery upon the leasehold property belonging to the deceased would belong to the executor and not to the heir. It appears, I repeat, to have been a subsidiary and a minute point in the case, and the machinery upon the leasehold property appears ultimately to have been admitted by the heir to be properly included in the executry. So much, my Lords, for the decision of the Court of Session.

[1] 5 D. 839.

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When the case came to this House by way of appeal[1] the appellants were persons representing the executry and not the heir. Of course it was not for them to raise, and they did not raise, any question upon this point which had verbally been given by admission in their favour in the Court below. The respondents, who had presented no cross appeal, could not raise the question, and therefore the question did not fall in any way to be decided by your Lordships. Some expressions of opinion, not very distinct, in the report which we have of them, appear to have fallen from Lord Brougham and Lord Campbell, and to some extent from Lord Cottenham. I think it is unnecessary to put any precise construction upon those expressions, because, I repeat, the matter did not fall to be decided; but as far as I can gather from those expressions of opinion there certainly appears to have been an impression upon the mind of those noble and learned Lords that there might have been a question raised on the part of the respondent, which they rather commended him for not having raised by means of a cross appeal.

The case therefore not being, in my opinion, covered by any decision which has settled the law upon the subject, I have to proceed to look at it in point of principle. Looking at it in that way, I would remind your Lordships that there are with regard to matters of this kind, which are included under the comprehensive term of "fixtures," two general rules, a correct appreciation of which will, as it seems to me, go far to solve the whole difficulty in this case. My Lords, one of those rules is the general well-known rule that whatever is fixed to the freehold of land becomes part of the freehold or the inheritance. The other is quite a different and separate rule. Whatever once becomes part of the inheritance cannot be severed by a limited owner, whether he be owner for life or for years, without the commission of that which in the law of England is called waste, and which, according to the law both of England and Scotland, is undoubtedly an offence which can be restrained. Those, my Lords, are two rules—not one by way of exception to the other, but two rules standing consistently together. My Lords, an exception indeed, and a very important exception, has been made, not to the first of these rules, but to the second. To the first rule which I have stated to your Lordships there is, so far as I am aware, no exception whatever. That which is fixed to the inheritance becomes a part of the inheritance at the present day as much as it did in the earliest times. But to the second rule, namely, the irremovability of things fixed to the inheritance, there is undoubtedly ground for a very important exception. That exception has been established in favour of the fixtures which have been attached to the inheritance for the purpose of trade, and perhaps in a minor degree for the purpose of agriculture. But, I repeat, the exception is not to the first of these rules, but the exception is to the second. Under that exception a tenant who has fixed to the inheritance things for the purpose of trade has a certain power of severance and removal during the tenancy. What extent of removal the executor of one who is not a tenant, but is a complete owner of the inheritance, may have as against the heir, whether in point of fact he has any right of removal at all, or any right to take more than that which really and properly considered was never fixed to the inheritance, in a definite way, I need not stop to consider, because the case of Fisher v. Dixon has clearly decided, by the authority of your Lordships, that fixtures of the kind now before your Lordships cannot be removed by the executor of one who is complete owner of the inheritances.

[1] June 26, 1845, 4 Bell's App. 286, 17 Scot. Jur. 568.

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Therefore, your Lordships have, upon the one hand, the rule as laid down in the case of Fisher v. Dixon, that fixtures of the present kind cannot be removed by the executor as against the heir of the complete owner of the inheritance; and you have, on the other hand, the exception to which I have referred, that fixtures of this kind can be removed by the executor of a tenant or by the tenant himself as against the landlord during the course of the tenancy. But your Lordships have here to consider an intermediate case between those two. You have not to consider the case of the person who represents the entire inheritance, but you have to consider the case, not of the whole inheritance, but of a heritable subject, namely, a lease, which is heritable according to Scotch law, upon the ground included in which fixtures of the kind I have referred to have been erected; and you have to determine whether, the tenant having died, and the lease still continuing, and the lease having passed to the heir, the executor has as against that heir a right to remove those fixtures. My Lords, there is certainly no authority for saying that the executor can remove these fixtures as against the heir. In my opinion there is no principle in the rules which I have endeavoured to express which can warrant that right of removal. These things which I have termed fixtures are, *ex hypothesi*, annexed to the inheritance at the time of the death of the tenant. Thereupon the heritable subject, namely the lease, at once passes to his heir. What right has the executor, or how is that right founded, to come upon the heritable subject which has passed to the heir, and to strip it of those things which have become fixed to it? There is no doubt, *ex hypothesi*, a right to remove these fixtures as against the landlord; but who is the person to exercise that right? It is not a right in gross; it is not a right collateral to the ownership of the subject; it is a right which of necessity must be annexed to the ownership of the subject, and must be exercised by him who is the owner of the subject. But the owner of the subject is not the executor,—the owner of the subject is the heir; and therefore, as it seems to me, your Lordships are obliged to consider the persons to whom the subject itself has passed, and to hold the right which is annexed to that subject to be exercisable by that person, and by that person only.

Looking at it in another way, it is decided already by the case I have so frequently mentioned, Fisher v. Dixon, that the executor cannot remove these fixtures as against the owner of the whole of the heritable subject. Upon what principle therefore is it that he could remove the fixtures as against him who is the owner of a part of the heritable subject? My Lords, every reason which was advanced in the case of Fisher v. Dixon shewing how strained, how impossible, how inconvenient it would be that there should be a right to strip the inheritance of fixtures of this kind, put up for the better use of the inheritance, can equally be advanced against the inconvenience of stripping that which continues a heritable and enduring subject, and which is in the possession of the heir, of those things which are necessary for the convenient use of that subject.

Therefore my Lords, without pursuing the subject further, I submit to your Lordships that upon principle it is impossible to justify the right of the executors in this case.

When I look at the grounds of the decision in the Court of Session I find them expressed in the opinion of Lord Gifford. Those grounds are two. In the first place, Lord Gifford considers the subject to be already decided by the case of Fisher v. Dixon. I have ventured to express to your Lordships a contrary opinion upon that point. Then, on principle, Lord Gifford gives reasons

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for arriving at the same conclusion in these words,—"I take it to be perfectly fixed law, and it was not disputed on either side of the bar, that in leases of ordinary duration, where the tenant erects fixtures solely for the purpose of his trade, these trade fixtures remain his property, and cannot be claimed by the landlord as *partes soli*, as it is said they are moveable in a question between landlord and tenant. Syme v. Harvey[1] and other cases are illustrations of the application of this principle. Now, it humbly appears to me that if trade fixtures do not go to the landlord, they must of necessity remain the moveable property of the tenant, and must remain moveable *quoad omnia*."

This is the basis of the decision of Lord Gifford, and if this statement were correct I possibly should arrive at the same conclusion at which he has arrived. But there is, as it appears to me, a complete fallacy in this mode of stating the facts. Lord Gifford appears to assume that you are to determine at the moment the fixture is placed in the soil what is to be its destiny during the whole of the lease, and he asserts that it never becomes attached to the inheritance so as to be capable of being called a part of the inheritance—that it remains, *quoad omnia*, moveable, and amongst the moveables of the tenant. It appears to me that that is an error; it does become attached to the inheritance; it does become part of the inheritance; it does not remain a moveable *quoad omnia*; there does exist on the part of the tenant a right to remove that which has been thus fixed; but if he does not exercise that right it continues to be that which it became when it was first fixed,—namely, a part of the inheritance.

That disposes of the whole case, with the exception of an argument which was raised, but which I think your Lordships will not consider, namely, whether there might not be a question of distinction here as regards some of the articles brought upon the ground under the lease. It appears to me that no such question arises. The interlocutor of the Lord Ordinary raises no question of that kind. It follows the wording of the order of this House in the case of Fisher v. Dixon, and it speaks of those things which are either attached to the inheritance or attached to what is attached to the inheritance. It is only upon things of that kind that any order now made by your Lordships will operate, and no order that I shall propose to your Lordships will operate by treating any of this machinery as machinery destined to be attached to the inheritance.

Upon the whole, I would propose to your Lordships to restore the interlocutor of the Lord Ordinary, and to give the appellants what they should have had in the Court of Session, the expenses of the reclaiming note, and, with that direction, to remit the case to the Court of Session.

Lord Chelmsford.—The question to be determined upon this appeal is, whether certain machinery used upon a colliery held under lease is moveable or heritable, belonging, if moveable, to the respondents as trustees and executors of Robert Brand junior, and, if heritable, to the appellants as trustees of Alexander Brand, the heir of Robert Brand junior, and of his father, Robert Brand senior.

The machinery in question was erected by Robert Brand senior for the purpose of working the colliery which he held under a lease for nineteen years. When the lease had eleven years to run Robert Brand senior died, having made a trust-disposition of all his estates, heritable and moveable, under which it is admitted that his only son, then a minor, took a vested interest in the lease and

[1] Dec. 14, 1861, 24 D. 202, 34 Scot. Jur. 98.

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machinery. Robert Brand junior survived his father for a few months, and died before attaining majority. He left a settlement which proposed to dispose of all his estates, heritable and moveable. Being a minor at the time of the settlement, it could not operate upon such parts of the estate as were heritable. A leasehold by the law of Scotland being realty, the lease of the colliery fell to the heir of the settlor. Whether the machinery went also to the heir with the lease, or passed under the trust-disposition of Robert Brand junior, depends upon whether in a case of succession it is in its nature heritable or moveable.

A great part of the note of the Lord Ordinary, and of the judgment of the Court of Session, is employed in considering whether the question at issue between the parties had or had not been decided in the case of Fisher v. Dixon, first in the Court of Session, and afterwards upon appeal to this House. With respect to the decision of this House, the question of the right to fixtures erected for the purposes of trade upon a leasehold was not before it, there being no appeal against the interlocutor of the Court of Session upon that point.

I will not enter into an examination of the difference between the Lord Ordinary and the Inner-House, as to how the opinion of the Judges in Fisher v. Dixon upon the question are to be reckoned. Assuming that a majority of them were in favour of the judgment that the tenant's fixtures were moveable, there were circumstances connected with this finding which deprive it of much of its authority. The fixtures were of trifling value, and were therefore probably not much considered in the argument. This probability is greatly increased by the respondent having admitted, as stated by the consulted Judges (Bell's Appeal Cases, p. 343), that the fixtures in question must be included in the executry. It is quite true, as stated by Lord Gifford, that "in actually deciding a point of law the Court never do so upon mere admissions by counsel;" but where an admission is made, a Court is not likely to examine the point so closely as when it is contested and fully argued. It is necessary to advert to the conflicting opinions of the Lord Ordinary and the Judges of the Inner-House as to the application of Fisher v. Dixon to this case, because Lord Gifford at the close of his judgment says he prefers to rest it mainly upon general doctrine, which he thinks is fixed by Fisher v. Dixon, "that a mere tenant's trade fixtures in an ordinary case are moveable *quoad* succession, and descend to the executors."

The law as to fixtures is the same in Scotland as in England. The meaning of the word is anything annexed to the freehold, that is, fastened to or connected with it, not in mere juxtaposition with the soil. Whatever is so annexed becomes part of the realty, and the person who was the owner of it when it was a chattel losses his property in it, which immediately vests in the owner of the soil, according to the maxim "*Quicquid plantatur solo, solo cedit.*"

Such is the general law. But an exception has been long established in favour of a tenant erecting fixtures for the purposes of trade, allowing him the privilege of removing them during the continuance of the term. When he brings any chattel to be used in his trade and annexes it to the ground, it becomes a part of the freehold, but with a power as between himself and his landlord of bringing it back to the state of a chattel again by severing it from the soil. As the personal character of the chattel ceases when it is fixed to the freehold, it can never be revived as long as it continues so annexed.

A question between landlord and tenant as to fixtures can rarely arise except with regard to the description of those which the tenant claims the right to

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remove. But the present question is between heir and executor, and depends upon the character of the fixtures whether they are part of the realty or not. The lease itself is admittedly realty. The fixtures were annexed to the soil by the owner of that realty. If he had been owner in perpetuity there would have been no doubt that the fixtures would have been part of the inheritance. Can it make any difference that he was owner for a limited period? He was as absolute owner of the realty during that period as if he had had it for ever. The fixtures were annexed to the ground for use during the whole term of enjoyment of the heritable subject. There is nothing in the terminable character of the lease at different periods that can affect the question, for as long as it continues it preserves its heritable character. So, the power reserved to the landlord to purchase the machinery at the end of the lease, though it might interfere with the right of removal as against the landlord, cannot have the effect of changing the heritable character of the fixtures.

Lord Gifford says,—"The only thing that can make the fixtures heritable is their annexation to the soil, but that would carry them to the landlord, to whom alone the soil belongs." But this is not quite accurate. The question arises at a time when the portion of the soil included in the lease of the colliery belongs to the lessee as owner of the realty as long as the term endures, and the landlord's right to the fixtures does not arise till the termination of the lease. Adverting also to an argument stated by him to have been used to prove the heritable character of the fixtures—that they were fixed to the lease so as to go with it to the tenant's heir, Lord Gifford observes,—"A lease is an incorporeal right, and it is difficult to follow what is meant by a fixture to a lease." If the argument was as represented it was certainly incorrect, for the machinery was not fixed to the lease, but to the subject of it, the colliery; nor do I comprehend what is meant by a lease being an incorporeal right. Leases may be of incorporeal as well as of corporeal hereditaments, but a lease itself is neither corporeal nor incorporeal.

The conclusion at which I have arrived is, that the lease of the colliery being realty, the annexation of machinery to the soil for the purpose of working it became an accessory to the principal subject, and partook of its character,—that Robert Brand junior might if he pleased have separated the fixtures from the soil, and so made them part of his personal estate; but not having done so, they, remaining attached to the ground, went as part of the realty to the trustees of Alexander Brand, the heir of Robert Brand junior.

I agree with my noble and learned friend that the interlocutor appealed from ought to be reversed.

Lord O'Hagan.—My Lords, this case has been argued on authority and on principle. For the respondents it was contended, and the contention is sustained by the judgment of Lord Gifford, speaking for himself and his colleagues in the Court of Session, that the point in it was decided by that Court in Fisher v. Dixon, 5 Dunlop, 775, in a final interlocutor, which was the subject of appeal to and affirmation by your Lordships' House. On the other hand, the appellant insists that the interlocutor in question is not decisive, as being in terms inconsistent with the reported opinions of the learned Judges who pronounced it, and to be accounted for only on the supposition that, in the single matter which affects the controversy before us, it was pronounced upon consent, so that in that matter it was not presented for decision here by the appeal, and was not in fact

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dealt with at all by the judgment of this House, and that, the question thus remaining open, it should have been on principle ruled against the respondents.

Certainly the proceedings of the Court of Session in Fisher v. Dixon are affected with much obscurity, and difficult to be clearly understood. A great part of the conflicting judgments of the Lord Ordinary and Lord Gifford is occupied with an enumeration of the Judges who discussed and decided that case, and an elaborate detail of their individual opinions, with a view of shewing that the majority favoured the appellants and the respondents respectively. The Lord Ordinary comes to the conclusion that the greater number sustained the contention of the appellants. Lord Gifford reaches the very opposite conclusion, and declares his opinion to be that "the question has been decided" (the other way) "as authoritatively as any question can possibly be decided in Scotland, by a majority of the whole Court." It is odd that able men deliberately considering a series of judgments could have so entirely differed as to their import and effect; and it is hard to judge with confidence between them. But this I may say, inclining rather to the adoption of the view of the Lord Ordinary, that the irreconcileable antagonism of such eminent persons may perhaps justify your Lordships in refusing to acknowledge the conclusiveness of the judgments one way or the other, either in the Court of Session or in this House, as to the matter before you, and looking beyond them to the principles on which your own independent decision should be based. For myself I am content with this result, and I decline to criticise the numbers or to weigh judicial opinions which are open to such diversity of skilled construction.

Then, as to the interlocutor relied on by the respondents, it is no doubt unequivocal in its phraseology, and would be authoritative if the judgments which preceded it did not cast serious doubt upon it. But when this is so, and when, besides, we have clear proof that the respondent in Fisher v. Dixon admitted that the erections which he was entitled to remove at the end of the lease might be "included in the executry," being, as has been seen, of small appreciable value, we may, I think, concur with the Lord Ordinary even without holding, as he did, that the finding is directly contrary to the judgment of the majority of the Judges, that it proceeded upon admission, and does not increase the authority of the case. As to the appeal to the House of Lords, it is enough to say that the present question was not really raised by it. For the purpose of raising that question there should have been a cross appeal. As there was not, the House could not deal with it; and it will be seen on reference to its ruling that it carefully and expressly abstained from adjudicating on any point which it was not required to decide. So far as there is any indication of opinion by the learned Lords who heard the appeal, it is given in favour of the appellant here by Lord Campbell, when he repudiates the distinction "attempted to be made between leasehold and freehold," which he holds entirely to fail "when we bear in mind that by the law of Scotland the leasehold is realty and goes to the heir."

I have satisfied myself, although I had some doubt on the matter at one stage of the argument, that the question in this case is open and unconcluded by authority, and although I cannot accept the appellant's representation that the judgments in Fisher v. Dixon are decisive in his favour, I think that on principle he is entitled to succeed, and that the machinery, dealt with by the Lord Ordinary in a very careful and guarded manner goes to the heir and not to the

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executors. I can add little to the reasons which your Lordships have already heard in support of this opinion, but the case is important, and I shall add a few words.

There has been no dispute about the law, which is the same in England as in Scotland, and has been so from very early times, giving to the heir machinery fixed and attached to the soil. If the property had been in this case freehold, there could have been no controversy as to the application of the rule. The executor could not have been heard to contest the claim of the heir. But the property is leasehold, and no doubt in England that rule would not have been applicable in the circumstances of this case. In Scotland, however, the heir takes the lease as he takes the feu, and the incidental right to fixtures which the latter would have given him, in my opinion, attaches to the former. The cases have not been distinguished in principle, and I know no authority shewing that they should be differently dealt with in this regard. The Scotch heir has property in the lease which is identical in kind with his property in the freehold, although they vary in duration and degree. It was urged, I think, in the very able and learned argument of Mr Bryce, following Lord Gifford's very able argument, that the leasehold gives him only an incorporeal hereditament, whilst the freehold clothes him with permanent ownership of the land. But surely in both cases the soil goes to him equally, in the one case by assignment, in the other by inheritance or demise; but in both he has the soil, and has it completely, for a time or for ever, according to the nature of his interest, and any fixtures attached to it have precisely the same connection with it, and are equally a part of it, so long as his ownership endures. As between heir and executor, there seems to be no cause for holding that their destination should be different, or that the same old rule should not be applied indifferently to both. Settled exceptions exist in the interest of trade, and from the exigencies of social life, as between tenants for life or entail and remainder men, and as between landlords and tenants. But there is no ground for such a relaxation of the strict law, and there has been no such relaxation in fact, which can avail the respondents in their attempt to abridge the rights of the heir when he succeeds to the leasehold as well as to the feu.

The principle which underlies the rule of law has been properly said to be, that machinery attached to the land follows it as its accessory in the case of the land—the land is heritable and so are the fixtures; and why, having a like attachment, should not the machinery going with a leasehold which is heritable become accessorially heritable also? I see no sufficient reason, in the absence of authority, for holding it moveable in one case and heritable in another.

I do not go into the argument which has been founded on policy, or into the illustrative cases which were discussed in the Court of Session. It suffices for me to say that the presumptions arising as to the purpose of the tenant from his use of the fixtures on a property in which he has a limited and terminable interest, and the considerations as to the benefit of trade which have secured to him the exceptional privilege of removing those fixtures before the close of his tenancy, do not arise or apply as between executor and heir. They do not apply in reference to fixtures attached to the freehold, and as soon as we ascertain that a Scotch leasehold is heritable, they have as little application in that case against the heir.

The law as to trade fixtures is well stated (as to cases of mortgage) by my

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learned friends Lord Hatherley and Lord Selborne, on appeal before your Lordships during the past year, and the observations are of force with reference to the principle by which our judgment should be governed. "The law," said Lord Hatherley, "has held that trade fixtures may be, at any time during the limited interest which the owner of the lease may have, removed by him; yet, if he do not remove them during the lease, he is held to have allowed them to pass to the owner of the reversion, because, and only because, they are attached to his reversion; and if they are not removed as the law would have enabled the person to remove them during the lease, they must be considered to have returned at once and finally to the owner of the reversion. The doctrine therefore was that they were a part of the land during the time they remained attached, but that for the benefit of trade they might, during the interest of that person who had only a partial interest in the land, be removed so long as he had that interest, although there was no power whatever given to them for the purpose of removal if he chose to allow the time to pass during which he might have removed them, and so far severed them from the property"—(Meuse v. Jacobs, Law Reports, 7 E. and I. Appeals, p. 490.)

No doubt, as Mr Cotton argued, cases of mortgage, to which Lord Hatherley particulary referred, are not identical with that before the House, but these remarks are of general application in this country; and I do not, with great respect for the Lord Ordinary, concur with him that "the law of England does not afford any assistance in the decision of the present question, because leasehold property is in England moveable estate in a question of succession." On the contrary, it seems to me that the leasehold in Scotland being heritable, as the freehold is in England, the heir, who is put for the purposes of succession in the same relation to both, should have as to both identical rights so far as the nature of the estate permits, and that therefore all the reasons on which the English law is based, and the conclusions which they warrant, are of force to secure to him those rights, the executor in Scotland being deprived of the interest in chattels real which he enjoys in this country.

On the whole, I concur with the noble and learned Lords who have preceded me, that the interlocutor of the Lord Ordinary should be sustained. I shall only add a word as to the terms of it, which have been the subject of a little controversy. It designates the machinery, which it pronounces heritable, not by pointing to any catalogue of the parts of which it is composed, such as we have had before us, but by describing it as "attached, either directly or indirectly, by being joined to what is attached to the ground," for the use and in the manner which it indicates. And by that accurate description it anticipates and answers the argument which has been founded on the details of the catalogue and the report of Mr Geddes. Your Lordships were asked to amend the interlocutor byputti ng the word "physically" before the word "attached," but I think any such amendment unnecessary. Attachment "to the ground" must mean "physical" attachment; and if the preceding part of the sentence could have admitted of any doubt in this respect, the subsequent words pronouncing as also heritable loose articles which, "though not physically attached" to the fixed machinery, are necessary for its working, put the meaning, as I conceive, by contrast, beyond all dispute.

Upon the whole, my Lords, I entirely concur in the proposition which has been submitted to your Lordships by my noble and learned friend the Lord Chancellor.

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LORD SELBORNE.—My Lords, I agree with the opinions your Lordships have delivered.

The lessee has right during the term of the lease to the whole heritable subject, including those things which have become accessions to that subject by being affixed thereto. So long as his estate under the lease continues, there is no more reason for regarding his interest in the fixtures as separate from his interest in the soil than if he were owner in fee-simple.

Nor can it make any difference that, as against the landlord, who is the owner in fee-simple subject to the lease, the lessee, who has during the term placed upon the subject fixtures severable without damage to the landlord, has the same right of severing and removing those fixtures which an owner in fee-simple during his lifetime would have had. This is a right which, on the death of the lessee before any severance has taken place, passes to his successor in the estate; in England to his executor, because there his executor succeeds to the lease; in Scotland to his heir, because a lease for years is heritable in Scotland.

The authorities, except Fisher v. Dixon in the Court of Session (which, for reasons stated by my noble and learned friends who have preceded me, is an authority of no real weight to the contrary), are all consistent with this view. It is unnecessary to consider any distinction which the law has introduced in favour of creditors, because there is no question with creditors in this case.

APPEAL sustained; interlocutor appealed from reversed; interlocutor of Lord Ordinary of 4th August 1874 restored, and cause remitted.

HOLMES, ANTON, GREIG, & WHITE—ALEX. MORISON, S.S.C.—WM. ROBERTSON, Westminster—E. MILL, S.S.C.

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CAPTAIN DE THOREN, Appellant.—*Sol.-Gen. Giffard, Q.C.—Matthews, Q.C.—Thesiger, Q.C.—H. D. Greene.*

MRS SARAH OGG OR WALL (as Guardian of William Ellis Wall and Edward William Wall), and the ATTORNEY-GENERAL, Respondents.—*Att.-Gen. Holker—D.-F. Watson—Southgate, Q.C.—Spinks, Q.C.—A. E. Hardy.*

Marriage—Impediment to Marriages, removal of—Cohabitation and Habit and Repute.—In a question of legitimacy *held* (in conformity with opinion of the First Division) that the presumption of marriage arising from cohabitation with habit and repute was not rebutted by proof that the cohabitation had followed upon a marriage *in facie ecclesiæ*, which was invalid by reason of a temporary legal impediment to marriage.

Observed (*per* Lord Chancellor), the presumption of marriage arising from cohabitation with habit and repute is stronger than an ordinary presumption of fact, and must receive effect unless there is strong and cogent evidence to the contrary.

Ld. Chancellor (Cairns). Ld. Chelmsford. Ld. O'Hagan. Ld. Selborne.

Vide ante, vol. i. p. 1036.

In this, which was a suit before the Court for Divorce and Matrimonial Causes in England, a case had been stated by the Judge Ordinary, under 22 and 23 Vict. c. 63, sec. 1, for the opinion of the Court of Session.

The case so stated, and the opinion of the Judges of the First Division thereon, will be found reported under date 16th June 1874, *ante*, vol. i. p. 1036.

The Judge Ordinary of the English Court for Divorce and Matrimonial Causes gave judgment in accordance with this opinion.

Against this decision Captain de Thoren appealed to the House of Lords.

At the conclusion of the arguments on behalf of the appellant their Lordships delivered the following opinions:—

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LORD CHANCELLOR.—My Lords, in deciding the question of legitimacy raised by this case your Lordships will not, I think, find yourselves in any way embarrassed by the particular procedure which has taken place in the Court below. The petition was filed in the ordinary way; no formal issues were framed in the case, apart from those which the case itself raised; evidence was given before the Judge Ordinary, and among the evidence was the evidence of experts with regard to the law of Scotland. The Judge Ordinary considered that he, sitting as an English Judge, might not be able to draw inferences as to Scotch law from the evidence tendered before him in the way that a Scotch Court could do; and, availing himself of the powers given by the Act of Parliament relating to the subject, he stated and sent a case for the opinion of the Scotch Court upon a certain point, which he placed before it. The opinion of the Scotch Court was given in favour of the marriage; and therefore in favour of the legitimacy. The learned Judge Ordinary pronounced his final decree, establishing the legitimacy of the respondent upon all the materials before him; and all those materials are now before your Lordships, and your Lordships sit here as a Court of appeal, not merely from the decision of the English Court, the Court of Probate, but also, under the statute, with power to review the opinion expressed by the Scotch Court upon the case sent to them, if your Lordships think that that opinion ought to be reviewed.

My Lords, the question here comes to be simply this: A man and a woman being both at the time in Scotland, go through a ceremony of marriage in a church in Scotland. They are under the impression that the marriage is a valid one, and that they have done everything that is necessary to make it valid. The man had shortly before been divorced in England, that is to say, there had been a decree *nisi* of the Matrimonial Court for a divorce, which decree *nisi* was afterwards made absolute. But at that time there was a certain length of time given, which has since been taken away, during which an appeal against the sentence of the Matrimonial Court might have been brought, and that time had not elapsed.[1] The parties were not aware that that circumstance created an impediment to a valid marriage. Having gone through the ceremony they lived as husband and wife, and were reputed to be husband and wife. They had children; and those children were treated as being legitimate. There was a question of succession to real property in the case, and it is clearly shewn that the man was anxious to have legitimate children, and believed that he had legitimate children who would succeed to that property. They resided, subsequently to the marriage ceremony, for some years in Scotland, and for another part of the time out of Scotland. Under those circumstances, putting aside for the moment any inference which ought to be drawn from the fact of both parties being ignorant of the impediment to marriage, and looking merely to the habit and repute to which I have referred, and which continued altogether for a period of, I think, about ten years, and until the death of the man—looking merely to these facts there cannot be any doubt (indeed, it is not disputed at the bar) that there would be ample ground for presuming, according to the law of Scotland, marriage by consent, of which cohabitation with habit and repute is evidence.

But it is said that that inference, which otherwise might be drawn and ought

[1] As to liberty to divorced parties to re-marry see 31 and 32 Vict. c. 77, sec. 4, and 36 Vict. c. 31.

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to be drawn, is rebutted, because you have here the parties commencing their cohabitation under the belief that the ceremony of marriage was a valid ceremony, and that, therefore, unless you can shew that they afterwards were undeceived upon this point, and in some way or other must be taken to have actually assented or consented to a fresh contract of marriage, you cannot imply from the cohabitation with habit and repute that a marriage by the interchange of consent afterwards took place.

Now, my Lords, I cannot in any way accept that argument. I may refer, in the first place, to the case of Piers v. Piers[1] before your Lordships' House, in which, although the facts were in many respects different from the present, yet it was held in a most striking way as a general rule that the presumption of marriage is not the same as the presumption raised with regard to other facts, which may be presumed either the one way or the other; that the presumption of marriage is something much stronger; and that from cohabitation with reputation a marriage is to be presumed unless there is strong and cogent evidence to the contrary. One of the most striking cases that can well be imagined upon this subject is the Breadalbane case,[2] in which the presumption was held to be one that not only might be drawn but ought to be drawn from the cohabitation with habit and repute, although in that case the cohabitation commenced with a ceremony of marriage which not only was invalid by reason of the real husband of the woman being alive at the time, but was known to both parties to be invalid. Your Lordships held that, notwithstanding that the marriage could not have been valid at the inception, notwithstanding that both parties knew that it was invalid, notwithstanding that both must have known that at the commencement of their cohabitation that cohabitation was illicit, still the presumption of marriage might and ought to be drawn.

My Lords, I own it appears to me that that was a somewhat stronger case than the present, because it might there have been fairly contended, and it was contended with great energy, that any presumption of marriage ought to be held to be rebutted by the fact that the cohabitation at the beginning could not have been intended by the parties themselves to be a cohabitation for the purpose of marriage, because they must have known that their marriage could not be valid. Here, on the contrary, the cohabitation began with the full intention of the parties themselves that their cohabitation should be upon the footing of a legitimate and valid marriage, and they were under the impression that there was a legitimate and valid marriage. If that is so, I ask, why should it not be presumed from the cohabitation with habit and repute that as soon as that obstacle was removed, which it very shortly was, a consent was exchanged between the parties to be husband and wife, when you would make that presumption in a case such as the Breadalbane case was.

My Lords, I will refer to the Breadalbane case for the purpose of reminding your Lordships of some, or at least of one of the opinions that were there expressed. Lord Westbury says:[3]—"The appellant objects that cohabitation, which began when the parties were incapable of contracting marriage, and which was continued without change, is ineffectual to form the basis of the conclusion that

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[1] March 22, 1849, 2 Cl. and F., H. of L. Cases, 331.

[2] July 16, 1867, 5 Macph. (H. of L.) 115, 39 Scot. Jur. 567, L. R. 1 Sc. App. 182.

[3] 5 Macph. (H. of L.) 141, 39 Scot. Jur. 588, L. R. 1 Sc. App. 212.

consent to marry was interchanged after the impediment to marriage had been removed. That would be a very important rule if it were proved to be well founded; but I am unable to find any principle to justify the introduction of such a rule; and what is more material to the purpose, I am unable to find any case or any book of authority in which that principle has been either followed out into a decision or has been laid down as a rule of Scotch law. There is nothing to warrant the proposition that the subsequent conduct of the parties shall be rendered ineffectual to prove marriage by reason of the existence at a previous period of some bar to the interchange of consent. It would be very unfortunate if it were so. Marriage may be contracted between parties in a foreign land where certain observances are required which from ignorance or mistake may not have been fulfilled."

So that, your Lordships will observe, Lord Westbury puts as an illustration the very case which here occurs. He puts as an illustration the case of parties contracting a marriage and being from ignorance or mistake unaware that the marriage is invalid; and yet he puts that as an *a fortiori* case where, undoubtedly, the presumption should be raised. He continues:—"The parties having cohabited on the strength of an imperfect celebration, may afterwards come to Scotland and reside there for years, continuing the same course of life. It would indeed be a very sad thing if such a course of conduct, lasting, perhaps, for twenty or thirty years, were insufficient to warrant the conclusion of marriage. There is no foundation for the argument that the matrimonial consent must of necessity be referred to the commencement of the cohabitation. I think a sounder rule and principle of law will be that you must infer the consent to have been given at the first moment when you find the parties able to enter into the contract."

The argument at your Lordships' bar has consisted principally of a minute criticism of the wording of the case sent by the Judge Ordinary for the opinion of the Scotch Court, and an attempt to establish that the wording of that case merely amounts to certain findings by the Judge Ordinary which in some way established as matters of fact the statements which are made for the particular purpose of this case. I do not myself read these statements as doing more than saying, on the part of the Judge Ordinary, to the Scotch Court, that he cannot point to specific evidence of an exchange of consent, but leaving entirely to the Scotch Court the duty, if it be their duty, and if they think it is their duty, to draw the inferences which the Scotch law would warrant. For example, my Lords, the principle statement relied upon in that case is this: Paragraph 5 states —"From the time of the said marriage ceremony on the 16th of July 1862 till the death of the said William Ellis Wall, which occurred at Sidmouth, in England, on the 23d of July 1871, he and the said Sarah Ogg constantly, continuously, and openly, lived and cohabited together as husband and wife, and were holden and reputed to be so by their relations and friends and by all who knew them. They so lived and cohabited together in Scotland from the 16th of June 1862 till May 1863; in Ireland from May 1863 till March 1864; in Scotland from March 1864 till November 1867; and in England from November 1867 till the death of the said William Ellis Wall. The habit and repute which attended their cohabitation from the first and throughout was undivided." The 6th paragraph states—"The said William Ellis Wall and Sarah Ogg intended to contract marriage together. The marriage ceremony of the 16th of July 1862 took place in pursuance of that intention. They believed, and

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never prior to the death of the said William Ellis Wall ceased to believe, that the marriage ceremony was lawful and valid, and throughout their cohabitation they intended to stand to each other in the relation of husband and wife, and believed that they did so, and their said treatment of each other as husband and wife, and of their children as legitimate offspring, was due to this belief." The 7th paragraph states—"The said William Ellis Wall and the said Sarah Wall did not at any time after the said 16th of July 1862 interchange or express to each other any consent to marry, or make any acknowledgment with the purpose of contracting a marriage, unless such consent or acknowledgment is to be inferred as a presumption of law from the facts herein stated." I rather incline to the opinion that that amounts to nothing more than a statement that, except as far as a presumption of law was proper to be drawn from the facts, it had not been affirmatively and directly proved before the learned Judge that there was any interchange of consent to marry. And undoubtedly no such exchange of consent was proved. If it had been proved the reference to cohabitation with habit and repute would have been altogether unnecessary. But I certainly hold that your Lordships are here entirely free to look at once at the evidence given before the learned Judge and at the judgment of the Judge Ordinary founded upon that evidence, and that your Lordships are not in any way fettered, as I have said, by the statement of facts which was made for one purpose, and one purpose only, namely, to obtain the opinion of the Scotch Court.

Turning to the evidence given before the Judge Ordinary, your Lordships find that Mrs Sarah Wall was examined. In her direct examination she proves that after the marriage ceremony in July 1862 she lived with William Ellis Wall as her husband till his death; that children were born; that during the lifetime of William Ellis Wall they visited and were visited as husband and wife, and treated each other constantly in all respects upon that footing; that their children were received as legitimate, and no doubt existed in their own minds that they were so; that Mr Wall was anxious for a son, that he told her so, and the reason was, that he was to inherit entailed property in England; that when they lived at Dalkeith they were visited by the father and mother of William Ellis Wall, who took away the eldest girl on a visit. Certain letters are then put in passing upon the footing of their being husband and wife. That being the evidence in chief, she is then cross-examined by those who were interested to rebut the presumption of law, but in her cross-examination she is not asked one single question with the view of negativing the presumption, or of proving that no consent passed between them, after the impediment to marriage was removed. My Lords, if that is so, if those who have the *onus* of rebutting the presumption cast upon them take no step to rebut that presumption, I apprehend that the presumption remains in its full force and vigour.

Upon these grounds, my Lords, I submit that the decision of the Judge Ordinary establishing the legitimacy in this case is entirely correct, and that this appeal ought to be dismissed with costs.

Lord Chelmsford.—My Lords, the question to be determined is whether there was a consent to a marriage between William Ellis Wall and Sarah Ogg, evidenced by habit and repute, prior to the birth of the elder of the sons. If there were no other question than this in the case there would be no difficulty in giving an answer in the affirmative. But the appellant, though he admitted

that there had been such cohabitation of the parties as husband and wife as in an ordinary case would have conclusively established the presumption of a marriage by consent, yet contends that the circumstance of a previous ceremony of marriage having taken place between the parties, which was invalid, though unknown to them to be so, prevented that presumption. The ground of this argument is that the living together of the parties as husband and wife must be attributed to the invalid ceremony, and therefore that the habit and repute could not be evidence of any other consent.

In the case sent by the Judge Ordinary it is stated that, prior to the death of William Ellis Wall, he and Sarah Ogg never ceased to believe that the marriage ceremony was lawful and valid. There was no evidence given before the Judge Ordinary to this effect. Mrs Wall was called as a witness, and no question to elicit that fact (if it existed) was put to her. If, then, the case is to be disposed of upon the facts, without reference to the case prepared to obtain an opinion as to the law, it appears to me to be quite open to your Lordships to presume (especially in favour of the legitimacy of the sons) that knowledge of the invalidity of the marriage was acquired during the cohabitation, and that the parties subsequently lived together as husband and wife. If it be asked why, with this knowledge, they did not marry openly *in facie ecclesiæ*, it may be answered that probably they did not desire to have it known that they had been cohabiting without being lawfully married, and that it was unnecessary in Scotland, as their continuing to live together as man and wife afterwards would be of equal efficacy with an actual marriage.

But taking the facts as they are stated in the case, and applying the law to them, the Court of Session is of opinion that, assuming the ignorance of the parties of the invalidity of the ceremony of marriage during the whole period of their cohabitation, yet, after the removal of the impediment to their marriage and before the birth of their eldest son, they became married persons.

I agree entirely with this opinion. A marriage is established by habit and repute on the ground that the cohabitation as husband and wife is proof that the parties have consented to contract the relation. If any legal impediment exists to prevent their marrying, as long as it continues no presumption of consent can arise. But if the cohabitation begins in an illicit intercourse, and is continued after the bar to marriage (whatever it may be) is known to be removed, habit and repute may have their proper operation upon the continuing cohabitation, which is not to be referred to the original intercourse.

In the present case the ceremony which took place, although invalid, was undoubtedly a consent by the parties to live together as husband and wife. And their subsequent cohabitation was a proof of continued consent.

But the appellant seeks to displace the case founded on habit and repute altogether by reason of the invalid ceremony of marriage, to which he contends the consent must necessarily be referred. Assuming this to be correct, the proof of consent being unquestioned, what difference can it make that the motive to such a consent was an erroneous belief that the parties had the sanction of a legal marriage? The habit and repute arising from the parties having lived together as husband and wife for many years was amply sufficient to prove their consent to contract this relation. Can the invalid ceremony of marriage, which strengthens the proof of consent, have the effect not merely of weakening, but of entirely destroying, that proof? No valid consent could, of course, be given during the time allowed for appealing against the decree of divorce. But as soon as that

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time had passed there was nothing to prevent the marriage of the parties, or to invalidate any consent to become husband and wife; and their living together so many years as married persons raised a presumption of their consent to contract that relation, which could only be rebutted by proof of some fact which raised an impediment to their marriage.

LORD O'HAGAN and LORD SELBORNE concurred.

DECREE appealed from affirmed, and appeal dismissed, with costs.

E. L. ROWCLIFFE—VALLANCE & VALLANCE—TATHAM, PROCTER, TATHAM, & PROCTER.

No. 6.

Mar. 23, 1876. Mackintosh v. Lord Advocate.

ANGUS MACKINTOSH, Appellant.—*Hemming, Q.C.—D. M'Lennan.*
THE LORD ADVOCATE, Respondent.—*Lord-Adv. Gordon—Badenach Nicolson.*

Appeal—Competency—Justiciary Court.—Held that no appeal is competent from judgments of the Court of Justiciary to the House of Lords.

Ld. Chancellor (Cairns). Ld. Chelmsford. Ld. Hatherley. Ld. O'Hagan.

(IN the Court of Justiciary May 20, 1872, 2 Couper, p. 236, 44 Scot. Jur. p. 418; and Nov. 4, 1872, 2 Couper, p. 367, and 45 Scot. Jur. p. 51.)

An appeal was offered to be presented to the House of Lords by Angus Mackintosh of Holme against two judgments of the High Court of Justiciary in Scotland, dated 20th May and 4th November 1872, in the circumstances stated in the opinion of the Lord Chancellor.

The Lord Advocate presented a petition praying that the appeal should not be received.[1]

After hearing one counsel on each side the following judgment was pronounced:—

LORD CHANCELLOR.—My Lords, this question of the competency of the appeal has been argued with great care and diligence at your Lordships' bar, and everything that could be said on behalf of the appellant has been said by his learned counsel, Mr Hemming, but I think your Lordships will have no hesitation in holding that this appeal is not competent.

The appeal is brought under these circumstances:—In 1872 the appellant, Mr Mackintosh, applied to the then Lord Advocate for what is termed his concourse, or his assent, to a bill which Mr Mackintosh was in the course of presenting to the Court of Justiciary for criminal letters against one Dr Thomas Graham Weir, a physician in Edinburgh, "charging him with having in 1852 (twenty-four years ago) "entered into a conspiracy for the purpose of obtaining the detention of Mr Mackintosh as a lunatic in Saughton Hall Lunatic Asylum, near Edinburgh, well knowing that the petitioner was not insane." The Lord Advocate, the public prosecutor of Scotland, not thinking fit himself to prosecute in the case, in the exercise of his discretion refused his concourse or concur-

[1] *Appellant's Authorities.*—Earl of Roseberie v. Sir John Inglis, Feb. 18, 1707, Macqueen's Appellate Jurisdiction, p. 286; Munro and Others v. Lord Advocate, 1724, N. R. Appellant's Case, p. 8, House of Lords Journal, vol. xxii.; Geddie and Mackintosh v. Dempster, 1767 (Respondent's Case, p. 18); Magistrates of Elgin, July 3, 1713, Rob. Ap. 69; Durham v. Lundine, March 20, 1711, Rob. Ap. 16; Lord Kilsyth v. Presbytery of Stirling, Rob. Ap. 65; Greenshields v. Provost of Edinburgh, March 1, 1810, Rob. Ap. 12.

Respondent's Authorities.—2 Hume, 504; 1 Alison, 677; Bywater v. The Crown, May 1, 1781, 2 Paton, 564.

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rence to the bill which Mr Mackintosh wished to present to the Court of Justiciary, and thereupon Mr Mackintosh called the Lord Advocate before the Court of Justiciary for the purpose of obtaining an order obliging the Lord Advocate to give his consent. The Court of Justiciary, upon the first occasion, and upon a second occasion when the same request was repeated, pronounced two interlocutors, refusing the application, that is to say, declining to force the Lord Advocate to give his concurrence. Upon that an appeal is brought to your Lordships' House. It is an appeal of a very special kind, for it is an appeal against the Lord Advocate. The appellant is Mr Mackintosh; the respondent is not any person with whom Mr Mackintosh wishes to litigate any question, but is the Lord Advocate. It is not, therefore, an appeal in the sense of an appeal between ordinary litigants; it is an appeal against one who is himself a public officer, raising the question of the exercise of his discretion.

That being the nature of the appeal, the Lord Advocate presented a petition to your Lordships' House praying that the appeal might be refused as incompetent. That petition, in the ordinary course, was referred to the appeal committee, and the appeal committee desired that the question of competency should be argued before your Lordships' bar before the case went further, and accordingly it has been argued on that point to-day.

My Lords, the broad question which has been argued at your Lordships' bar is this,—whether an appeal lies to this House from an order or sentence of the Court of Justiciary, the criminal Court in Scotland; and to that I will immediately address myself. But I am anxious, at the outset, to guard myself from being misunderstood upon this subject, and I wish to say that, so far as my opinion is concerned, if it were the case that an appeal lay from the Court of Justiciary to this House, which, for reasons I will afterwards give, I do not think it does, still I should be of opinion that, having regard to the nature of the application, and to the question which is raised in this particular case, the case is one in which no appeal would lie. I only wish to say that at the outset, and not to base any decision upon it, because it was said on the part of the appellant that that was not a question which he came here to-day prepared to argue. I only, therefore, make the observation as I pass, lest it should be supposed that that question had escaped your Lordships' attention.

But now, my Lords, I come to the larger question, the question which has been argued,—how far an appeal lies, or whether it lies at all, from the Court of Justiciary. The answer to that question appears to me to lie in a very narrow compass. Your Lordships have asked for all the information which could be given as to what the precedents were before the Act of Union with Scotland for any appeal from the Court of Justiciary; and, going back as far as any precedent can usefully be searched for, and considering everything that can be adduced, I think your Lordships will agree with me in saying that there has been no precedent whatever adduced of any appeal maintained before the Union from the Court of Justiciary to the Parliament of Scotland. It may be quite true that during the whole of that time it was not the habit to have appeals from other Courts to the Parliament of Scotland. But certainly, even during the time when appeals, or what were called protestations for remeid of law, which in substance were quite the same as appeals, were brought to the Parliament of Scotland from the other Scotch tribunals,—in those times there is no instance of any appeal from the Court of Justiciary.

I apprehend, looking to the state of Scotland at that time, and to the occu-

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pations of the Court of Justiciary, if it had occurred to any person that an appeal would lie, the chance of an appeal certainly would have been taken.

The Act of Union provides by the 19th article, with regard to the Court of Justiciary and the other Courts, upon what footing they shall stand. It provides, first, that the Court of Session or College of Justice do after the Union remain "in all time coming within Scotland as it is now constituted by the law of that kingdom, and with the same authority and priviledges as before the Union." Now, my Lords, if it was the case that before the Union the Court of Session stood as a tribunal subject to protests for remeid of law, which led to the review of its decisions by the Parliament of Scotland, and that that was its position the proceedings which took place between the Scotch Estates and King William III. abundantly shew, and if at the same time the Court of Justiciary stood as the criminal tribunal, from which there was no appeal to Parliament or elsewhere,—then I apprehend that the 19th article of the Act of Union, continuing both these Courts with the same powers and authority which they had before, would naturally be taken to be a statute continuing the Court of Session with its decisions subject to review, and continuing the Court of Justiciary with its decisions as final and conclusive.

How, then, does it stand, my Lords, as a matter of precedent since the Union? Your Lordships have now the experience of upwards of one hundred and seventy years since the Union. Is there any instance produced of any appeal from an order of the Court of Justiciary during that time? No instance has been found, notwithstanding the diligence used by the learned counsel for the appellant. On the contrary, your Lordships have a most exhaustive and conclusive argument, delivered in this House by Lord Mansfield in Bywater's case, upon this very point. Lord Mansfield went through every case that was supposed to bear upon the question up to the time at which he spoke, and he shewed that there was no case of an appeal from an order of the Court of Justiciary, and that the one or two cases, the case of Mr Dempster and the earlier case of Elgin, which were supposed to bear an appearance to an appeal of that kind, really were no authorities whatever for holding that an appeal would lie. With regard to one of those cases, the case of Dempster, it appears to me to afford the strongest possible argument that an appeal would not lie, for that was a case in which, if this House could have exercised an appellate jurisdiction, it was obviously extremely well inclined to do so. But it found that it could not do so, and it therefore resorted to a very singular proceeding, which Lord Mansfield describes, and which was quite inconsistent with any assertion of an appellate right by this House.

From the time of Bywater's case down to the present day there is no instance of any appeal to this House from the Court of Justiciary, and it would be somewhat strange to imagine that during the period up to the Union, and during the period of nearly two centuries which have elapsed since the Union, down to the present time, there should during all that time have been slumbering a right to maintain an appeal from the Court of Justiciary, either to the Scottish Parliament in the first period, or to this House since the Union, and that that right should never have been resorted to by any of the hundreds and thousands of those persons to whose interest it would have been to resort to it.

To that, my Lords, I will only add one other observation. Your Lordships have, in the printed cases before you, the statutory enactments which have been made with regard to the Court of Justiciary in modern times—statutory enact-

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ments which have been provided sometimes by way of definition, sometimes by way of enlargement, for the jurisdiction to be exercised by the Court of Justiciary. In all of those statutes the orders and sentences of the Court of Justiciary were made final and conclusive. It appears to have been assumed, whenever the Court of Justiciary was legislated for, that it was a final Court, from which no appeal lay. It would be very strange indeed if an appeal were to lie from the decisions and sentences of the Court of Justiciary outside those statutes, and not from the decisions of that Court under those statutes.

My Lords, these considerations appear to me entirely sufficient for disposing of this case. I think that the attempt to maintain the right of appeal from an order of the Court of Justiciary is a pure experiment, altogether unwarranted by precedent, and which must fail the moment the history which I have attempted to narrate to your Lordships is looked into. I think that the petition of the Lord Advocate, to have the appeal dismissed as incompetent, ought to succeed, and that an order to that effect should now be made, and I move your Lordships accordingly.

LORD HATHERLEY.—My Lords, I am entirely of the same opinion, and I think that a case has seldom been brought before your Lordships in which you have been so clearly guided to a decision by previous authority, and that of the highest character, brought to bear upon the very subject-matter in question before you. The personal authority and weight of judgment of Lord Mansfield, supported as that weight of judgment is by the authority of preceding cases, entirely, as it seems to me, on every ground, disposes of this case.

I cannot follow Mr Hemming's argument, founded upon what he conceives to be the course that the appellate jurisdiction took after the Union. He has endeavoured to satisfy your Lordships that the appellate jurisdiction stands simply in this position, that everything that was not forbidden by the Act of Union or under the Articles of Union, ratified by that Act, would take the course of the English jurisdiction, and that all the decisions of all the tribunals in Scotland would fall to be decided according to an analogy (for it could only be an analogy, and that in some instances a very distant one) with what would be done in England upon decisions of a similar character of inferior tribunals as to the subsequent correction of them upon appeal.

I apprehend that what we must really look to is this: we must see to what revision the judgments of the Courts in Scotland were liable anterior to the Act of Union. We find that the judgments of the Court of Session were, as is narrated in the Petition of Right presented to King William III. in 1689, subject to revision by the Scottish Parliament in the manner there pointed out. Then we have to inquire what was the position of the decisions of the Justiciary Court, in case any corrections should be thought necessary with regard to these decisions. We cannot find that any such course took place with respect to them. There is no trace of it, and we have this satisfactory statement on the part of Mr Hume, who has been cited as an author deserving of the highest deference in respect to his industry and judgment. After having gone through the several cases which he refers to in detail, he says,—"After detailing this series of authorities, may I presume to add in the close of all that in the course of my researches, which have extended to the oldest genuine records of the Courts of the Justiciar and his deputies, I have not met with anything in the nature of an appeal to Parliament beyond a mere protest, not followed

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with any proceeding, or which tends in anywise to shake that account of our ancient course of practice on which the Lord Advocate's report in Ogilvie's case and the judgments in other cases are bottomed. It is true that in some instances the justiciar and his deputies appear to have gone to Parliament for instruction or advice, as in the case of Blair and Lawson, where, on the supplication of the justice-depute, the Estates of Parliament gave their opinion that death is the punishment of forgery." He mentions another case also, but he says that there was nothing which can be considered as in any way in the nature of an appeal from that Court to Parliament.

No doubt analogy was pursued so far as this: Finding that an appeal lay from one Court to the Parliament in Scotland anterior to the Union, and finding that from another Court, namely, the Court of Justiciary, it did not lie to the Parliament of Scotland before the Union, your Lordships' House after the Union said,—We must supply the place of the Parliament of Scotland, with such little changes as may be necessary in consequence of the changed position of things since the Union, with regard to the detail of the mode of carrying into effect the Union; subject to these little changes, we will hear those appeals which the Parliament of Scotland heard from the Court of Session, and (I apprehend this is the result of what Lord Mansfield says) we will not hear those cases, namely, cases from the Justiciary Court, which were not heard by the Parliament of Scotland before the Union.

The second branch of what I have just stated is the point we have at the present moment to consider. The case, then, stands thus:—Mr Hemming tells your Lordships that there was no doubt whatever of the jurisdiction for the first fifty years after the Union. It may be so, because there really was no case to call for a doubt,—I mean no case to call for a doubt in this respect, that all that you find in reference to appeals from the decisions of the Justiciary Court are these few cases: In 1713, the Elgin case; in 1724, a case in which a petition seems to have been received, as it is called, by the House (which might well arise from an inadvertence on the part of its officers, or the like—the petition was simply received—no further step was taken upon it); and then came that class of cases where the matter was fully discussed, and where conclusions adverse to those advocated by Mr Hemming on the present occasion were arrived at.

As to the Elgin case in 1713, it was so fully explained by Lord Mansfield that it seems almost a work of supererogation to go over the same ground again.

It is perfectly clear that the real point in issue in that case was a civil right which all parties were desirous of having tried. Both the party that was unsuccessful and the party that was successful in the Court below were anxious to have the point decided once for all. They choose to try that question of civil right by means of an indictment. The question was to whom the right of officiating in a certain building belonged, and the magistrates having given the possession of the building to one person, whilst the Presbytery claimed it for the Kirk of Scotland, the course taken was to indict the magistrates for the course they had pursued. The Justiciary Court saw what was the object and wish of the parties, namely, to have the civil right tried, and they sent it to the Court of Session to try, and when the Court of Session had tried it, and remitted it back to the Justiciary Court with their finding upon it, the Justiciary Court acted thereupon, and imposed a fine, something more than a nominal fine—I think it was £20—and they made the magistrates pay the costs. It is important to observe that when the case came up to your Lordships' House nobody

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raised the question of jurisdiction. It is from that that I assume that all parties were anxious to have the civil right tried and determined. Nobody opposed the matter being heard; the matter was heard, and the main finding was reversed. Certainly, I am bound to say that your Lordships' House did in that case proceed to deal with the decision of the Justiciary Court as well as with the decision of the Court of Session; but the House dealt with it simply as founded upon the conclusion which the Court of Session had come to, and, having reversed the decision of the Court of Session, your Lordships' House proceeded to hold that the judgment of the Justiciary Court must fall with it. That is the way in which Lord Mansfield explains that case; and, really, when you have gone through these two cases, and when you have looked at the third case, the case of bribery, you have considered every case which it is necessary for us on the present occasion to consider, as it was then for Lord Mansfield to consider.

The last case, the Dempster case, with regard to bribery, is a very singular one; indeed my noble and learned friend on the woolsack has stated exactly how that case stood. So far from your Lordships' House having there come to any decision upon an appeal, it is perfectly plain that from beginning to end of the proceedings this House felt very much embarrassed at having anything to do with the matter at all. In that case, the House was clearly of opinion that the Court of Justiciary was wrong; yet, notwithstanding that, they did not take it upon themselves to interfere with that decision directly. I think that a stronger instance of the doubt which the House felt as to its jurisdiction could hardly be cited. While holding manifestly a decided opinion that the Court of Justiciary had fallen into an error, the House took the mild course of letting the matter stand over, recommending the Judges of the Justiciary Court to think more about the matter, and see upon what they had founded their decision. The House did not venture to reverse that decision, and so it stood. The matter was finally determined by Mr Dempster withdrawing his plea of privilege, the Justiciary Court being very well pleased to get out of the matter in that way.

Before the case arose on which Lord Mansfield expressed his opinion there had been one or two other cases, of which the case of Ogilvie was one. That case stood in rather a peculiar position, and it does not throw much light upon this particular subject. The other was a case of conviction of felony. I forget the man's name. In that case, the House of Lords, after referring the matter to a committee, came to the conclusion that they could not interfere.

Then came the case of Bywater, in which Lord Mansfield, with his usual luminous and perspicuous detail of the transactions, leads you up to the conclusion that he himself had arrived at—namely, that there was no jurisdiction; and so it was held and determined.

Now, my Lords, if there was no jurisdiction with regard to matters of that description, I think your Lordships can have little hesitation in coming to the conclusion that, upon a matter such as we have before us on the present occasion, the jurisdiction could not be upheld. It would be upheld now for the first time in an opposed case if your Lordships were now to come to the conclusion that it is competent for you to hold the Justiciary Court to have been in error when they declined to accede to the petition of the petitioner in this case. He sought to obtain from that Court authority to proceed in a criminal prosecution although he could not obtain the concurrence of the Lord Advocate, and asked either to have that concurrence obtained by an order of the Court, or to obtain

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from the Court of Justiciary the power to proceed without any such concurrence. Certainly that is not the case, to say the least of it, in which, for the first time, a precedent would be made for interfering with a decision of the Justiciary Court. I am clearly of opinion upon the argument we have heard to-day that this is not a Court of appeal from the Justiciary Court in Edinburgh, and certainly least of all would it be a Court of appeal in such a case as is here brought before us.

On these grounds, my Lords, I concur in the motion which has been made by my noble and learned friend.

LORD O'HAGAN.—I am of the same opinion. The Treaty of Union between England and Scotland expressly provided (article 19) that the Scottish Court of Justiciary should continue as it had theretofore been constituted; and, although in the argument of Mr Hemming everything has been urged which ability and research could bring to the aid of the appellant, it has not really weakened the force of the statement of Mr Hume (2 Hume, page 504), that the judgments of that Court were not subject to revisal "in any form of process," and of the fact that they never were revised in any recorded case by the Scottish Parliament, or otherwise, before the Union. It has not displaced the allegation of the Lord Advocate in the Ogilvie case that there is no vestige of such process either in the records of the Parliament or of the Court itself.

Your Lordships are asked to entertain an appeal for which there is no precedent. As it was before the Union, so it has been during the hundred and seventy years which have since elapsed. No such appeal has ever been admitted by your Lordships' House. Several cases have been the subject of discussion at this bar and by my noble and learned friends, and I shall not occupy time by further adverting to them. I shall content myself by saying that the only one of them, the Elgin case (Innes and Others v. Dundas, 2 Hume, 505), on which, in my opinion, the appellant has not even a plausible ground of reliance, is clearly distinguishable, and has been authoritatively distinguished by Lord Mansfield (in Bywater's case) in such a way as to deprive it of all weight in the circumstances with which we are at present dealing. The civil proceedings of the Court of Session were the real subject-matter of that appeal. The criminal proceedings in the Court of Justiciary were merely a corollary to them, were confessedly founded upon them, were necessarily consequential and absolutely ruled by the issue which they had. Throughout the case its civil character was dominant, and legitimately brought it within the jurisdiction of this House. Besides, in the Elgin case, as Lord Mansfield noted, no objection was taken or could have been taken to that jurisdiction, because, in the words of that most eminent Judge, "the foundation is the civil sentence of the Court of Session, and all that is built upon that must fall to the ground when the House of Lords had reversed the sentence of the Court of Session, for then there never was such a sentence." It is idle to rely upon a case in all respects so diverse before your Lordships, and yet, I repeat, it is the only one which seems to me to give any countenance to the appellant's contention.

My noble and learned friend upon the woolsack has sufficiently disposed of the order in Geddie v. Dempster (Journals of the Lords, xxxii., 132), which, rightly considered, gives no countenance to the appellant's contention.

But this appeal is not only without warrant from precedent or authority,—it is urged upon your Lordships directly against authority of the highest kind.

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The judgment of Lord Mansfield in Bywater's case, to which I have already adverted, is decisive and unequivocal on the very point before us, and if it needed confirmation, as it does not, that confirmation is abundantly supplied by the cases of Mungo Campbell, and Murdieson and Miller,[1] which are fully in the recollection of your Lordships.

It is conceded that from a capital sentence of the Court of Justiciary no appeal would lie to your Lordships. In despite of the repeated rulings of the House, no one could maintain the contrary view; and I apprehend that sentences not capital would be for the same reason beyond the range of its appellate jurisdiction. Is not the present case rather *a fortiori*? If formal judgments be unappealable, is there, in reason or policy,—authority and precedent wholly failing the appellant,—any pretence for asserting the right of appeal in a question of simple procedure, where the object is to invoke an unexampled interference with the exercise of the undoubted discretion of a public prosecutor? With deference, I think there is not. The highest interests of society requires that that discretion should be reasonably maintained, and used freely whilst it is used honestly, and I do not know that this House possesses the means or the machinery for controlling or regulating it to the advantage of the public.

Without occupying further time, I express my full concurrence with the noble Lords who have preceded me, and I take leave to add that, whilst in determining generally on the question of jurisdiction, we have nothing to do with the events of this particular case. I am glad that your Lordships are not compelled even to entertain a controversy with reference to a decision of the Lord Advocate, which appears to me to have been perfectly just and wise.

THE following order was pronounced:—"That the said petition and appeal be not received, as being incompetent: And it is further ordered that the said Angus Mackintosh do pay or cause to be paid to the Lord Advocate for Scotland the costs incurred in respect of this matter, the amount thereof to be certified by the Clerk of the Parliaments."

SIMSON, WAKEFORD, & SIMSON, Westminster—P. H. CAMERON, S.S.C.—HUGH HOPE, Westminster, Crown Agent—JAMES AULDJO JAMIESON, Crown Agent.

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Ramsay, &c. v. Blair.

ROBERT BALFOUR WARDLAW RAMSAY AND THE ALLOA COAL COMPANY (Defenders), Appellants.—*Pearson, Q.C.—Cotton, Q.C.*
JAMES BLAIR (Pursuer), Respondent.—*Southgate, Q.C.—Kay, Q.C.*

Minerals—Property—Superior and Vassal—Servitude.—B acquired in feu from A three contiguous parcels of lands. In the titles to the different parcels A reserved respectively:—

(1) "The coals and coal heughs to be won and disposed upon . . . at our pleasure."

(2) "The whole coal, stone quarries, and all other metals and minerals, . . . with power to search for, work, and carry away the same."

(3) "The coal, . . . with full power to dig for, work, win, and carry away the same."

A was proprietor of the land surrounding B's land, and leased the whole coal-field, including the coals under B's lands, to a coal company who drove a nearly level mine, with its entrance in A's lands, cross-cutting coal and other strata in B's lands, to A's lands beyond, and thereby conveyed the minerals wrought under these last-mentioned lands to the surface.

Held (*aff.* judgment of the Second Division) that, while A's right in the reserved minerals was one of *plenum dominium*, his right to bore through strata under B's lands not reserved could only be used for the purpose of working the reserved minerals and bringing them to the surface; and accordingly that A and

[1] Maclaurin's Remarkable Cases, pp. 505 and 581.

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his lessees were not entitled to use the mine under B's lands for conveying minerals wrought under A's lands, except in so far as the mine passed through reserved strata.

(In the Court of Session October 22, 1875, reported in the present volume Court of Session Reports, p. 25.)

The defenders having appealed,—

Ld. Chelmsford.
Ld. Hatherley.
Ld. Selborne.

Lord Chelmsford.—It seems to me, as I believe it seems to your Lordships, that there is no difficulty whatever in this case, and that there is no necessity to hear the counsel for the respondent.

The simple question arises upon three grants, with reservations made by the appellant, Mr Ramsay of Whitehill. These grants were made in 1825, 1827, and 1857. The first of the grants, which is dated the 13th of July 1825, contained this proviso,—"Reserving always to me, my heirs and successors, the coals and coal heughs of the said haill lands, to be won and disposed upon by me and my foresaids at our pleasure." The grant of 1857 is said to be practically in the same terms; the reservation is—"Excepting always the coal within the said several subjects above disponed to the said James Blair, which coal is hereby expressly reserved to the said Robert Balfour Wardlaw Ramsay, with full power to him to dig for, work, win, and carry away the same on paying the surface damages which the ground may thereby sustain." With regard to those grants there can be no doubt at all that the only reservation is of the coal under the surface, and the granter would have no power whatever to carry under those lands any coals or minerals won and worked from any other lands.

The reservation in the grant of 1827 is more extensive. It is—"Reserving always to the said Robert Wardlaw Ramsay, and his heirs and successors, the whole coal, stone quarries, and all other metals and minerals within the said three acres of the lands of West-Quarter hereby disponed, with power to search for, work, and carry away the same, they always paying to the said James Blair and his foresaids all damages." Undoubtedly under that grant the whole of the land under the surface, all the coals, and all the metals and minerals, were reserved to the granter, and it gave him a right, of course, as upon his own property, to make any way for any coals or other minerals that he might have in any other part of his lands. But in this case he could not use that power because there were barriers on either side which prevented access to that underground.

The Judges of the Court of Session have been unanimous on this subject, and are of opinion that Mr Ramsay had no power whatever to use the underground of the lands reserved for the purpose of carrying away coals or minerals from any other lands which were not granted. I cannot help observing that I think that Lord Ormidale in giving judgment in this case has stated that which is not perfectly correct, because he says that the reserved right to work and carry away the coal was not of the nature of a proprietary right, but rather of the nature of a "privilege, servitude, or easement." Now, it appears to me that being upon a grant or reservation of minerals *prima facie*, it must be presumed that the minerals are to be enjoyed, and therefore that a power to get them must also be granted or reserved as a necessary incident. As was said by Lord Wensleydale in the case of Rowbotham v. Wilson, in 8th House of Lords Cases, 360—"It is one of the cases put by Sheppard's Touchstone in illustration of the maxim, *Quando aliquid conceditur conceditur etiam et id sine quo res ipsa esse non potuit*—that by a grant of mines is granted the power to dig them."

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This power to dig would of course be futile unless it involved the right of bringing to the surface. A necessary incident to a grant cannot therefore, in my opinion, be styled a "privilege, servitude, or easement."

I think the matter is perfectly clear, and I move your Lordships that the interlocutor of the Court of Session be affirmed.

LORD HATHERLEY.—I am entirely of the same opinion.

In the case of The Duke of Hamilton v. Graham[1] it was clearly pointed out what the exact right of a proprietor was in respect of a property excepted from a demise, and as to which therefore all the original rights of the demising proprietor remained, together with all the incidents to that property necessary to its working and enjoyment, that which the owner has reserved to himself being as much his as other parts of his land of which he had made no demise whatever. In the Duke of Hamilton's case it did not appear from the evidence that he was exceeding that right; it did not appear that he was using for any purpose whatsoever anything but that portion of the mineral property which he had actually reserved, and over which he had entire and complete *dominium*, and therefore it was held that he was not transgressing his own grant or departing in any way from it. But as respects the power of working, whether incidental to the reservation of the property, or expressly specified in the instrument, no right of property is attached to that; it is simply a right of availing yourself of that property which you have reserved to yourself in the lands in question.

Now, the right which has been reserved in the lands in question in this case is only a right to the coals under the lands which have been parted with and demised, that is to say, a right to the portion of the coal situated under the surface demised to the pursuer (the respondent), and although the right to that coal would exist fully if that alone was being dealt with, with regard to this mode of access to the minerals which he has reserved to himself nothing can be done beyond the purpose for which that right was reserved, namely beyond the purpose of working the coal under Mr Blair's lands, and no other coal. That really seems to me, my Lords, the simple principle upon which the Court has proceeded; and as to the question of interpretation I do not see how we can give to the words "coal and coal heughs" (whatever coal heughs may mean) any interpretation going such a length that it would amount to a reservation of all the wastes between the different seams of coal in the lands.

As regards the intervening piece of land demised by the grant of 1827, the reservation is more extensive. The reservation there is of "the whole coal, stone quarries, and all other metals and minerals within the lands demised, with power to search for, work, and carry away the same." If those who, advising Mr Ramsay with regard to the granting of his leases had happily thought of drawing the other two leases in the same form, it is possible that he might have found himself in a more favourable position, but as things stand I have no hesitation in coming to the conclusion that the pursuer is right, and that the appeal ought to be dismissed.

LORD SELBORNE.—The question seems to me to be a very simple one, both in fact and in law.

The engineer, Mr Simpson, finds in the report, which is the only evidence as to the facts that the level cross-cut which he speaks of by the word "mine" runs under the pursuer's lands, partly in the cherry coal waste and splint coal

[1] July 28, 1871, 9 Macph. H. L. 98, 43 Scot. Jur. 491, L. R. 2 Sc. App. 166.

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waste, and partly in other strata, and that the strata through which the mine passes, other than the coal, consists chiefly of shale and sandstone. The interlocutors under appeal have recognised the right of the appellant to carry through the coal and the coal wastes whatever he is able to carry through them without any interference on the part of the pursuer, but have denied him that right as to the other strata, stated here to consist chiefly of shale and sandstone. The only possible question that I can see is, whether by the grants of the two feus of 1825 and 1851 those other strata of shale and sandstone passed in fee to the feuar, who was the pursuer in the action, or were reserved and excepted in favour of the appellant.

Looking at the terms of the grants, I can see no ground whatever for raising so much as a doubt that those other strata of shale and sandstone passed to the feuar, and were not reserved or excepted in favour of the appellant. In the first grant the only thing excepted is whatever is properly described by the words "coals and coal heughs." The expression "coal heughs" is interpreted to mean coal pits. As there were no open coal pits at that time under this land I take that as equivalent to coal mines; but coals and coal mines mean, I apprehend, when unopened mines are spoken of, nothing more nor less than the veins or seams of coal underlying the surface. Whatever he can do within the limits of those veins or seams, whether before or after their exhaustion by working, is still permitted to him by these interlocutors, and the question arises solely as to the other strata, which are neither coals nor coal mines. With respect to the third grant, there is even less apparently upon which the argument can be founded than in the first, because the words "coal heughs" are not there, but only "the coal."

I must take the liberty of saying that I think Lord Ormidale was not so far wrong in the language which he used. No doubt the right to work coal which is reserved under land otherwise granted is a right connected with property in the person who makes the reservation in his own favour, and not like an easement, still, so far as it is a right to be exercised, not within the *solum* which is reserved, but over and through the *solum* which is granted, I cannot but think that Lord Ormidale was justified in describing it by the words "privilege, servitude, or easement."

APPEAL dismissed.

HOLMES, ANTON, GREIG, & WHITE, London—MACLACHLAN & RODGER, W.S.—ALEXANDER MORISON, S.S.C.—GRAHAMES & WARDLAW, London—GIBSON-CRAIG, DALZIEL & BRODIES, W.S.

No. 8.

May 23, 1876. Clyde Navigation Trustees v. Barclay, Curle, and Co.

THE TRUSTEES OF THE CLYDE NAVIGATION (Pursuers), Appellants.—*Cotton, Q.C.—Benjamin, Q.C.*

BARCLAY, CURLE, AND CO., (Defenders), Respondents.—*C. P. Butt, Q.C.—Herschell, Q.C.—Alison.*

Ship—Merchant Shipping Act, 1854, *sec.* 388—*Reparation—Compulsory Pilotage.*—To entitle the owners of a ship, under the charge of a licensed pilot, where such pilotage is compulsory, to the benefit of the provision of the statute which exempts them from liability when a collision has occurred by the fault of the pilot, it is sufficient for them to prove that the accident was occasioned by his fault, unless the facts proved raise a presumption of contributory fault on the part of the shipowners, which requires to be rebutted.

Circumstances in which *held* (aff. judgment of the Second Division) that a collision had been caused by the fault of the pilot, and that there was no contributory fault on the part of the owners.

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Ld. Chelmsford.
Ld. Hatherley.
Ld. Selborne.

(In the Court of Session 18th June 1875, *ante*, vol. ii. p. 842.)

On 17th February 1873 the new steamer "Colina," built by Barclay, Curle, and Company, sailed down the Clyde from Glasgow on her trial trip, and was returning up the river on 19th February, when, about a quarter to five in the afternoon, the light being good and the weather clear, she ran into a dredger belonging to the trustees of the Clyde Navigation, moored on the south side of the river near Dalmuir, and sank her.

At the date of the collision the "Colina" had not been taken over by the purchasers, and was still in the custody of the builders.

The present action was raised by the trustees of the Clyde Navigation against Barclay, Curle, and Company for £6000, as the damage sustained by them in consequence of the sinking of the dredger by the "Colina," through the fault, as the pursuers alleged, of the defenders and their servants.

The pursuers averred that the accident had been caused by negligence or want of proper care of those navigating or steering the vessel, and by gross and palpable defects in her construction and apparel.

The defenders, besides maintaining that the collision was not caused by their fault, pleaded;—(3) *Separatim*, the collision having been occasioned by the fault or incapacity of a duly licensed or qualified pilot acting in charge of the steamer within a district where pilotage was compulsory by law the defenders are entitled to absolvitor, with expenses.

This plea was founded on section 388 of the Merchant Shipping Act, 1854, which enacts,—"No owner or master of any ship shall be answerable to any person whatever for any loss or damage occasioned by the fault or incapacity of any qualified pilot acting in charge of such ship within any district where the employment of such pilot is compulsory by law."

It was not disputed that Luke Skelly, a pilot duly licensed by the Clyde Pilot Board, was, at the time of the collision, in charge of the "Colina," and that the collision occurred within a district where the employment of a pilot licensed by the board was compulsory.

The facts disclosed in the proof are sufficiently given in the opinion of Lord ~~Chancellor~~ *Chelmsford*.

The Lord Ordinary (Mackenzie) assoilzied the defenders.

The pursuers reclaimed.

The Second Division (*diss.* Lord Ormidale, *absent* Lord Gifford), adhered.

The pursuers appealed.

LORD CHELMSFORD.—My Lords, the only question upon which there is any dispute in this case is whether the owners of the "Colina" have done or omitted to do any act which contributed to the collision for which they are sought to be made answerable. Their defence is founded on the Merchant Shipping Act, 1854, which enacts that "no owner or master of any ship shall be answerable to any person whatever for any loss or damage sustained by the fault or incapacity of any qualified pilot acting in charge of such ship within any district where the employment of such pilot is compulsory by law." But although an accident may have been attributed originally to a pilot, yet if any fault of the owner or master of the vessel has contributed to it, the responsibility still remains.

There has been some little confusion in the cases as to the *onus probandi* of the charge of contributory negligence. In a case relied upon in the judgment

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of the Court below, and mentioned in the argument at the bar, the case of the "Iona" (Law Reports, 1 Privy Council, 426), Vice-Chancellor Kindersley is reported to have said—"It is not enough for the owners to prove that there was fault or negligence in the pilot; they must prove, to the satisfaction of the Court which has to try the question, that there was no default whatever on the part of the officers and crew of their vessel, or any of them, which might have been in any degree conducive to the damage." The learned Vice-Chancellor imposes upon the owners a species of negative proof which it is impossible for them to give. If, instead of saying "they must prove," &c., he had said "it must be proved that there was no fault on the part of the officers and crew," he would then have been perfectly correct.

The condition of exemption that the owners should prove that the accident arose entirely from the fault of the pilot, is one which must be fairly and reasonably interpreted. The owners having proved fault on the part of the pilot sufficient to cause, and in fact causing the calamity, must therefore, in absence of proof of contributory fault of the crew, be held to have satisfied the condition on which exemption depends, and are not to be called on to adduce proof of a negative character to exclude the mere possibility of contributory fault. It may be that in the course of the evidence of the owners to fix the responsibility solely upon the pilot certain acts or omissions on the part of the crew may come out, and it will then be incumbent on the owners to shew satisfactorily that those acts or omissions in no degree contributed to the accident. There are certain facts which are clear in this case. The "Colina" was under the compulsory charge of Skelly, a licensed pilot, and he was the main cause of the damage which occurred, which is attributable to his improper steering of the vessel at the critical time when danger was imminent, when he appears not to have had complete command of himself. The original cause of the accident is beyond a doubt. Is the pilot then alone responsible? or were there any acts or omissions which contributed to the accident attributable to the owners and crew of the "Colina"? This vessel had just been built, and had not been delivered by the shipbuilders to the owners, but was upon her trial trip in the Clyde, having on board three persons who afterwards became the master and first and second mate, and a crew employed for the occasion, consisting of twenty-five men. The first act of contributory negligence imputed to the owners is the having a crew of this description; and the bye-laws of the Clyde Pilot Board are referred to, and the evidence of Skelly, the pilot.

With regard to the bye-laws of the Clyde Pilot Board, those bye-laws require that "all steam vessels must be supplied with a captain or sailing master, who shall be an experienced seaman, and must also be manned with a sufficient number of able-bodied and experienced seamen, for the safe navigation of the vessel." The Judges who were in favour of the defenders spoke disparagingly of this state of things. The Lord Justice-Clerk says,—"The vessel was still the property of Barclay, Curle, and Company, and she was manned on this her trial trip by officers and men who had no regular commission, but were there for the purpose of the trial trip. It is said that this is not sufficient compliance with the bye-laws. I think it was a slovenly state of matters, and not one to be commended." And Lord Ormidale says,—"The evidence shews that the 'Colina' was, as regards her officers and crew, in a very deplorable condition, so much so that it is not the least surprising that an accident occurred." With respect to the bye-law, one can only observe that it was totally inapplicable to the present

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case. The "Colina" was still in the shipbuilder's hands, and therefore could not have any captain or sailing master, or an established crew of seamen. And this may account for what was observed by my noble and learned friend in the course of the argument, that no charge is made by the trustees of the Clyde Navigation—the authors of the bye-laws—that there had been any fault by the non-observance of it. With respect to the constitution of the crew, it was necessarily one collected for the occasion, and could not consist of a master and officers strictly so called. There is no doubt that upon the trial trip of a vessel, although she cannot be officered and manned like a ship on a voyage, every provision must be made to navigate safely, and every precaution taken to avoid danger to other vessels. All that was necessary was that the pilot should be assisted by a sufficient crew to obey his orders and carry them out promptly and efficiently; and certainly, so far as number is concerned, there was a sufficient crew, for it appears that the "Colina" would, if properly manned, have a complement of sixteen men, whereas on the occasion of this trial trip there was no less a number than twenty-five men. But assuming any objection to arise from the constitution of the crew, the point to be established against the owners is that the accident was occasioned in some degree by this circumstance.

It was said that the accident was partly owing to the want of proper assistance given to the pilot. It is said that the master ought to have been on the bridge to advise the pilot. There was no master, as I have already observed, strictly so called; but there is no magic in the word master, and it appears that Durie, who was to be one of the officers of the "Colina," was on the bridge and did what was necessary. It is further objected that the chief officer was not at the bow to repeat the pilot's orders, and it is said that if the chief officer had been there the hawser of the tug would have been sooner cast off. But Skelly, the pilot, says expressly that he did not want assistance for hailing the tug. He says,—"I did not require any assistance in signalling the tug;" and he says in another part of his evidence that all his orders were obeyed.

Lord Ormidale sums up his objections to the conduct of the owners as contributing to the accident in these terms:—"I am of opinion that in respect of want of promptitude in seeing that the order of the pilot to throw off the tug was carried into effect, and failure to keep a proper look-out, the defenders have failed to exonerate themselves." With regard to "the failure to keep a proper look-out," there is not the slightest evidence that there was not a look-out kept. With respect to "want of promptitude in seeing that the order of the pilot to throw off the tug was carried into effect," it is already answered by the part of the pilot's evidence to which I have directed your Lordships' attention.

Under these circumstances, I think your Lordships will be clearly of opinion that there is no ground for this appeal, and that the interlocutors appealed from ought to be affirmed.

LORD HATHERLEY.—My Lords, I am entirely of the same opinion as that which has just been expressed by my noble and learned friend.

The law has been laid down with perhaps a little want of his usual carefulness and accuracy by Vice-Chancellor Kindersley in the case of the "Iona," as far at least as he is reported as expressing in the opinion delivered by him on the part of the Judicial Committee of the Privy Council the principle to be this, that there is thrown upon the owner of a vessel who wishes to escape from the consequences of damage done by his ship, by the application of the privilege of

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exemption given to him by the Merchant Shipping Act of 1854 the burden of proving that his own officers and his own men, who were under his control or employed by him, did not concur in producing the accident. I apprehend that the true rule, as was stated fairly enough by Mr Benjamin this morning, is that the mode of proof will be this:—In order to exempt yourself, by virtue of the provisions of the statute, from that which is a general common law liability, you who desire the exemption must bring yourself within the provisions of the statute, and the burden is therefore thrown upon you of proving that the mischief was occasioned by the pilot. There the case would rest if nothing more occurred; but the other side may prove that although the mischief was occasioned in one sense by the bad management of the pilot, there was, on the other hand, a default on the part of you, the owners of the ship, which default conduced to the accident, and that you, having therefore partly caused the accident which has occurred, having concurred with the pilot in occasioning the damage and injury, the burden is thrown upon you. It being established that there has been some miscarriage on your part, if you wish to repel that you must say and prove—"True it is that there may have been some miscarriage on our part, but the miscarriage you have pointed out had nothing to do with the accident which has occurred; and therefore we again come back to the original proposition, that the damage was occasioned by the pilot, and by the necessity of our having that pilot; for if there were any defects in our own organisation and management they had nothing to do with contributing to that particular damage which is alleged."

I think that the defenders in this case have entirely satisfied the conditions which are required to be satisfied in order to exempt them from the ordinary consequences of an injury done by a vessel. There is no question—indeed it has not been denied by the counsel for the pursuers—that the mischief here was occasioned by the orders given by the pilot. The only question therefore which remains to be discussed is, whether or not the defenders or their agents in any way conduced or contributed to that mischief?

The points raised on the part of the pursuers are two—They say, first, you had not the proper complement of persons on board for the navigating of this vessel in this river, which is peculiarly liable to accidents from its crowded state, and which is subject to particular rules and regulations in consequence. The accident has been occasioned by the want of your having the proper number and complement of persons on board as well as by the pilot's mistake, and in that manner you have contributed to the injury occasioned by the pilot's error. My Lords, the mode of proving this has been by producing certain orders of the pursuers themselves as trustees of the River Clyde Navigation, which orders do not appear to me, I confess, to have any application to a vessel on her trial trip, or to the present case, beyond indicating (as they may do) what may be considered to be the reasonable number of persons to have on board to discharge the duties, and beyond directing the attention of all of us who have to determine this case to the fact that a certain number of persons are required for the discharge of such duties, and thereby endeavouring to induce us to infer that where such a number of persons are not to be found sufficient assistance is not given to the pilot in navigating the vessel, and therefore there is a contributing to the mischance which has happened through his mismanagement in consequence of his not having that sufficient assistance.

The pursuers say, We will make out our case in two ways—First, we will

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shew that if the pilot had had sufficient assistance he might have been advised at the moment when his error first commenced, in leaving the helm too long a-port; he might have been told of that error if anybody had been standing with him on the bridge in the position of an ordinary master of a vessel, who might be standing by the side of the pilot, although the pilot had the vessel in charge, and might give him an intimation of any danger he himself saw, such as the danger of having a dredger ahead or the like, or the danger of continuing the vessel in the wrong course. They say the pilot had not that advice and assistance, and if he had had it the accident would not have occurred. Secondly, they say that the vessel might have been saved from occasioning this damage by running her, without danger or injury to herself, on to a soft bank on the south side of the river, lower down than the dredger which she encountered by not taking that course; and that this collision would not have happened if the hawser which attached the steam-tug to the "Colina" had been promptly cast off. There were two steam-tugs in this case, one at the bow the other at the stern of the vessel, and it is said that if the hawser which attached one of the steam-tugs to the bow of the vessel had been relaxed and cast off, so that the pull to the northward which was given by that first steam-tug at the bow would have ceased, and if the vessel therefore had been allowed to fall off to the southward and to run upon the mud bank which was in rear of the dredger in question, the vessel's course would have been arrested by her being thrown upon the mud below the point where the dredger was, and the dredger would have been saved from destruction. The argument has been this—First, that there was no person to advise the pilot of the danger of his running upon this dredger; and secondly, that there was no person to assist him in giving such effective orders to the steam-tug as would have enabled the tug by casting off her hawser to leave the steamer in a position to run upon the mud bank on the south side of the river.

Now, it appears to me that all this is really open, in the first place, to the very serious objection which was taken in the course of the argument by my noble and learned friend opposite (Lord Selborne). Here are the Trustees of the River Clyde, who give their orders with respect to the proper and due navigation of the river; they are the pursuers in the present case, and they do not appear to have thought it worth while to raise this question in any shape or form whatsoever upon the pleadings. True it is that the evidence has been directed (and Mr Benjamin called our attention to it) to this species of misfeasance, namely, the want of a due supply of men on board the vessel. But the pleading seems to have been directed altogether to a point which wholly failed, namely, the defective construction of the ship, so that she was not in a proper condition to have been navigated upon this her trial trip on a river so crowded as the Clyde was. That part of the case was not pursued, but another part of the case which was not referred to, or if at all referred to, referred to only in the most distant manner by the pleadings, has been the part that has been insisted upon in the evidence. I do not wish to rely upon the absence of that pleading in this matter, although I think it is a point of considerable importance, as tending to throw doubt upon the case of the pursuers when they attempt to attribute the disaster to a want of sufficient assistance afforded to the pilot.

The pilot seems evidently to have been assisted in every way. As regards the number of men on board, although for the most part they were not sailors,

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they were carpenters, they were men employed in building ships, and accustomed to make trial trips of this kind. But more than that, the person who was afterwards appointed as captain of the vessel was on board. Certainly I agree on this point with the remarks which were made by the counsel for the pursuers in this case, that although he who afterwards became the captain of the vessel when the vessel was handed over to the purchasers was on board, making his observations no doubt, and sometimes throwing out useful observations, he was not there (as he himself says) in any capacity as commanding the vessel. Not only was he not in charge of her, but he was not taking any active part in her navigation. But, on the other hand, there were two other persons on board who afterwards became the first and second officers of the vessel when she was handed over to the purchasers, and they were both of them performing active duties in connection with the navigation. It appeared, in the first place, that Durie, an experienced officer, was on the bridge with the pilot the whole of the time that the vessel was steaming up the river; whether or not he left the bridge to sound the whistle is left apparently a little in doubt in the evidence, although I read his evidence as saying that he was on the bridge the whole time, and I presume he was able to arrive at the whistle whilst he was on the bridge, although, of course, he would not be at the pilot's side at the moment whilst he was sounding the whistle; however, he was on the bridge with the pilot. There was also another man who had had considerable experience, namely, Corrigall, who was afterwards second officer of the vessel when the purchasers took her in hand; he was placed at the wheel-house expressly for the purpose of seeing that the pilot's orders were promptly and explicitly obeyed. Besides that, there were four men at the wheel; one of them was Quigley, a young man only twenty-two years old last year, so that at the time of the accident he was probably about twenty years of age. However, he was accustomed to the sea, and he had as his assistants at the wheel three ship's carpenters, all of whom were superintended by Corrigall.

Then what does the pilot say? He says that every order he gave was attended to; there is no doubt about that, so that nothing whatever could be attributed to any defect on the part of those who were on board to assist him. Any danger or difficulty that did arise must have arisen from the unfortunately mistaken orders of the pilot—when I say "mistaken" I mean erroneous—not mistaken by those who received them, for they were carried punctually and implicitly into effect by those who received them; with respect to that he had every possible assistance in the men who were placed at the wheel, and in the man who was superintending them, and in Durie also. I apprehend it would be a strange thing to say that a party had contributed to the mischief because he did not point out an error to the pilot, who alone had charge of the steering; still, if it were necessary that somebody should be there to point out such an error, Durie was the man, and he did point out to the pilot that the course was erroneous in consequence of the helm of the vessel being kept so long a-port.

Then, my Lords, as regards the steam-tug, the point that is raised is this: It is said several of the witnesses have declared that if the rope had been cast off at the time when the pilot first shouted out to the tug the accident would have been avoided, because the vessel would have run on the south bank.

It appears to me, my Lords, that independent of any evidence about who did or did not shout, the evidence being at last this, that no one seems to have

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heard any shouting at all, as far as I can make out, but the real result was achieved by the waving of the hand, it only comes to this—if the pilot, who must have been aware that paddle-wheels do prevent people from hearing signals made to them by means of the human voice, had waved his hand in the first instance instead of shouting, nothing of the kind would have occurred.

That being so, I think it would be quite preposterous to say that the owners of a vessel can be made liable for damage of this kind, because, if they had placed somebody at the head of the vessel, or if there had been somebody with a louder voice than the pilot to call out, the accident would have been averted, and therefore they must be held to have contributed to the mischief in consequence of the want of having so placed a person. I apprehend that if the pilot had taken the course at first which he did at last, of waving his hand, he might have saved the dredger and avoided the accident. That is the conclusion at which I arrive, looking at the whole evidence, especially that of Durie, who seems to have been a man of great carefulness and watchfulness, as well as skill. Durie's opinion is that it would have saved it. But I hold that it is not necessary to have recourse to his evidence at all. I hold that if the difficulty did arise from the pilot not being able to make himself heard, that difficulty might have been avoided by his resorting to other means of communication. It seems to me that under these circumstances there is no possible pretence for saying that the defenders in this case contributed to the injury to the dredger.

Lord Selborne.—My Lords, the argument for the appellants has been mainly founded upon the suggestion of there being some special rule of law different from the ordinary principles regulating *onus probandi* between parties applicable to cases of this particular kind. I myself see no reason for inferring from any of the cases which have been cited the existence of any such special or peculiar principle applicable to the burden of proof in this class of cases. If we look at the case on general principles, apart from any *dicta* in any of the authorities, it would seem to be not difficult to apply those principles to a case of this kind.

In the first place, the pursuers, coming into Court to obtain damages for the improper running-down of their vessel, have, of course, an original *onus probandi* laid upon them to shew that the dredger was in fact run down through some fault on the part of those navigating the steamer. That, no doubt, is a burden of proof very easily discharged. Then the burden of proof is shifted to the defenders; and they, in order to relieve themselves from liability under the Merchant Shipping Act, 1854, must prove that the loss or damage was "occasioned by the fault or incapacity of a qualified pilot acting in charge of the ship within a district where the employment of a pilot is compulsory by law." Your Lordships will observe that there are three things necessary to be proved—1st, that a qualified pilot was acting in charge of the ship; 2d, that that was compulsory; and 3d, that it was his fault or incapacity which occasioned the loss or damage.

I apprehend that if a defender proves all these three propositions, and proves nothing more, then the burden is upon the pursuer to lay some foundation at all events for alleging that, notwithstanding the proof given, that there was a qualified pilot in charge, and that compulsorily, and that he committed some fault or shewed some incapacity by which loss or damage

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was occasioned, yet there was also contributing to the loss or damage other causes for which the owners of the ship were responsible. Some foundation for such a case of contributory negligence must be laid, and, I apprehend, it is clear on general principle that the burden of laying that foundation rests upon the pursuer. The defender, if he has simply proved what he was obliged to prove to exonerate himself, and proved nothing more, is not obliged to travel into the indefinite region of negatives, or to anticipate by denial that for which no foundation is laid to call upon him to deal with it. No doubt the pursuer may discharge the onus lying upon him in that respect either by direct proof tendered by himself or by shewing that in the proof brought forward on the part of the defender there are matters appearing from which fault or negligence which may have contributed to the mischief is legitimately and reasonably to be inferred. Unless he does that he does nothing. When that is done no doubt a further *onus probandi* is thrown on the defender to rebut the *prima facie* evidence which has been given of contributory negligence on his part.

Whatever may be the precise expressions to be found in any of the judgments, I see no reason whatever, referring them, as they ought to be referred, to the facts of the particular cases in which these expressions were used, for supposing that an arbitrary rule was meant to be laid down, inverting the general principle of *onus probandi* as applied to this particular class of cases. The Lord Justice-Clerk seems to me to have expressed the matter very properly, with the exception perhaps of one single word, which I should prefer to alter, when he says,—"I should prefer to state the law to be that it is not enough for the owners to shew that the damage arose through the fault of the pilot, if there is reasonable room for saying that there was contributory fault on the part of the master or crew." I confess, my Lords, I should not have used the word "room;" I should have used the word "ground," and have said,—"if there is reasonable ground for saying that there was contributory fault on the part of the master or crew." The proof of circumstances which *prima facie* shew such reasonable ground for saying that there was contributory fault on the part of the master or crew no doubt would throw upon the defender the burden of explaining these circumstances, so as to satisfy the Court that in point of fact the *prima facie* conclusion from these circumstances is not correct. If he fails to do that he fails altogether. So much with regard to the principles of law; and I think, when they are correctly understood, there is no difficulty whatever in applying them to the facts of this case.

In this case the argument has ultimately turned upon the want of proper officers on board the ship. In the first instance it took perhaps a wider range, and it was said that the ship was not properly manned and officered; but ultimately it was reduced to that, and reference was made to the bye-laws made by the pursuers in their official character for the navigation of the river Clyde. My Lords, I must say, after having studied those bye-laws, that even if it were clear that they did apply to trial trips as well as to other occasions in all respects, I am by no means satisfied there is any proof whatever given in this cause that they were not strictly complied with, substantially complied with at all events. These bye-laws are two. The first is—"Every vessel shall during the day-time have one person, and from sunset to sunrise, or, in time of fogs, two persons, properly qualified, stationed at the bow as a look-out, to give notice in due time of any obstruction or danger, who shall

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be furnished with a trumpet or horn or whistle, to be used when there is reason to believe another vessel is near." I do not know whether the words "stationed at the bow" point to anything different from being stationed on the bridge, but in this case the evidence makes it quite clear that the proper place for a look-out was the bridge; and, as a matter of fact, the evidence is that this accident occurred in the day-time, when, according to that bye-law, one person only would be sufficient for the look-out, for there was plenty of light and no fog —no fog is suggested. There was not only one person, the pilot, but another, Durie, who practically acted as an officer, on the bridge the whole of the time, to say nothing of a third person, Ferguson, whom I will mention presently, who was there too, but who may not perhaps have been properly qualified. But that the pilot and Durie were properly qualified for this purpose is perfectly clear. They were in the proper place during the whole time, and there was a trumpet to give proper notice; therefore it seems to me that that bye-law, at all events, was duly complied with in this case.

The second bye-law is—"Every steamer navigating the river shall be manned by an experienced captain or sailing-master and a sufficient number of able-bodied and experienced men, and shall in all cases have a person or persons stationed as a look-out, in terms of article 2." I have already dealt with article 2. It is not now denied that there were "a sufficient number of able-bodied and experienced men," because it is admitted that no case can be made of a want of a proper crew of seamen. The sole question therefore upon that bye-law would be reduced to this—Was the requirement that every steamer should be manned by an experienced captain or sailing-master duly complied with? My Lords, I venture to say that the pilot was the sailing-master in this case, and if there be nothing more than the mere language of that bye-law, considered as applicable, at all events, to a trial trip, I cannot conceive any ground for saying that a pilot might not be a sufficient sailing-master within the meaning of the bye-laws. So much with regard to the bye-laws.

Now, I come to the pleading; and it does seem to me that if ever there was a case in which the pursuers were to be bound by the inferences to be drawn from their own pleadings, this is a case of that description. For who are the pursuers? They are a public body, who have made these bye-laws—a body expressly charged with the care of the navigation of the river Clyde, and whose duty it would therefore be to use all the proper means to prevent all improper practices in the navigation of the river. It is not alleged that they discovered after these pleadings were put in any fact which they did not know before. They knew, therefore, both what was usual in the case of trial trips, and what was reasonably to be required and expected, whether under their own bye-laws or otherwise, in respect of the officering and manning the vessel; and knowing all the facts, they distinctly put upon their pleading this averment, that the accident was due to two causes, or to one or other of those causes, not alleging any other cause besides.

Those two causes were—First, "Negligence or want of proper care and skill on the part of those navigating or steering the vessel;" that is one. The other is—"Gross and culpable defects in her construction and apparel;" in another place more fully expressed thus—"in the hull, machinery, steering-gear, and other appliances of the vessel." Therefore they distinctly alleged two causes—one, improper steering and navigating at the time, and the other, improper con-

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struction and fitting up of the vessel itself. But there is a total absence of allegation either that the ship was improperly manned or not properly officered, or that the want of proper manning or proper officering had anything to do with the accident which occurred. I cannot but come to the conclusion that if there were any doubtful points in the evidence, any ambiguous points, any room for the suggestion of possible inferences tending to the conclusion that the ship was improperly officered, all doubt and all ambiguity upon that subject ought to be removed when we bear in mind that those who best understood the matter, and whose interest it was to suggest these objections, if there were any ground for them, have themselves not made such suggestion, and have shewn that they did not rely upon that view of the case.

But, my Lords, I think there is no real ambiguity in the matter, for this seems to be the state of the evidence: It is proved, and not in any way disputed, that the ship was manned as is usual on trial trips. I should be very sorry indeed to say anything which could give countenance to the notion that as much care was not to be taken by putting a proper number of skilled persons on board to prevent accidents and to navigate the ship properly upon a trial trip as upon any other occasions; but it would be most unreasonable to suppose that you should put on board a crew and officers engaged and commissioned in the same way as they would be engaged and commissioned when the ship is to be sent to sea, at a time when she is still only in the hands of the builders, when a temporary purpose is in view, and when she is not delivered over to those whose business it will be to engage the officers and the crew. All that is required is, that substantially something should be done by putting on board a sufficient number of men capable of navigating the vessel and obeying orders, and a sufficient number of intelligent persons who will be capable of acting as officers, and assisting the pilot in charge in every way in which assistance ought to be given. That being all that can be necessary, and it being proved that the manning was such as is usual in similar cases, that in itself, I think, raises a considerable presumption of sufficiency, because the navigation of the Clyde is a very important matter, and these pursuers would probably make rules to prevent danger and improper navigation upon trial trips as well as at other times.

That being so, your Lordships have this evidence, that the pilot was in sole charge, and I apprehend, in order to give the defenders the benefit of the exemption under the statute, it was necessary that he should have been so; the pilot was in sole charge, but he had, as my noble and learned friends have pointed out, the assistance not only of a competent crew and of four persons at the wheel (one of them a quartermaster), but also of Durie and Corrigall, who were in substance acting as officers though not having the engagement of officers at that time. Did they or did they not do all that was needful, and were they or were they not in such a position as to make it a right and reasonable conclusion that the pilot had all the assistance which he could possibly require? My Lords, the pilot, whose interest it was, as has been pointed out, rather to exonerate himself than otherwise, does in the result of his evidence say that he has no reason whatever to doubt that all his orders were properly obeyed and attended to, and that he needed no assistance with which he was not provided.—(His Lordship here referred to other evidence to the same effect.)

My Lords, I will not add anything to what your Lordships have said as to a

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suggestion, for which I find no ground directly laid in any portion of the evidence, that if there had been somebody stationed at the bow of the vessel at the moment at which the orders were given to the tug, which were not heard, those orders could have been transmitted within the half minute—which was a material space of time—so as to enable the tug to receive them and act upon them sooner than she did. All that I will say upon the subject is, that I could not, as a reasonable man, draw any such conclusion as within the limits of any degree of probability—I might almost say possibility—from the evidence before your Lordships. With regard to look-out, there was plenty of look-out; and the whole result is that the particular causes of the accident alleged by the pursuers stand thus: the first is proved, but then that was due to the fault of the pilot, for which by law the defenders are not responsible; the second the pursuers did not even attempt to prove, and they have entirely failed, in my judgment, in the attempt to fish out from the evidence a third, which they did not allege.

Therefore, my Lords, I entirely agree that this appeal must be dismissed.

APPEAL dismissed, with costs.

W. A. LOCH, Westminster—WEBSTER & WILL, S.S.C.—GRAHAMES & WARDLAW, Westminster—FRASERS, STODART, & MACKENZIE, W.S.

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June 20, 1876.
Harrisons v. Anderston Foundry Co.

WILLIAM HARRISON AND ROBERT HARRISON, Appellants.—*Aston, Q.C.* —*Asher.*

THE ANDERSTON FOUNDRY COMPANY, Respondents.—*Att.-Gen. Holker*—*Balfour*—*R. E. Webster.*

Patent—Specification.—In the specification of their patent, patentees described their invention as consisting "in new or improved simple and most efficient modes of and arrangements of mechanism, for actuating the set or sets of 'compound' or 'multiple' shuttle boxes of looms," and after describing in detail the various parts of a shuttle box moving and holding mechanism, and a pattern mechanism, and mechanism for connecting the two, they claimed,—

"First, the construction and arrangements of the parts of pattern mechanism and shuttle box moving and holding mechanism as herein distinguished generally for actuating the shuttle boxes of power-looms, all substantially in the new or improved manner herein described and shewn in the accompanying drawings, or any mere modification thereof."

They also claimed,—Second, third, and fourth, particular portions or movements in the general mechanism described in the first claim.

Held (in *rev.* judgment of First Division) (1) that in a claim for a mere combination it is not necessary to explain what is the novelty and what the merit of the invention, otherwise than by a description of the combination as a whole, nor to specify what of the combined parts are old and what are new; (2) that the claim to certain subordinate parts excludes the possibility of a claim to any other subordinate parts as novel, without any special disclaimer; and (3) that the first claim in the specification was *ex facie* a valid and sufficient claim for a mere combination, the second, third, and fourth claims in claiming certain subordinate parts as novel by implication disclaiming the rest.

Observed (*per* Lord Chancellor)—"If there is a patent for a combination the combination is itself *ex necessitate* the novelty; and the combination is also the merit, if it be a merit, which remains to be proved by evidence. So also

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with regard to the discrimination between what is new and what is old. If it is clear that the claim is for a combination, and nothing but a combination, there is no infringement unless the whole combination is used, and it is in that way immaterial whether any or which of the parts are new."

Observations (per cur.) on the cases of Foxwell v. Bostock, 4 De Gex, Jones, and Smith, 298, and Lister v. Leather, 8 El. and Black. 1004.

Ld. Chancellor (Cairns). Ld. Chelmsford. Ld. Hatherley. Ld. Penzance.

(IN the Court of Session July 2, 1875, *ante*, vol. ii. p. 857, and Jan. 20, 1876, Court of Session Reports, *postea*, p. 386.)

This action for infringement of patent was tried before Lord Gifford and a jury. The jury, at the end of a trial extending from 22d March to 2d April 1875, by a majority, returned a verdict for the patentees. The defenders took several exceptions to the ruling of the presiding Judge, and also obtained a rule for a new trial. The bill of exceptions and the rule were heard together, and, at advising, the Judges of the First Division, on 2d July 1875 (*ante*, vol. ii. p. 857), disallowed the exceptions which had been taken. At the same time they stated their opinion that the patent was void in point of law in respect of defective specification, but that they could not give effect to this view for want of an exception directed to the point. Being, however, also of opinion that the verdict of the jury was contrary to evidence, they granted a new trial.

A new trial was thereafter held, *pro forma*, on 22d December 1875, the Judge's notes of the evidence at the former trial being taken as the evidence in the case, and the Lord President directed the jury, in conformity with the opinion expressed by the Judges of the First Division at advising the first bill of exceptions, that the patent was void in law, and that they must therefore find a verdict for the defenders. To this direction and ruling the pursuers excepted. This exception was, without further argument, on 20th January 1876, disallowed by a judgment of the First Division (Court of Session Reports, *postea*, p. 386).

Against this judgment the present appeal was taken.

For the terms of the letters-patent and specification, and description of the machine patented, see *ante*, vol. ii. p. 857.

At delivering judgment—

LORD CHANCELLOR.—The present appeal is brought from an interlocutor of date 18th January 1876, by which the First Division of the Court of Session disallowed an exception to a direction to the jury given by the Lord President at the trial of a patent action raised by the appellants.

The direction of the Lord President was to the effect that the letters-patent of the 29th October 1868, upon which the appellants sued, were void in law, and that the jury must therefore return a verdict for the defenders. This direction was given in consequence of opinions which had been expressed by the Court of Session at the hearing on a bill of exceptions taken on the occasion of a previous trial of the same action. A motion for a new trial had been made at the same time, and the result of the hearing on the bill of exceptions and the rule was, that though the particular exceptions taken were not allowed, a new trial was granted, upon which new trial the direction now in question was given. On the argument on the former exceptions the learned Judges of the First Divison intimated the opinion that the letters-patent were *ex facie* void, and sent the case down to a second trial, in order that this opinion might be acted upon.

A considerable body of evidence had been entered into at the previous trial,

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and this evidence was taken as repeated, *pro formâ*, at the second trial. Nothing, however, now turns upon the evidence. The question has been treated by the Court, and was treated in argument at your Lordships' bar, as one merely of construction of the specification. If your Lordships should be of opinion that the specification is not *ex facie* void the case will have to go down again to another trial, and upon such further trial every other question will be entirely open. The invention may turn out not to be new, or not to be useful; or the specification, when tested by evidence, may appear to be not intelligible or not sufficient for the instruction of a skilled workman. All these points will be open, and other questions may possibly arise. The question, and the only question now to be determined is, whether, reading the specification as it appears before us, your Lordships ought to say that it is upon the face of it, by reason of something contained in it or something omitted, invalid.

Your Lordships will find this question to be further narrowed into the construction of the first claim in the specification. The Lord President, in respect to the first claim, says that it clearly fails, because it contains no discovery or explanation of the novelty, but is simply a claim for the whole machine as shewn in the drawings and described in the specification. Lord Gifford, before whom the case had been tried in the first instance, says—"It appears to me that the validity of this patent, in point of law, turns entirely on the first claim in the specification. Had that first claim not been stated I think there would have been no valid legal objection to the other claims—I mean no valid legal objection to these claims as stated, and apart altogether from questions of previous use or previous publication of the invention claimed. It is the first claim which endangers the whole specification. And the objection arises in this way, that the patentees have not in that first claim, or in any part of their specification, complied with the conditions on which alone they are entitled to protection. The absolute and indispensable condition of the patent and monopoly claimed by the patentees is that they must disclose the nature of their invention and the manner in which it is to be performed. While they have done the latter with great minuteness, they have failed in their first claim, or anywhere else, to state what their invention is."

It is necessary therefore to turn to the specification, and to consider what, on the face of it, the patentees appear to claim. The specification commences thus —"Our said invention consists in new or improved simple and most efficient modes of and arrangements of mechanism for actuating the set or sets of 'compound' or 'multiple' shuttle boxes of looms for weaving striped, checked, and other ornamental or figured fabrics requiring two, three, or more shuttle boxes and shuttles in each set." The specification then describes in detail, and by reference to drawings, the arrangements of mechanism in question, numbering the parts from 1 to 35 and from 36 to 62, and then continues,—"What we believe to be novel and original, and therefore claim as the invention secured to us by the letters-patent is—First, the construction and arrangements of the parts of pattern mechanism, and shuttle box moving and holding mechanism as herein distinguished generally for actuating the shuttle boxes of power looms, all substantially in the new or improved manner herein described and shewn in the drawings, or any mere modification thereof."

Following, and apparently distinguished from this first claim, which is a claim for the construction and arrangement of the parts of mechanism as therein dis-

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tinguished generally—by which I understand the patentees to claim generally or as a whole the combined mechanical arrangement described in the specification—there are added second, third and fourth claims, each relating to particular portions or movements in the general mechanism described in the first claim.

It is not, as I have already pointed out, disputed by the Court of Session that the 2d, 3d, and 4th claims, if new and useful, are sufficiently expressed in point of form. In my opinion the first claim is also sufficient in point of form. It is, as I read it, a claim for a combination, that is to say, a combination of all the movements going to make up the whole of the mechanism described. It must for the present at least be assumed that this combination, as a combination, is novel,—that it is, to use the words of the Lord President, a new combination of old parts to produce a new result, or to produce a known result in a more useful and beneficial way. It is not doubted that a combination of which this may be said may be the subject of a patent. What, then, are the objections to the first claim viewed as a claim for a combination?

The first is an objection said to be founded upon the case of Foxwell v. Bostock,[1] decided by the late Lord Westbury when Lord Chancellor. It is said to have been determined in that case that where there is a patent for a combination there must be a discovery or explanation of the novelty, and the specification must shew what is the novelty and what the merit of the invention. I cannot think that, as applied to a patent for a combination, this is or was meant to be the effect of the decision in Foxwell v. Bostock. If there is a patent for a combination, the combination itself is, *ex necessitate*, the novelty; and the combination is also the merit, if it be a merit, which remains to be proved by evidence. So also with regard to the discrimination between what is new and what is old. If it is clear that the claim is for a combination, and nothing but a combination, there is no infringement unless the whole combination is used, and it is in that way immaterial whether any or which of the parts are new. If, indeed, it were left open on the specification to the patentee to claim not merely the combination of all the parts as a whole, but also certain subordinate or subsidiary parts of the combination, on the ground that such subordinate and subsidiary parts were new and material, as it was held a patentee might do in Lister v. Leather,[2] then it might be necessary to see that the patentee had carefully distinguished those subordinate or subsidiary parts, and had not left it *in dubio* what claim to parts, in addition to the claim for combination, he meant to assert.

The second objection to the first claim in the present case was founded on the doctrine of Lister v. Leather. In the present case, however, no question of this kind appears to me to arise. The patentees claim, as I have said, for a combination under their first claim, calling it "the construction and arrangements of the parts of mechanism as herein distinguished generally," and in their 2d, 3d, and 4th claims they have specified the subordinate or subsidiary parts to which they lay claim as novel, and the specification of these subordinate or subsidiary parts appears to me to exclude the possibility of a claim for any other parts as novel.

The specification therefore appears to me *ex facie* to distinguish the new from the old where it is necessary to distinguish the new from the old, and to claim for a combination where it is claimed in a manner which is sufficient for a combination of the kind described.

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[1] 1864, 4 De Gex, Jones, and Smith, 298. [2] 8 Ellis and Blackburn, 1004.

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My Lords, I am therefore of opinion, differing, with great respect, from the opinions of the Judges of the Court of Session, that this action cannot be stopped at the point at which it has been stopped by the Court in Scotland, and that the interlocutor ought to be reversed, and the exception allowed, and the case go down to a new trial, where, as I have already said, every other question will be open, and where the evidence will have to be examined and applied with reference to all the issues in the case. I move your Lordships that the interlocutor be reversed, and the case remitted, with a declaration that the exception ought to have been allowed and a new trial had.

LORD CHELMSFORD.—My Lords, although the argument on this appeal took a wider range, the only question which is open upon it is the sufficiency *ex facie* of the specification. It is necessary, in the first place, to the determination of that question, to ascertain whether there is such a description given of the invention by the specification and the drawings annexed to it as will enable a workman of ordinary skill and information, by following them, to produce the thing patented. As, however, no doubt has been raised as to the sufficiency of the description to this extent, it must be assumed.

But the specification may fail in some other essential respect, and so it is said to have done by the First Division of the Court of Session. That Court held that the specification was bad, not because it was ambiguous or uncertain or unintelligible, but, according to what was said by the Lord President, because there was no discovery or explanation of the novelty of the invention. "No doubt," his Lordship said, "a new combination of old parts to produce a new result, or produce a known result in a more useful and beneficial way, may be a good subject-matter of a patent, but only under the conditions that the combination shall be claimed as a combination, and be so described as to shew intelligibly what is the novelty and what the merit of the invention." Lord Gifford, following the same course of reasoning, said—"The patentees have failed to tell the public what they truly claim as their invention. . . . . They should have said what they claimed and what they disclaimed. . . . . The patentees themselves must tell us what is new, and if they claim too much the patent goes."

With great submission, the claim of a combination or arrangement of parts of a machine, without more, is in itself a sufficient description of a novel invention, i.e. of a combination of parts which have never been combined in the same manner before. The explanation of the novelty is to be found in the description of the arrangement of the parts in the body of the specification. Whether the combination claimed is new or not is a question of fact to be proved on a trial. Where a claim is clearly and distinctly made, there can be no necessity for a patentee to distinguish between what is claimed and what is disclaimed. It is enough to say, in answer to Lord Gifford's suggestion, that everything that is not claimed is disclaimed. It may be necessary for a patentee sometimes not to disclaim in his specification, but to state what he does not claim. Where, for instance, it may not be possible to explain his improvements of a machine without describing other closely connected parts of it which are not patented, it may then be proper and will certainly be prudent for him to state that he does not claim these as parts of his invention, and to add a distinct description and limitation of his claim.

The opinions of the Judges of the Court of Session were in the argument maintained on the authority of Lord Westbury in Foxwell v. Bostock—and

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certainly the observations of that noble and learned Lord closely resemble those which I have mentioned of the Lord President and of Lord Gifford. In the case cited, Lord Westbury said—"The term 'combination of machinery,' which has of late been a favourite form of words with patentees, is nothing but an extended expression of the word machine. It is the word machine writ large, and as a patent for an improved machine, in the specification of which the improvement is not particularly stated and described, would hardly be attempted to be supported, so neither in my judgment can the patent for an improved arrangement or combination be supported, in the specification of which there is nothing to distinguish the new from the old."

It cannot be doubted that in a patent for an improved arrangement or combination of machinery, "the specification must" (as Lord Westbury said in Foxwell v. Bostock) "describe the improvement and define the novelty otherwise and in a more specific form than by the general description of the entire machine." But it is clear that if the claim is for a combination of particular parts of the machine, and for that only, the *differentia* (to use Lord Westbury's expression) is sufficiently assigned. And as it is admitted that there may be a good patent for a new combination of parts, all of which or a portion of which are severally old, upon what principle can a patentee claiming a combination be required to distinguish the new and the old parts from each other?

The argument at the bar extended far beyond the limits of the question, which, as already observed, is confined to the sufficiency of the specification, and a good deal of time was occupied in discussing what was covered by a claim for a combination, and by reference to the decision in Lister v. Leather, that a valid patent for an entire combination gives protection to each part that is new and material, without any express claim of the particular part. It is unnecessary for the determination of this appeal to consider the propriety of this decision, but I cannot forbear expressing a doubt whether it can be supported. If a patent is solely for a combination, nothing is protected by it but the combination, and consequently nothing can be an infringement but the use of the entire combination.

I do not think it right to dwell on this irrelevant matter further, but I return to the question whether the patentee has sufficiently described his invention in his specification. This question turns entirely (as has been said) on the first claim in the specification. The office of a claim is to define and limit with precision what it is which is claimed to have been invented and therefore patented. In the construction of a specification it appears to me that it ought not to be subjected either to what has been called a benign interpretation or to a strict one. The language should be construed according to its ordinary meaning—the understanding of technical words being of course confined to those who are conversant with the subject-matter of the invention, and if the specification is thus sufficiently intelligible it performs all that is required of it.

It is not asserted that the description in the specification is not sufficiently explicit and clear to enable a workman of ordinary skill and information to make the thing patented. In what, then, is the claim in the specification supposed to fail? As far as can be gathered from the opinions of the Judges, it is from the want of an explanation of the novelty of the invention. But if the claim is for a combination, it has been fully shewn that the claim itself is a statement and assertion of novelty.

What is it, then, that the patentee claims, on the head of claim, to which the

objection is confined? It appears to me that although this important part of the specfication is not very artistically drawn, it is sufficiently intelligible to be read as a claim for a combination of two separate parts (called improperly the two main parts) of an entire machine consisting of the mechanical apparatus, called respectively the shuttle box moving mechanism and the pattern mechanism, both of which are described in the specification and delineated upon the drawings with great minuteness of detail, and, as must be assumed, with sufficient clearness to enable a workman of ordinary skill to follow the directions.

In the other heads of claim, parts of the mechanical apparatus are claimed separately. There can be no objection to a claim of a combination and at the same time to a claim of the separate parts of that combination, and indeed it is the only way in which those separate parts of that combination can be protected from infringement. And it is immaterial whether the separate parts are claimed first and then the combination, or, as in this case, the combination first, and then the separate parts.

The patentee seems to me to have framed his specification in such a manner as to make it unobjectionable on the face of it, and therefore I think the interlocutor appealed from ought to be reversed.

LORD HATHERLEY.—I am of the same opinion.

I think it is a very unfortunate circumstance in this case that the jury at the original trial having been charged with the duty of finding under the several heads usually applicable to patent cases,—namely, the heads of novelty and of usefulness combined with the head of infringement as regards the right of the pursuers to pursue the defenders—the course taken was such as to have led to so singular a result upon the application that was made for a new trial. The jury, not unanimously but by a majority, had decided all the issues originally in favour of the pursuers. A bill of exceptions was thereupon tendered, and without entering into more detail on the subject I may say that the course the matter took was this: When it came up to the First Division the Court was of opinion that the matter had not been properly laid before the jury, and that there was a primary question with regard to the patent itself which ought to have been considered before they came to their conclusion upon either the infringement or the novelty of the invention. That question was as to whether or not, whatever the thing was, whether new or otherwise, it had been sufficiently clearly described and claimed in the specification.

Accordingly the case went back more *pro forma*, I may say, than anything else, upon this question, to another trial, and the learned Judge who then presided directed the jury as a matter of law, with such amount of evidence only as was necessary to raise that issue, that the specification in itself was bad, because, regard being had to the first claim (the other claims were not further entered into) there was not a sufficiently clear statement on the part of the patentees of what their invention really consisted in, and what it was that the general public were excluded from in consequence of the novelty of the invention, and what it was that they were at liberty to do, it being admitted that a great many of the particular portions of the machinery in question—indeed I think the counsel for the patentees in arguing the case at the bar said he was ready to admit that the whole of the particular movements in question were in themselves and existing separately, as distinct from a combination of them, matters which had been previously known.

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That being the case the Judges of the Court below have, as it appears to me, with great respect, extended the doctrine of Foxwell v. Bostock in their application of it to this case. It was there held, and that I think was all that was held, that it is not competent to a man to take a well-known existing machine and place that before the public and say—"I have made a better machine than that. There is the sewing machine invented by so and so. I have improved upon that—that is mine—it is a much better machine than his." That will not do. You must state clearly and distinctly what it is in which you say you have made an improvement. To use an illustration which was taken, I think, by Lord Justice James in another case, it will not do if you have invented the grid-iron pendulum to say—"I have invented a better clock than anybody else"—not telling the public what you have done to make it better than any other clock which is known.

That principle was laid down in Foxwell v. Bostock, and I do not think that anything further was intended to be determined in that case. It could not have been meant in that case to say that where it happens, as it may well happen, that a person arranging his machinery in a totally different way from the way in which it has ever been before arranged, although every single particle of that machinery is a well-known implement, produces an improved effect by his new arrangement, that arrangement cannot be the subject of a patent. It may be that the levers may be perfectly well known in their mode of action, and it may be that all the other separate portions of the machinery to which the patent relates may be perfectly well known; but if he says, "I take all these well-known parts, and I adjust them in a manner totally different to that in which they have ever before been adjusted; I have found out just what it is that has made these parts, though they may have been used in machinery, fail to produce their proper effect, and it is this—that they have not been properly arranged; I have therefore reconsidered the whole matter, and put all these several parts together in a mode in which they never were before arranged, and have produced an improved effect by so doing." I apprehend it is competent to that man so to do, and that it would be perfectly impossible for him to say what is new and what is old, because *ex concesso* it is all old.

That, my Lords, I apprehend, is the principle of a patent for a combination. It seems to me that that is just what these gentlemen claim to have done. Whether or not they have really done it will remain to be seen. It is true enough that a majority of the jury in one case found in their favour; but this question will have to be tried and will have to be decided after the case has been remitted as has been proposed by the noble and learned Lord on the woolsack.

Now, what is it that the patentees have taken upon themselves to say? They simply tell you in the first part of their letters patent—"Our said invention consists in new or improved simple and most efficient modes of and arrangements of mechanism for actuating the set or sets of 'compound' or 'multiple' shuttle boxes of looms for weaving striped, checked, and other ornamental or figured fabrics."

Then they proceed to describe that combination, which they say effects the new and improved mode, and they divide for that purpose the composition of a loom into two main parts, which they call the check shuttle box moving mechanism and the pattern mechanism. That is well known to those engaged

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in this particular pursuit, and there is no question that any workman at all skilled in the manufacture would be able directly from this description to do that which the patentees say they desire to have done for the purposes of effecting their improvement. There are but two parts, namely (first), the part which brings the shuttle box up to the point where the delivery is to take place of the thread exactly in such a position as to be suitable for the work in hand, and (secondly) the mode of connecting that with the pattern mechanism. The patentees tell you they have directed their attention to what they call these two "main points." Having done that, they divide the parts carefully, not however always with extreme precision, inasmuch as sometimes they throw into what they call the check shuttle box moving apparatus two or three numbers which they afterwards seem to include in the pattern apparatus as being a portion of it. But I apprehend there is no confusion introduced by so doing, because the numbers are all given—every portion of the machinery is well described, well figured, and well numbered, and no mistake can be made as to what portions of the machine they intend to describe and to use.

Having done that, I take occasion to notice, with reference to the claim at the end of the patent, that the patentees farther inform the public that "although the new check shuttle box moving mechanism (numbers 1 to 29) had so far been only shewn and described as applied to a three shuttle box loom, it is equally applicable for working a four, five, or six shuttle box, and it can be worked with the pattern mechanism of check looms now in use where these are in a good state and of a suitable construction, and only the shuttle box moving mechanism required; and many of the improvements in the patern mechanism (numbers 36 to 62) may be applied to other pattern barrels and mechanism heretofore or now in use for check shuttle boxes."

It is rather important to notice that, with reference to the claim at the end of the patent, because what they say is this,—first, we have made a new combination which runs through the whole arrangement of pattern-loom weaving; we have made a whole set of apparatus which we call the check shuttle box moving apparatus, and the function of that check shuttle box moving apparatus which we have so framed in a new combination we apply to any particular pattern, also by an apparatus which is a new combination, and which we have here in our patent described and figured. But they say,—It is not necessary that you should take our combination for pattern machinery; you may, if you like, take your own combination of pattern machinery and apply it to our new check shuttle box moving machinery: or *vice versa*, you need not take our check shuttle box moving machinery, but you may take our pattern machinery and apply your own check shuttle box moving machinery to that.

Therefore, you would expect *a priori* that when you came to the description of the claim you would find that they would claim for the general combination of the whole, and they would also wish to secure (as they are entitled to secure, if it be novel and useful) the one-half of their machinery, namely, the machinery for moving the check shuttle boxes according to the improved combination; they would also wish to secure the other half of their machinery, namely, the pattern mechanism, according to their new combination for that. So they say there are three things you must not do—you must not put your whole machinery into a combination which will follow ours with reference to the complete machine; you must not put your check shuttle box moving machinery into a com-

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bination which will be our combination for that purpose; and you must not put your pattern machinery into a combination which will be our combination for that particular purpose.

That, my Lords, is what it appears to me the patentees have done by the claims which are contained at the end of the patent,—"Having thus particularly described the nature of our said invention, and the manner in which the same is or may be performed, we have to state that we do not restrict ourselves to the precise details herein described or delineated, but what we believe to be novel and original, and therefore claim as the invention secured to us by the hereinbefore in part recited letters-patent, is, first, the construction and arrangement of the parts of pattern mechanism and shuttle box moving and holding mechanism, as herein distinguished generally." That seems to me to be one great claim for the whole. They say, we cannot tell you that this part, or that part, or the other part, is in itself a new engine or a new machine, but we tell you that our combination of all those parts into a complete machine affecting both the shuttle box moving apparatus and the pattern apparatus is a new combination, and we claim to be capable of carrying that out in an improved manner under the specification in our letters-patent.

Well, my Lords, that may or may not be true; that matter has still to be decided. It may or may not be true that it is novel, and that no one ever combined it in that way before; it may or may not be true that when the combination is so effected it is of any use. It may be that the old combination is as good as the new, and that no useful purpose is effected. That again will have to be for the consideration of the jury. But what the learned Judge who directed the jury at the trial, and what the learned Judges who concurred upon the subsequent review of the case have done, is this:—The jury were told that according to Foxwell v. Bostock there is no claim at all in the first claim which is here made—nothing specifically pointing out anything which the patentees describe as being a novelty; whereas, it appears to me, that as far as their words go in their claim (and it is for them to make out their case) they have claimed sufficiently distinctly a total and complete combination—from number 1 to number 62 they have put together every single member in a certain order and manner. Of course, it may be said that this does not preclude a question as to the substitution of a mechanical equivalent which may be substituted in one place or another with the particular object the patentees had in view. For example, as one of the learned Judges put it, if the machine were turned upside down, instead of putting it the right side upwards, would a person on that ground be allowed to say he had not been infringing the patent? In all other respects the combination, if invaded, will only be invaded by that which breaks in on the whole combination which the patentees have here described in their first claim, and which they say they prohibit the public from using on account of their letters-patent.

Then you come to the second, third, and fourth claims. The second claim turns on what I said you would expect to find—a claim as regards a combination which shall imitate the patentees' check shuttle box moving machinery. The third relates to a combination which shall imitate their pattern machinery; and the fourth is also directed to a combination that shall imitate in another respect their pattern machinery.

Having therefore said that there is here one total combination which is new—having said that there are here three special parts which are wholly new in com-

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bination—I apprehend they have both told you what they claim; and they have done another thing which appears to the noble and learned Lord on the woolsack to be necessary—and in that I entirely concur—they have by the special claims made under the other three heads warned off the public from using those heads, and have left open and have made no claim and are not to be treated as having in any way made a claim unduly or improperly to anything more than the first total combination running through the whole, the subordinate combination running through all the description up to 29 for the check shuttle box moving machinery, and the two other subordinate combinations going up to the higher number 62, which compose the part of the combination for effectuating and making the pattern machinery.

Under these circumstances, though with that diffidence which one ought to feel in differing from so many of the learned Judges in the Court below, I am of opinion that this interlocutor of the Court of Session cannot be sustained, and must be reversed, with the direction proposed by the noble and learned Lord on the woolsack.

LORD PENZANCE.—I agree in the course which your Lordships have been advised to take, and will shortly state my reasons.

In this case all questions of fact have been withdrawn from the jury, the specification has been held to be bad, and the patent consequently void in law, and the question is, whether the direction of the learned Judge to that effect was erroneous or not.

The objection taken to the specification, as I gather it from the opinions of the Judges in the Court of Session, is as follows:—"There is no statement that any part or parts of either mechanism are new, or that any part or parts are old or disclaimed. . . . The claim is simply for the construction of the pattern mechanism, and the arrangement of its parts in the new and improved manner described in the specification and shewn in the accompanying drawings, and for the construction of the shuttle box moving and holding mechanism, and the arrangements of its parts in the new and improved manner described in the specification and shewn in the accompanying drawings." "Each of these mechanisms," it is said, "is described in the specification and shewn in the drawings as a whole, and thus the claim is in effect for the two entire machines without even an attempt to state in what the novelty of either the one or the other consists." And again, "the combination shall be claimed as a combination, and be so described as to shew intelligibly what is the novelty and the merit of the invention. . . . There is no discovery or explanation of the novelty; on the contrary, the claim is simply in each case for the whole machine as shewn in the drawings and described in the specification. The patent is therefore void in law, in respect of its claiming too much."

These observations, made by the Lord President, are directed to the first claim in the specification (to which alone exception has been taken) and the substance of them, as I understand them, is this—that the patentee has claimed as the subject of his patent the whole of an entire combination of mechanism which he has fully described, but has not gone on to state whether any and if so which of the parts of this combination are new or old; further, that he has not explained the merit of his invention, and that therefore his patent is void as claiming too much.

It will not be denied that a valid patent may be granted for a new combina-

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tion of parts, all of which are old. If so, the question arises, how should the claim for such a combination be described? The patentees in this case have said—"What we believe to be novel and original, and therefore claim" as our invention, . . . "is, first, the construction and arrangements of the parts," &c. . . . "in the new or improved manner herein described and shewn in the accompanying drawings." Is not this a statement of what the novelty consists in? They lay no claim to novelty in any particular part or subordinate combination of parts, but they say that the "novelty" consists in the entire arrangement of the whole "in the new or improved manner" described. What they say in effect is that such an entire combination has never been contrived before, and that it is a useful one.

Having thus described what the novelty consisted in, were they bound to go further and state in what the novelty did not consist? in other words, to point out everything that in the several parts, or the subordinate combinations of them, might be old and had been previously used? I cannot think that they were, or that there is any authority in law for this requirement. If such a task were attempted to be fulfilled in reference to a machine so old, so largely altered, and so greatly improved from time to time as the weaving loom, it is not too much to say that it would be hardly possible to fulfil it without insufficiency or error. If the patentee accurately defines on the face of his specification his real invention and the limits within which that which he claims as a novelty is confined, he is not bound, as it seems to me, to go further, and specify how it is and why it is that his invention is novel, or recapitulate all the particulars in which it differs from preceding arrangements.

The cases that have been cited at the bar are all cases of a very different description. They are cases in which the facts have been ascertained, and it has turned out that while the specification claimed an entire combination, the real invention resided in something short of that entire combination, and consequently the patent has been held void as claiming too much. In all of them this proposition is insisted upon, that a patentee who has invented a particular combination of parts, which combination forms a portion only of a larger combination, or of an entire machine, is bound in his specification to limit his claim or description of the thing invented to the particular combination in which the invention resides, and that if in place of so doing he describes or claims the larger combination or the whole machine his patent is void.

This doctrine in respect of patents is to be found shortly and clearly stated nearly one hundred years ago in the passage quoted in the respondents' case—"'The patent must not be more extensive than the invention; therefore if the invention consist of an addition or improvement only, and the patent is for the whole machine or manufacture, it is void,' *per* Lord Mansfield in different cases, and *per* Buller, J., in Rex v. Else, 1785." Buller's *Nisi Prius*, page 76 *d*. From that time to the present this doctrine has been sustained, but in all the cases in which it has been applied to defeat a patent the real nature of the invention has been ascertained by the proper judges of the facts, whether Court or jury as the case may be; and the description in the patent when compared with the real invention has been found to be larger than the invention which it professed to describe.

But it is obviously impossible to apply a doctrine of this kind to a case in which the Court has nothing before it but the specification itself, and this is the state of things in the present case; for although the evidence in the case was put

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in *pro forma*, and was therefore before the Court, the conclusions of fact as to the nature of the pursuers' invention remained to be drawn by the jury, and in the course which the case took under the direction of the learned Judge were never drawn at all.

The important distinction, therefore, between the cases cited and the present is, that in the present case in the stage at which it had arrived no valid objection to the specification could be entertained which was not apparent on the face of the specification itself; whereas in the cases alluded to the specification was condemned only upon a comparison with the real invention. Thus, in Clarke v. Adie the whole facts were before the learned Judge, who had to decide on fact as well as law. In Parkes v. Stephens, June 4, 1869, L. R. 8 Equit. Ca. 358, Nov. 12, 1869, L. R. 5 Chan. Ap. 36, the Judge was again judge of both law and fact, the facts were fully before the Court, and the real invention compared with the specification. The learned Judge said that "the sufficiency of the specification was a question of fact," and ended by deciding that the defendant had not in fact infringed the plaintiff's patent.

Finally, in Foxwell v. Bostock, the case so much relied on, the true invention was declared by the Lord Chancellor, who was judge of both law and fact, to consist in a single shaft with certain cones upon it, whereas the plaintiff in his specification had described as his invention an entire sewing machine. It was to this state of things, this variance between the actual invention and the description of it—the invention residing only in a part, and the description of the invention embracing the whole, of a sewing machine—that Lord Westbury's remarks were addressed when he said—"I must therefore lay down the rule that in a patent for an improved arrangement or a new combination of machinery the specification must describe the improvement and define the novelty otherwise and in a more specific form than by the general description of the entire machine; it must, to use a logical phrase, 'assign the differentia' of the new combination." The entire machine in that case was a sewing machine. The new combination was "an arrangement of three cones on one shaft," and Lord Westbury held that although "it was true that the cones and the shaft were described indiscriminately with the rest of the machine in the specification, there was nothing to indicate that it was this addition which constituted the improved arrangement or new combination." By "assigning the differentia" there, I understand Lord Westbury to have meant that where the patentee's invention only extended to a portion of an entire machine he must point out the limits of that portion, distinguishing it from the rest of the machine of which it forms a part.

But what has the duty thus cast upon the patentees in cases of that description to do with the present case, in which the patentees on the face of their specification claim that "what is novel and original" is not any portion of an entire combination, but the entire combination itself? On the face of their specification *non constat* that their invention does consist in anything short of that entire combination, or that it would be adequately described by any words which did not include the whole of it.

Some confusion appears to me to have been imported into the argument of the case by opening the question of what will amount to an infringement of a patent which, like the present, claims as novel an entire combination of several parts, many of which may be old. This question, I think, is quite separate and dis-

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tinct from the sufficiency of the specification on the face of it, which is all that we have to do with here.

But the case of Lister v. Leather has been cited and commented upon as an authority for the proposition that a patent for a combination covers and protects all subordinate combinations or parts, or at least such of them as are "new and material." It is plain, however, that that case did not go this length. It decided nothing more than this—that though the patent is for a combination it does not follow that there can be no infringement of it unless every part of that combination without exception is pirated. What the Court said was that the taking of a subordinate part or parts might be, not that it necessarily would be, an infringement of the patent, and that whether it would be so or not depended, as the Court of Error said, "upon what the parts taken were, how they contributed to the object of the invention, and what relation they bore to each other."

This only amounts to saying that on a question of infringement the essential nature of the invention will be regarded, and that there may be cases in which, though the patent is for an entire combination of numerous parts, a collusive imitation of that invention may be effected though some detail of combination is omitted or changed, which is a doctrine familiar enough in patent law.

Upon the whole, then, I am of opinion that the direction of the learned Judge cannot be sustained. The case must, I think, go to a jury, and if on the evidence there is room for the jury to find that the novelty and usefulness of the pursuers' arrangements—in other words, the pursuers' invention—consists in anything short of the entire combination mentioned in the first claim, the jury should be directed that in the event of their arriving at that conclusion they should find for the defenders on the pursuers' issue of infringement on the ground that the patent is void in law.

THIS judgment was pronounced:—"It is ordered and adjudged, by the Lords Spiritual and Temporal in Parliament assembled, that the said interlocutor of the Lords of Session in Scotland, of the First Division, of the 18th January 1876, complained of in the said appeal, be, and the same is hereby reversed, and that the said cause be remitted back to the Court of Session in Scotland, with a declaration that the exception ought to have been allowed, and a new trial had: And it is further ordered that the respondents do repay to the appellants the expenses to which the respondents were found entitled by the said interlocutor appealed from, in so far as paid by the appellants to the respondents, and that the appellants be found entitled to the expenses incurred in discussing their bill of exceptions before the said Court of Session, as the same may be taxed by the Auditor thereof: And it is also further ordered that the said Court of Session do further in the said cause as shall be just and consistent with this declaration and judgment."

GRAHAMES & WARDLAW, Westminster—HAMILTON, KINNEAR, & BEATSON, W.S.—GEORGE FAITHFUL, Westminster—DAVIDSON & SYME, W.S.

FRANCIS KYAN DUNCAN (Petitioner), Appellant.—*John Pearson, Q.C.*—*Badenach Nicolson.*
JOHN SCOTT (Respondent), Respondent.—*Herschel, Q.C.*—*Gully.*

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Duncan v. Scott.

Lease—Road—Proof.—*Held* (in *rev.* judgment of the Second Division) that permission by a landlord to his tenant in a farm to use a private road over an adjoining property, also belonging to the landlord, did not make the right to use the road a pertinent of the farm, and that a person to whom the farm had been let by a subsequent proprietor of both estates was not entitled to use the road in the absence of a contract to that effect.

Ld. Chancellor (Cairns). Ld. Chelmsford. Ld. Hatherley. Ld. O'Hagan.

IN May 1873 Colonel Francis Kyan Duncan, of Firth and Old Woodhouselee, in the county of Edinburgh, presented a petition to the Sheriff, praying that John Scott, the petitioner's tenant in the farm of Firth Mains, should be interdicted from using a private road or avenue passing Firth House, over the lands of Old Woodhouselee.

Scott, in his answers, averred that the road in question had been used as a road to his farm by the tenants thereof for upwards of twenty years, and was the proper road from his farm to Edinburgh.

The following facts were proved:—The petitioner, Colonel Duncan, acquired by purchase the properties of Firth and Old Woodhouselee in 1865. The farm of Firth Mains was then occupied, under a nineteen years' lease, which expired at Martinmas 1868. In March 1868 the farm of Firth Mains was advertised to be let. The advertisement stated that Adam Bruce at Firth House would point out the boundaries. In the following month, by missives of offer and acceptance, Scott took the farm for nineteen years. The missives contained no mention of the road in question, and no reference to the possession by the previous tenant.

A draft lease was subsequently prepared by the landlord's agent, which bore that the farm was to be let as possessed by the former tenant, but it did not describe the farm roads or refer to the road in question. The lease was never executed in consequence of a question as to fences.†

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* Decided Feb. 22, 1876.

† The only oral evidence adduced by the tenant was as follows:—

John Brown, farmer, deponed to visiting the farm of Firth Mains with the respondent Scott and his brother in March 1868. "Bruce shewed us over the farm. Before we parted I said it was a bad road from Kirkettle, and I asked which was the road to Edinburgh, and he pointed and said it was past the Colonel's, or the laird's house, I am not sure which."

Walter Scott, the respondent's brother, deponed,—"On parting, last witness asked Bruce which was the road to Edinburgh, and he pointed down by the laird's house, and Mr Brown said it was a very bad road, and Bruce said it was the road Mr Good" (the former tenant) "had driven his carts to Edinburgh, that it was steep down and steep up other side."

John Scott, the respondent, deponed,—"Mr Brown asked Bruce the way to Edinburgh, and he pointed by the thrashing-mill, saying that was the road, past the Colonel's house." Cross.—"The conversation with Bruce was all the information I got about roads."

Mary Good, widow of Peter Good, Firth Mains, deponed,—"My husband was tenant of Firth Mains. I produce lease which we got from Mr Brown, the proprietor, for nineteen years from Martinmas 1849. After entering the farm we used the road passing by Firth House, and took our carts with produce by that road when passing to Edinburgh. Husband died in 1861. He told me that Bell, the land-surveyor, had complained to Mr Brown's grieve, a brother of the present proprietor's grieve, to the effect that he was to take his carts by Auchendinny Mains, and my husband said he might do so as he liked, but that he, my husband, would use the road that was pointed out to him when he took

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The Sheriff-substitute (Gebbie), on 20th April 1874, pronounced the following interlocutor:—"For the reasons stated in the subjoined note, refuses the interdict, dismisses the petition, and decerns: Finds the petitioner liable in expenses, allows an account thereof to be lodged for taxation, and remits to Mr Robert Barclay Selby, solicitor, to tax and report."*

On 14th July 1874 the Sheriff (Davidson) on appeal, pronounced this interlocutor:—"Recalls the interlocutor appealed against: Finds that it

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the farm, which was past Firth House. My husband used the road till his death, and after that I continued to use it with our carts to and from Edinburgh."

Jessie Good and Hugh Good, son and daughter of the former witness, gave evidence to the same effect as to the use of the road.

Colonel Duncan, the petitioner, deponed that when he acquired the two properties of Firth and Woodhouselee from Mr Brown in 1865 the farm was occupied by the trustees of Peter Good, and that his widow occupied the farmhouse till the lease expired at Martinmas 1868.

Bruce, who was a witness for the landlord, deponed that nothing was said about roads when he shewed the farm.

* "NOTE.—The road in dispute is the most direct to Edinburgh, and passes along what forms the approach or avenue to the petitioner's mansion, from the high road leading from Edinburgh to Auchendinny. The other road, which, it is contended, the respondent ought to use, joins the same road on the other side of Auchendinny village, and is about three quarters of a mile longer, besides being, it is stated, much steeper. The petitioner became proprietor in 1865, and the respondent entered to his farm at Martinmas 1868; the contract of lease for nineteen years stands upon a missive offer and acceptance—the formal lease, which is in draft, not having been executed, owing solely, it would appear, to the tenant not being satisfied upon the matter of fences. These documents make no special reference to the road against the use of which interdict is sought.

"The question involved is, whether the respondent's right to use the road in question is an incident to, or an accessory of, the farm leased from the petitioner as landlord? This question, the Sheriff-substitute is of opinion, must be answered in the affirmative.

"The considerations which have weighed with the Sheriff-substitute in arriving at the conclusion above expressed are principally the following:—

"1. The petitioner's avenue is not used solely as an approach to the mansion-house, but is regularly used for the purposes of the home farm, which is situated between the mansion-house and the respondent's farm.

"2. During the nineteen years' lease immediately previous to the respondent's occupancy the then tenant and his representatives constantly and regularly used the avenue for farm purposes in going to and returning from Edinburgh. And it would appear from the draft lease that the farm was to be let as lately possessed by the former tenant.

"3. It is clear upon the evidence that, on the occasion of the respondent examining the farm, the petitioner's grieve pointed out the road in dispute as the one leading to Edinburgh from the farm; and

"4. It is also clear that, from his entry at Martinmas 1868, down to a period shortly before presenting the petition, the respondent was in the habit of using the road in connection with his farm without objection.

"In view of these facts, is it possible to hold that the respondent is to be debarred from all use whatever of this road? which is what is prayed for. What appears to be chiefly objected to by the petitioner is the respondent's milk-van passing near his residence at early hours, but it is not easy to distinguish between milk and any other farm produce. Whether keeping a dairy is an unwarrantable misapplication of the use of the subjects let is a matter which does not appear to be here raised, and no opinion therefore need be expressed upon it. If, however, the petitioner can succeed in shewing that it is, he will probably have no difficulty in stopping the objectionable traffic."

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is not proved that the respondent acquired right, by his lease of the farm of Firth Mains, to the use of the private avenue or road leading through the grounds of the petitioner, to and from the petitioner's residence of Firth House: Therefore interdicts, prohibits, and discharges the said John Scott, respondent, his servants, and all others employed by him, from entering upon or using the said road or avenue as craved." *

* "NOTE.—This road, to which the respondent says he has right, is not a public road; and no claim to it is stated by the respendent on the ground that the public have a right of way upon that road. It is the avenue to and from the mansion-house of the petitioner, extending through policies and grounds of his about his residence. It seems to be the only access to Firth House.

"The respondent claims right to it as tenant of Firth Mains farm. He says it is a road which leads to Edinburgh, and no exception of the use of it by the tenant of Firth Mains having been made in his lease he is entitled to use it.

"Further, he says it was pointed out to him before he took the farm as one of the roads of the farm. But this road forms no part of the respondent's farm. The farm lies to the south of the grounds of Firth House. It is bounded on its north side by a parish road, to which there is a road (or roads) from the farm-house and farm. That parish road leads on the one hand (west) to the Penicuick and Edinburgh road, and on the other hand to Dalkeith. The respondent has also three additional fields on the north side of this parish road, with accesses from them to it. The home farm and the grounds of Firth House lie to the north of these three fields.

"Now, it seems very clear that, without positive stipulation, the tenant of Firth Mains can have no right to the use of this private road through the petitioner's private grounds.

"He cannot, in the circumstances, maintain that he has a right to it, inasmuch as it was not made a condition of his contract that he should not use it. As it is no part of his farm, it is necessary for him to shew that he has, by his lease, an express right to it. He accordingly says it was pointed out to him, and so it is part of his contract that he should have the use of it. The question is, has he proved that?

"No formal lease has yet been executed. Certain documents have been produced (apparently on the call of the respondent), which are said to express the terms of the contract between the parties. There are the letter by the petitioner's agent to the respondent, with his reply to it, being an offer and acceptance (No. 21 of process), the conditions of lease (No. 20), and a draft lease (No. 22), in regard to some part of which parties are at variance. In not one of these documents is there any reference to the use of this avenue. All that is said about roads is an obligation on the tenant—(see conditions of lease and draft lease)—to keep the whole drains, roads, gates, ditches, and fences in good order. That refers to the roads on the farm, of which undoubtedly this is not one. It is proved that the subject of this avenue was never mentioned, either to the petitioner or to his agent, until in 1873 the respondent's use of it was challenged. These are important facts clearly against the respondent's claim. But he says this road was pointed out to him before he took the farm as the road to Edinburgh,—that is, the road to Edinburgh he, as tenant of the farm, would have the use of. It is said it was pointed out to him by Bruce, who was the petitioner's overseer. Bruce had no instructions nor authority to do this. The advertisement as to the farm, set forth in article 1 of defender's statement of facts (and it is admitted to be correct), refers to Bruce only as the person who 'will point out the boundaries.' Bruce states that he did not point out this road,—that they never saw the road, nor were farther north than the parish road, and that he is 'quite sure that the subject of roads was not mentioned at all.' It is somewhat doubtful if a right to the use of this kind beyond the farm could be established against the proprietor by a conversation with an unauthorised servant alone, even if the exact terms and meaning of that conversation were proved in a clear and satisfactory way. But the witnesses for the respondent merely mention an observation made by Bruce in answer to what appears to have been

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Scott, the tenant, appealed to the Court of Session.

On 7th November 1874 the Second Division (*abs.* the Lord Justice-Clerk) pronounced this interlocutor:—"Find it proved in point of fact that, along with the farm of Firth Mains, there was let to the appellant the right to use the road in dispute as a road to Edinburgh, for the purposes of the said farm: Therefore find that the respondent is not entitled to the interdict craved: Recall the judgment appealed against, dismiss the petition, and decern."

The petitioner appealed.

LORD CHANCELLOR.—My Lords, I cannot help regretting that there has been in this case, which does not involve a point of any great importance, so much litigation, and also that your Lordships have not the advantage of having before you the reasons of the Court of Session for the interlocutor which they have ultimately pronounced. What your Lordships have is that that interlocutor professes to "find it proved in point of fact that along with the farm of Firth Mains there was let to the appellant" (that is to say, the appellant before the Court of Session, the respondent here) "the right to use the road in dispute as a road to Edinburgh for the purpose of the said farm."

Now, my Lords, it is not in controversy that the road in question is a private road, and that unless the respondent can establish his right of passage over the road no person other than the owner of it, namely, the present appellant, has any right to use the road. Moreover, it is not in controversy that it cannot in any way be called a way of necessity for the Firth Mains farm, because the Firth Mains farm is provided with a road, somewhat longer, to Edinburgh on the one side and with a road to Kirkettle and other places on the other or eastern side. I turn therefore to the documents in evidence in the case for the purpose of seeing how a right to use this private road has been given to the respondent, because unless that right has been given either by some document,

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a casual question by a third party, and which, if it really was made, might easily have been forgotten. The respondent and his party had come to Firth Mains by Kirkettle; and John Brown says Bruce 'shewed us over the farm. Before we parted I said it was a bad road from Kirkettle, and I asked which was the road to Edinburgh, and he pointed and said it was either past the Colonel's or the laird's house, I am not sure which.' They did not see the house nor the road. It is impossible to hold what was said in this short and loose conversation as a deliberate agreement between the petitioner and the respondent.

"The respondent further founds on the occupation of this private road by the previous tenant, Good. It is not proved that Good, even if he were occasionally allowed to use the road, had any right to the use of it. He did use it to a certain extent, and he was found fault with by the proprietor for doing so. He certainly did not use it in the manner the respondent has recently done; and, having died in 1861, Cunningham, who managed the farm for Good's family, took nearly the whole produce to Dalkeith, and not to Edinburgh. The respondent did not know till after he became tenant that Good had ever used this road.

"The respondent founds also on his own use of it since his entry at Martinmas 1868. If he had no right to it by the terms of his lease, his use of it, whatever it may have been, would not preclude the petitioner putting an end to that use in 1873, when the respondent commenced his daily and continuous traffic of a new kind. There is not distinct evidence of the extent to which this occasional use went; nor is it proved that the petitioner knew of it. No such partial use permitted, or not stopped if known of, between Martinmas 1868 and 1873, would fix a right in the respondent."

or by some express verbal contract or licence, there can be no such right arising by implication of law.

My Lords, the documentary evidence in the case is extremely simple. There was an advertisement put forth for the letting of this farm, which described it as "the arable farm of Firth Mains"—"consisting of 300 acres"—"to which if desired about 20 acres of the adjoining lands may be added. The farm is intersected by the Edinburgh and Peebles Railway, the Roslin station of which is about a mile and a quarter from the house." And the advertisement stated that "Adam Bruce, at Firth House, near Roslin, will point out the boundaries;" and that application was to be made to Mr John T. Mowbray, "by whom offers will be received until the 1st of April next."

My Lords, the respondent went upon the farm and saw it—(I will refer for a moment to what took place on his going upon the farm)—and having gone upon the farm he appears to have indicated that he was ready to take it; and accordingly Mr Mowbray made him an offer in writing. "I hereby agree on the part of Colonel Duncan of Firth and Old Woodhouslee to let to you the farm of Firth Mains, with the additional fields as advertised, at the rent of £400 yearly, on the conditions of lease which you have seen." I pause there for the purpose of saying that these conditions of lease are before your Lordships, although not printed as part of the case, and there is nothing in them which has any bearing upon the question, except possibly one condition. That condition provided that the tenant was to keep "the roads" (without saying more) "in repair." It was not contended, and indeed it could not be contended, that that included or covered the road in question, because the tenant, I apprehend, would have no desire to keep this road, nearly a mile in length, through other property, in repair. The other stipulations in Mr Mowbray's letter are immaterial.

The acceptance of that offer is in writing in these words—"I hereby accept of the above offer on the terms stated; but there are one or two points to which if the landlord can consent I shall feel much obliged." I pass over the first. The second is this,—"I would also ask the landlord as a favour if he would assist me in applying to the Peebles Railway Company for a siding in the farm as the common road is far from being good." Now, the Peebles Railway passed through the farm. "The common road" obviously means the public road, the parish road, which also passed through the farm, communicating on the one side with Edinburgh, and on the other side with Kirkettle. The application therefore is, taking notice that that was the road which otherwise the tenant would have to use, that the landlord would intercede with the Peebles Railway Company to make a siding at which the railway might stop their goods trains and take on his produce from the farm and convey it to wherever the railway was going—to Edinburgh on the one side and elsewhere on the other.

Therefore, my Lords, so far as the documentary evidence up to this time goes, there is nothing whatever which in any way indicates any intention of including or asking for the inclusion of the right to use the private road of the appellant.

I turn, then, to see whether any foundation can be laid for the case of the respondent, and for the interlocutor of the Court of Session, in what took place on the occasion of the respondent going to the farm; and I do not propose to enter into any conflict of evidence there, which probably would not be open for your Lordships to consider; but I take the case as stated in the evidence of the respondent himself. Now, he was told in the advertisement that Adam Bruce would *point out* the boundaries of the farm. That was the only extent of

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authority which Adam Bruce had received to his knowledge. He went upon the farm and he saw there Adam Bruce, and the description which is given of what took place is this—The respondent says "Bruce was not in; his son took us to him, going by the west side of farm. We examined steading and farm, coming down with Bruce by the east side of the farm to the steading, and then came down to the parish road. Mr Brown asked Bruce the way to Edinburgh, and he pointed by the thrashing mill, saying that that was the road past the Colonel's house." Lower down he says—"The conversation with Bruce was all the information I got about roads."

John Brown, who was with him, says—"We drove to Kirkettle, and we were directed there the road to Bruce's house, and we called there and a boy took us to Bruce, and he shewed us over the farm. Before we parted I said it was a bad road from Kirkettle, and I asked which was the road to Edinburgh, and he pointed and said it was past the Colonel's or the laird's house—I am not sure which. He also said it was a hilly road, but generally well kept." And Walter Scott, who was present, says—"The last witness asked Bruce which was the road to Edinburgh, and he pointed down by the laird's house, and Mr Brown said it was a very bad road, and Bruce said it was the road Mr Good had driven his carts to Edinburgh, that it was steep down and steep up other side." Mr Good had been the former tenant.

With regard to the position of the former tenant, what I understand the evidence to amount to is this:—The former tenant had had a lease; the lease is not in evidence, and it is not suggested that anything was contained in the lease upon the subject of the use of this road; but it is said that the factor of the then landlord, whose name was Brown, had given a licence or permission to Good to use this road for his carts going to Edinburgh. It is said that the landlord expressed much disapprobation at this leave having been given, but the leave was not recalled or revoked. Your Lordships must take it therefore that the former tenant had not, by his lease, or by any contract in writing, but by the permission of the factor of the landlord, been allowed to take his traffic over this road.

Now, my Lords, putting all these facts together, what do they amount to? My Lords, if it had been the case that on the occasion of the respondent going on the farm Adam Bruce had said, here is a road past the landlord's house,—if you take the farm you shall have the use of it, and I undertake that it shall be your mode of passing to Edinburgh—even if he had said that, I apprehend that after the extent and ambit of the authority of Adam Bruce had been distinctly pointed out to the respondent by the advertisement, it would have been impossible for him to rely upon Bruce as having given him any binding contract for the use of the road in question. But in point of fact Bruce did nothing of the kind. Even by the statement of the respondent he did nothing more than this:—he said as a matter of fact that that, pointing it out at the same time, was the private road of the landlord; that that was the road to Edinburgh; that that was the way by which the former tenant had driven his carts to Edinburgh. But the respondent at the same time says that he was aware of and saw the other road, for he says he passed along the parish road to Auchendinny; that is, the same as the Edinburgh road.

Now, my Lords, if that had raised in the mind of the respondent any idea that he was to have the use of this road it was for him, having heard what he did hear from Bruce, to have made a demand or to have exacted a stipulation

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upon the subject from the landlord. Then he would have ascertained whether the landlord was willing to have made that concession, or whether he would have refused to have made it. But as it was, there was no power, in the first place, in Bruce to have made any engagement upon the subject, and in the next place there is no evidence that Bruce either made or intended to make any engagement upon the subject.

So much therefore for what passed on the farm. My Lords, is there anything else in the case? After the agreement was complete, after the tenant had entered upon the farm, it became necessary of course that a formal lease should be prepared. A draft of this formal lease was prepared by the agent of the appellant, and was handed to the tenant. That draft has not been settled, there being a controversy upon some point other than that now before your Lordships; but it appears that in that draft the property leased was described as the farm in question, with these words—"As possessed lately by the representatives of Good." The farm is described as "possessed." Now, what was possessed by Good? That which was possessed by him was the farm, and merely the farm. He may have had, or he may not have had, a collateral licence, a licence while he was tenant of the farm to use the road in question, but that was no part of the "possession" of the farm, nor was it appurtenant to the possession of the farm. Therefore it appears to me that unless before the exhibition of this draft lease there had been some contract of letting, by which the respondent became entitled to use the road in question, there is nothing in this draft lease exhibited after the contract between the landlord and tenant was complete that would alter or add to that contract.

My Lords, I am therefore, upon the whole, altogether unable to arrive at the conclusion at which the Court of Session has arrived, that "there was let to the appellant the right to use the road in dispute as a road to Edinburgh for the purposes of the said farm." I think, my Lords, that it would be most dangerous if your Lordships were to derive from such materials as I have referred to any conclusion such as that at which the Court of Session has arrived. I can therefore only submit to your Lordships that the two interlocutors of the Court of Session should be reversed; that the interlocutor or judgment of the Sheriff-depute should be revived; and that the appellant should have expenses, not of course of the appeal, but in the Court of Session.

LORD CHELMSFORD.—My Lords, the Court of Session in their interlocutor state that they "find it proved in point of fact that, along with the farm of Firth Mains there was let to the appellant the right to use the road in dispute as a road to Edinburgh for the purposes of the said farm." We have not been furnished with the reasons which led the Court of Session to this conclusion, and, therefore, I find it difficult to understand, whether, by the expression of the Court that it is "proved in point of fact that there was let to the appellant the right to use the road in dispute" they mean to say that upon the documents themselves in evidence there was an actual proof of the letting, or whether they mean to say that from the facts of the case, that is, the conduct of the parties, it may be inferred that there was a letting of this right of road.

My Lords, the question whether or not there was any such actual letting must entirely depend upon the terms of the draft lease, which, having been prepared by the appellant's solicitor, would be evidence against him, and would enable the respondent to call for a lease, to be executed according to the terms of

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that draft. We have not had that draft before us, but it seems, from the reasons given by the Sheriff-substitute for his interlocutor that it would appear from the draft-lease that the farm was to be let "as lately possessed by the former tenant." With regard to the right of the former tenant, Good, it appears that when he held the farm he had certainly no right of way or anything more than a licence or permission to use this road. That appears from the evidence of Mrs Good, who says,—"He" (her husband) "told me that Bell, the land-surveyor, had complained to Mr Brown's grieve, a brother of the present proprietor's grieve, to the effect that he was to take his carts by Auchendinny Mains, and my husband said he might do so as he liked, but that he (my husband) would use the road that was pointed out to him when he took the farm, which was past Firth House." This shews that there was nothing more at the time he took his lease than that the road was pointed out to him as a road which might be used, which certainly would not amount to a lease of the right, but would be a mere permission to use it. Now, supposing that Good had had a lease of the farm with this right appurtenant to it, and supposing that when the lease was granted to Mr Scott the farm had been leased, "with all ways usually possessed and enjoyed," there is no doubt whatever that this right would have passed as appurtenant to the farm. But Good having had merely a licence or permission to use the road, even if the words in Mr Scott's lease had gone to the extent which I have mentioned, they certainly would not have carried the right of this way to the respondent.

It appears, my Lords, that the words in the draft lease are, as I have said, that the farm was to be let "as lately possessed by the former tenant. What is the meaning of those words? It is quite clear that the right of way over the lessor's land is no part of the farm which is let, and therefore it is perfectly clear that there was no document of any kind which would give the right under the lease to the defendant.

With regard to the facts of the case as establishing any right, if such right could be established by parole evidence, my noble and learned friend on the woolsack has so entirely disposed of that part of the case that I need not trouble your Lordships with any observations upon it.

With regard to what has been said as to the use of this road from 1868 to 1873 by the respondent, even supposing that there had been actual permission to use it, that would not establish any right whatever or enable him to insist now that he has any right to use this road.

My Lords, under these circumstances I agree with my noble and learned friend that the interlocutor appealed against must be reversed.

Lord Hatherley concurred.

Lord O'Hagan.—My Lords, I am quite of the same opinion. I think it is a great misfortune that the House has not before it the judgment in the Court below. The very distinguished judge, Lord Neaves, who signs the memorandum of judgment, must have had reasons for coming to that conclusion, which, I think, are scarcely before us.

So far as I am concerned, I think that the finding of the Court that there was let to Colonel Duncan the right to use the road in question, is absolutely unsustained by the evidence. Mr Herschel argued very ingeniously that inasmuch as Good, the previous tenant of the farm, had used this road in a particular way, it was to be assumed that the succeeding tenant should have a right to use it in the same way. But, as has been said by my noble and learned friend just

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now, according to the only evidence we have of Good's claim to use it at all, that claim was founded by Good himself upon the mere statement that it had been indicated to him as the road going to Edinburgh at the time he took the farm. He did not pretend that he had any title at all to it. And to say that a man, by his enjoyment of the use of the road for a few years could bind a new proprietor, who came into possession only in 1865, and took a new tenant in 1868, appears to me to be a proposition that is not maintainable.

Putting that out of the question, I see nothing really in the case. There is nothing whatever in the documents in favour of the respondent. In the draft lease there is nothing whatever; and, as regards the note and acceptance of it, the argument is against him upon that, because the reference to the "common road" and the siding is a case of *expressio unius exclusio alterius*. It appears to me that these documents go entirely against his claim now before the House. As to user, mere user could not constitute a title or sanction any pretence of that kind. As far as the pointing out is concerned, we have a man pointing out this particular road, at an important time, no doubt, but in doing so he was going absolutely beyond his authority, inasmuch as we find the advertisement authorising him to point out "boundaries" only, and his own evidence proclaiming that he had no instructions whatever as to roads.

Upon the whole, my Lords, I entirely concur with my noble and learned friends that these interlocutors ought to be reversed.

INTERLOCUTORS appealed from reversed with expenses in the Court of Session; the interlocutor pronounced by the Sheriff-depute of the county of Midlothian on the 14th of July 1874 restored; and the case remitted.

LOCH & MACLAURIN, Westminster—JOHN T. MOWBRAY, W.S.—W. BUSHBY—MORTON, NEILSON, & SMART, W.S.

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THE PHOSPHATE SEWAGE COMPANY, Appellants.—*Napier Higgins, Q.C.—H. Davey, Q.C.—Alexander Young.*

JAMES ALEXANDER MOLLESON (Trustee in Peter Lawson and Son's Sequestration), Respondent.—*John Pearson, Q.C.—Locock Webb, Q.C.*

Bankrupt—Trustee—Claim—Constitution—Process—Foreign—Statute 19 *and* 20 *Vict., cap.* 79 (*Bankruptcy* (*Scotland*) *Act*, 1856), *secs.* 50 *and* 126.—The estates of a firm, which had offices and carried on business both in England and Scotland, were sequestrated in Scotland. An English company claimed to be ranked in the sequestration for £65,000 as the price paid to the bankrupts under a contract of sale which the claimants alleged to be reducible on the ground of fraud, and at the same time commenced proceedings against the trustee and certain other persons in the Court of Chancery in England with a view to set aside the contract and to obtain a judgment for the £65,000. The trustee rejected the claim as unfounded, and the claimants appealed, and contended that the sequestration proceedings should be sisted pending the issue of the Chancery suit, or otherwise that a dividend or dividends should be set aside to meet the amount of the claim in case it should be sustained. *Held* (*aff.* judgment of the First Division) that there were no grounds for interfering with the course of the sequestration, and that a proof of the averments on which the claim was based had been rightly allowed.

Fraud—Joint Stock Company—Sale of Concession.—Circumstances in which *held* (*aff.* judgment of the First Division) that a joint stock company, who had purchased a concession of a guano island, had failed to instruct fraud on the part of the sellers (who had no beneficial interest in the sale) to the effect of entitling the company to rescind the contract and claim repetition of the purchase-money.

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Ld. Chelmsford.
Ld. Selborne.

(In the Court of Session March 18, 1874, *ante*, vol. i., p. 840.)

The Court having allowed the parties a proof of their averments, evidence was led before Lord Young, and on 2d July 1874 his Lordship reported the proof and whole cause to the First Division.* The facts of the case, as they appeared from the evidence, were shortly as follows:—

In June 1868 the Government of San Domingo granted to Messrs Hartmont† and Company, of London, a concession of the guano, guanito, and phosphates, on the island of Alto Vela, upon certain conditions, for fifty years from 1st July 1869. Mr Hartmont having got an introduction to Messrs Peter Lawson and Sons, who were interested in such manures, induced them to enter into an agreement with him, of date 1st December 1868, whereby he undertook to assign the concession to them, and they, on their part, were to work the guano, and pay to Hartmont one-third of the profits realised. The Lawsons were, however, to take the whole risks, and pay all expenses. A subsequent concession was, on 8th May 1869, obtained by Hartmont from the Dominican Government, which also fell under the above agreement of December 1868. One of the conditions contained in the deeds which constituted these concessions was that the concessionaries were to ship every year from 1st January 1870 at least 10,000 tons of guano and phosphate from Alto Vela, paying the Dominican Government a royalty upon each ton. If this was not done the government reserved power to declare the concession void. The Lawsons proceeded to work Alto Vela during the year 1870, but did not ship 10,000 tons of material. The Dominican Government, however, did not declare the concession void, and the Lawsons continued to work the island and ship guano, &c., and pay royalties, until March 1871. These operations the Lawsons found to be much more expensive than they expected, and, in consequence, they considered, in the autumn of 1870 that it would be expedient to sell the concern to a company. Negotiations, with a view to bringing out a company to work the island and purchase the concession from the Lawsons were entered into between a Mr Begbie, a partner of the firm of Hartmont and Company, acting on behalf of the Lawsons and others who held interests in the concession, and a firm of financial agents in London, named Engelbach and Keir. A note of agreement between these parties was entered into on 21st December 1870, whereby the vendors agreed to sell the concession, with their rights and property in Alto Vela, "for the sum of £65,000 in fully paid-up shares of a company which is about to be formed."

The Lawsons, who, throughout their connection with Alto Vela, had expended upwards of £39,000, were, about March 1871, much pressed for money, and, accordingly, they arranged with Hartmont that he should purchase their whole interest in the concession for £10,000 in cash, and £2300 in acceptances. They were, however, to retain 500 £10 shares of the projected company. These shares were, in March and April 1871, purchased from the Lawsons by Hartmont for two sums of £3000 and £2000 advanced to them, but it was arranged that when issued they should stand in name of the Lawsons in trust for him.

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* In a note to his interlocutor the Lord Ordinary stated that he had reported the case in order that the First Division, now that the character of the pursuers' case had been more fully disclosed, should have an opportunity of sisting proceedings till the issue of the proceedings in the Court of Chancery, which, in his Lordship's opinion, was the only Court competent to decide whether the claimants could set aside the contract of sale to establish the liability of the bankrupts to restore the price.

† Misprinted "Harcourt" in the report in the Court of Session, *ante*, vol. i. p. 840.

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The following deeds were then executed:—1. Assignment of the concession by Hartmont and Company to the Lawsons, dated 20th April 1871; 2. Agreement dated 28th April 1871, between the Lawsons, as vendors, and Engelbach and Keir, as purchasers, on behalf of the principal company, for the purchase of the concession, and the whole rights and interests of the vendors in Alto Vela, for the sum of £65,000, to be paid thus—£20,000 in fully paid-up shares, and £45,000 in cash. This agreement in one of its articles stipulated that the purchase-deeds for carrying the sale into effect should contain all usual and proper covenants by the vendors for title, restricted to their own acts and defaults. The prospectus of the company was issued on 10th May 1871, and subsequently on 29th May an indenture was executed between the Lawsons and the Phosphate Sewage Company whereby the vendors assigned and transferred the concession, &c. to the company for the price above-mentioned. The prospectus contained a statement that the Lawsons had expended upwards of £39,000 in connection with the island of Alto Vela, and this expenditure was at the proof established by the production of their books. After obtaining the concession from the Lawsons the company proceeded to work it, but only shipped 5000 tons in the first year.

A settling day and quotation were granted for the company on the Stock Exchange, and large profits were realised by Hartmont and others through sales of the shares, but the Lawsons never sold a single share, and made no profit. The information upon which this settling day and quotation was allowed by the committee of the Stock Exchange was supplied by the chairman and secretary of the company, and was to a large extent incorrect, the great number of shares held by Hartmont and Company and others, as the price of the concession, being concealed.

On 28th August 1872, Colonel Mendes, the agent for the Dominican Government, wrote Messrs Hartmont and Company, the grantees of the concession, complaining that neither in 1870 nor 1871 had the minimum quantity of phosphate been exported, and stating that the Government had in consequence the right to declare that the concession had been forfeited. He, however, proposed that some new arrangement be entered into to obviate the forfeiture. Messrs Hartmont and Company informed Colonel Mendes that the concession had been transferred to the Phosphate Sewage Company, and Colonel Mendes accordingly, on 4th October 1872, wrote to that company in terms similar to those employed in his letter to Messrs Hartmont and Company. Some negotiations were subsequently entered into, but eventually the concession was declared forfeited, and a fresh concession granted to a French company.

It appeared also that 1500 fully paid-up shares of the company, equivalent at the time to £15,000, were handed to Messrs Engelbach and Keir, the original promoters of the company, as promotion money. The balance of the purchase-money of the concession, exclusive of the 500 shares nominally held by the Lawsons for Hartmont, viz., £45,000, was divided among Hartmont, Begbie, Ogle, and others, who had aided in starting the company.

On 2d July 1874 the First Division of the Court of Session refused the appeal, and remitted to the Lord Ordinary on the Bills to confirm the deliverance of the trustee.*

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* The following opinions were delivered:—

LORD PRESIDENT.—My Lords, the memorandum of association of the Phosphate Sewage Company—the appellants and claimants in this case—is dated 1st May 1871, and registered on the 6th of the same month. They claim, in the sequestration of Messrs Peter Lawson and Son, a sum of £65,000, as being a debt due to them by the Messrs Lawson at the date of their sequestration,

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with interest at five per cent from 31st May 1871 to the date of the sequestration, amounting altogether to £70,529; and the affidavit on which this claim is made sets out that these sums are due and owing by the bankrupts under the circumstances set forth at length in a bill of complaint in Chancery, filed on the 19th April 1873, between the Phosphate Sewage Company and a variety of other persons therein named, and they further depone in common form that no part of this money has been paid or compensated to them in any way, and that they hold no security over the bankrupts' estate. This sum of £65,000 is said to be the price paid under a certain contract of sale in which the Messrs Lawson stood in the position of vendors and the directors of the company in the position of vendees, and the claim is made upon the footing that the sale is reducible and may be set aside upon the ground of fraud.

Now, to deal satisfactorily with the question which has thus been raised it is necessary to attend to the history of the proceedings upon which this sale arose. It would appear that in the year 1868 a person of the name of Hartmont—whose name figures in the history of this case in a not very creditable way—had obtained a concession from the San Domingo Government of the phosphates and other similar substances in the island of Alto Vela; and the Messrs Lawson, who were naturally very much interested in all substances that could be used as manure, and who had at the time a great many speculations of their own of that description, came in contact with Mr Hartmont, and agreed with him to work those substances in the island of Alto Vela, and ship them to this country. The agreement which was made between those parties was on 1st December 1868, and the existing concession in favour of Hartmont was dated in the month of May preceding. But there was a new concession obtained in the following year, and it is not disputed that that concession fell under the agreement between Hartmont and the Messrs Lawson. The result was that Messrs Lawson worked the island of Alto Vela during the whole of the year 1870 and a part of the year 1871. They expended, undoubtedly, a very considerable amount of money upon it, and the returns do not seem to have been in proportion to the expenditure. In short, they were not making money by it, and they became desirous in consequence to dispose of their interest in the island, and to obtain in that way repayment of the large expenditure which they had made. It appears quite evidently from some of the letters, and also from the parole evidence, that at this time the Messrs Lawson were in difficulties. It does not appear that they were insolvent, but they were certainly in want of money, and therefore they found that the large expenditure which they had made on this Alto Vela undertaking was a very great inconvenience. I see that so early as 17th October 1870 Mr Graham Lawson had suggested the formation of a joint stock company to take up this concern, which he thought a very good concern, and one likely, by application of sufficient capital, to prove very profitable and advantageous. That is the first suggestion of a company being formed for that purpose, and I am bound to say that in that letter of 17th October, written by Mr Henry Graham Lawson, I do not see the suggestion of anything improper or fraudulent—the object being to get up a company for the purpose of taking over this undertaking upon fair and equitable terms. Mr Hartmont, however, had a very considerable interest and influence in this matter, because he was the person to whom the concession had originally been made by the San Domingo Government, and he still retained, under his agreement with Messrs Lawson, a considerable interest in the affair. And it becomes apparent, as we trace the history of those proceedings, that in the course of 1871 Mr Hartmont, either alone or with some of his other friends who are mentioned, conceived the project of getting this Alto Vela concern and the proposed company very much into his own hands; and I am very far from saying that, in the proceedings which followed, Mr Hartmont and some of his friends did not commit a very clear and gross fraud upon the public. But it rather appears to me that if it had not been for the ultimate object which Mr Hartmont had in view, and which he achieved

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LORD CHANCELLOR.—My Lords, the circumstances attending the litigation in this case are undoubtedly somewhat peculiar. with great success—viz., bringing this company out with the requisite number of shares having been subscribed to entitle him to go into the market, and, by misrepresentation, obtain from the Stock Exchange a settling-day and quotations, and then getting up the value of the shares in the market by fraudulent representations and deceit, and then selling out at a high price—if these things had not followed upon the history I am now tracing, I do not very well see there would have been any fraud upon the public at all; because merely to convert this Alto Vela undertaking into a joint stock company, got up in good faith and in regular form, would have been certainly nothing wrong in itself. The course of Mr Hartmont's proceedings may be seen very well from some letters which passed in the months of March and April 1871, in which he contrived to buy off Messrs Lawson, and certainly bought them off for no very large amount considering the great expenditure they had made upon Alto Vela. It comes to this, that he pays them £10,000 in cash and £2300 in acceptances, and stipulates that they are to have in addition 500 shares in the company which is to be formed, representing £5000, in all £17,300; and for that amount he acquires the whole right and interest of Messrs Lawson in the concession. Subsequently, however, Messrs Lawson being much in want of money, the £5000 worth of shares which they were to have is also converted into cash, Mr Hartmont first of all advancing £3000 and then an additional £2000, and Messrs Lawson undertaking to hold the 500 shares, when they come to be assigned to them, for behoof of Mr Hartmont. After this, the sale takes place which is said to be fraudulent, and the deeds which pass between the parties are, in the first place, a deed dated 20th April 1871, in which Mr Hartmont and Mr Begbie assign the concession to Messrs Lawson, and then a deed of 28th April 1871, by which Messrs Lawson sell and assign to Engelbach and Keir, the persons who were promoting the company; and then afterwards, when the company is formed, there is a regular deed of transfer by the Lawsons to the company. Now, it is said that there is fraud in the way in which this transaction was carried through, because, in the first place, the subject of the conveyance had really no existence—it had been lost or forfeited before it was made the subject of conveyance. That appears to me to be entirely a misunderstanding of the position of affairs at the time this conveyance was made. No doubt in the concession the parties, the concessionaries, undertook to ship 10,000 tons of guano and other similar substances from Alto Vela in the course of every year, beginning on 1st January 1870, and the San Domingo Government stipulated that if that obligation was not performed they should have the option of declaring the concession void, and making it void. During the year 1870 there certainly were not 10,000 tons shipped, and therefore it may be assumed that at the end of that year the San Domingo Government had the option of declaring the concession to be void, and so putting an end altogether to the rights of the concessionaries. But they did not do so. On the contrary, they allowed the Lawsons to go on, after 1st January 1871, shipping material from this island of Alto Vela; and then, after the company was formed, and when the concession had been transferred to them, they also allowed them to go on shipping for a very considerable period. The amount shipped by the company was, I think, 5000 tons; and all that goes on without any attempt upon the part of the San Domingo Government to exercise their right of declaring the concession to be void, and without there being any remonstrance upon their part as to the small shipments which had been made, until somewhere about the month of October 1872. It appears to me, therefore, that at the date of the contract of sale in May 1871 this concession had certainly not been lost. I think it is extremely doubtful, to say the least of it, whether, after the San Domingo Government had allowed the concessionaries to go on shipping after 1st January 1871, and taken their royalties upon the cargoes shipped, they were entitled still to come forward and say—"Because of the deficiencies of shipments in the year 1870 we will now put an end to this

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The firm of Lawson and Son carried on business in Edinburgh and in London. They were sequestrated or became bankrupt in the beginning of the year 1873, and

concession." If it were necessary to go into that subject at all I should say most undoubtedly that they were not entitled to do so—that they had lost their opportunity by allowing the shipments to go on and taking royalties upon these shipments. Of course, if at the end of 1871 there was again a default in the amount of shipments they might again have the right or option of putting an end to the concession; but they could not, I think, after May 1871, when this sale took place, proceed upon the deficiencies of the year 1870 as a ground for annulling the concession. But even supposing that were not so clear in point of law as I think it is, there does not appear to have been any desire on the part of the San Domingo Government to exercise the right they had. On the contrary, from everything we see, they were very anxious to go on with the contract they had made with these English traders; and the communications which passed between the secretary of the Phosphate Sewage Company and the representative of the San Domingo Government shew that the San Domingo Government was very anxious that they should go on, and go on of course on the footing that for the future they should comply with the obligation in the contract of shipping the full amount of 10,000 tons a-year. So that the fraud said to have been committed in this transfer and sale, by selling a thing that had really no value in respect that it had been already forfeited, I think falls entirely to the ground. But still further, it must be observed that even if there had been more apparent doubt respecting the continuance or endurance of this concession, that was a matter which was made fully known by the vendors to the vendees. It is obvious, on the face of the deed and other writings, as well as from the parole evidence, that the whole parties who were concerned in this matter were perfectly aware of the real state of the facts. It is said that a fraud was committed upon the company. I confess I find it exceedingly difficult to understand that statement. When the first deed was made between the Messrs Lawson, and Engelbach and Keir, who were getting up this company, there was no company to deceive; and after the company was formed, the directors, who were the only parties who could have been deceived in the transaction—for they were of course the parties who made the purchase and received the title from the Messrs Lawson—were not deceived, because they also, as it appears, were fully aware of the precise state of the facts. Therefore, there appears to me, in the first place, to have been nothing to conceal; and in the second place, that which was said to have been concealed was in point of fact not concealed but fully disclosed. But then it is said, that a fraud was practised by making it appear that the Messrs Lawson were the vendors in this transaction, and that Mr Hartmont was kept out of sight, his name not being disclosed as having any interest in the transaction. And the reason for doing that, it is said, was to impress people's minds with a sense of the good faith and straightforwardness of the transaction, by shewing that the sellers in the transaction were so respectable a firm as the Messrs Lawson. The Messrs Lawson, so far as I can see, had no object in parading their names, or in lending their names to any fraud. They had made their bargain with Mr Hartmont; they were bought off by the payment of £17,000, and really had no further interest in the matter. But I think it is not difficult to see why Messrs Lawson appear upon the face of the conveyance as the sellers of this concession. Although Mr Hartmont had been the original concessionary, the Messrs Lawson had in point of fact worked the whole concern during the year 1870, and were known to the San Domingo Government as the persons who were working the Alto Vela product; and the San Domingo Government would have been very loath, I should think, to recognise any one who had not obtained a title from Messrs Lawson. Therefore it was, I presume—for I can see no other good reason for it—that three deeds were executed at the time, instead of one deed directly, as has been suggested might have been done, by Mr Hartmont to the purchaser. Mr Hartmont, or rather Hartmont and Begbie, assigned in the first place to Messrs Lawson, to enable them to give a title to the company, and I think, without

the trustee of the sequestrated estate was chosen in the usual manner in Scotland. The Phosphate Sewage Company, who are the appellants at your Lordships' bar, that circuity which has been described, it would not have been very easy to have made a perfectly satisfactory and good title in the person of the company or its directors. Therefore I cannot say I see any fraud in using the names of the Lawsons in this transaction.

It is further said that in the prospectus of the company, which was issued upon 10th May, after the company had been registered, there is a false statement introduced, to the effect that the Messrs Lawson had expended £39,000 upon the island of Alto Vela. "In connection with the island of Alto Vela" is the expression; and it certainly turns out, from the evidence of the trustee, that they had expended at least £39,000 in connection with the island of Alto Vela, so that there was in point of fact no mis-statement there at all—no false allegation or suggestion. It is not said in the prospectus that the value of that £39,000 would be found upon the island. That would be a very different statement indeed. The statement is made only for the purpose of shewing that the Messrs Lawson had had so much confidence in the undertaking in which they were engaged that they had expended that large sum of money upon it. But even if there had been any exaggeration or mis-statement in regard to the amount expended as stated in the prospectus, I do not see that the Messrs Lawson should be made answerable for that, or that they were parties to the preparing or issuing of this prospectus. But in truth the whole fraud really occurs after the time when the sale was made. The sale itself was the sale of a subject which had a real existence, and was of value,—whether over-estimated at £65,000 we have no occasion to consider. It is not said that £65,000 was too much for it if it was a real transaction; but that it was a really existing subject, and a subject of value, and was sold for the price specified is quite clear upon the face of these documents. And up to this point I confess I do not see any indication or symptom of fraud on the part of Messrs Lawson. It is very difficult to understand why a respectable firm of that kind should have lent themselves to a proposed fraud. I do not see what they were to gain by it; and I do not very much see, on the other hand, what Mr Hartmont, who is at the bottom of the fraud which was committed, had to gain by implicating the Lawsons in that fraud. And, therefore, unless there were clear proof that the Messrs Lawsons really were implicated in the fraud at the date when this sale was made, I do not think we could possibly sustain this claim, which depends entirely for its soundness upon the proof of fraud in connection with the contract. But, no doubt, after the sale was completed, and after the company was brought into existence, the price was paid of £65,000; and instead of being paid in cash, it was paid entirely in what are called "paid-up shares" of the company. This is made clear by the evidence of Mr Ogle. No doubt he says he received cash; but upon cross-examination it comes out quite clearly that by receiving cash he meant there were cross-entries made in the book which were intended to represent cash, but what he actually got delivered to him were paid-up shares of the company to the amount of £65,000, and these he divided amongst the parties concerned—Mr Hartmont, and Messrs Engelbach and Keir, who were the promoters of the company, and Messrs Lawson to the extent of the £5000 worth of shares which they were to take as part of their payment from Mr Hartmont, but which, as I said before, was afterwards converted into a payment to them in cash. Again, I do not know that there is anything illegal in persons who sell a valuable commodity to a company that has just been formed taking payment for that commodity in paid-up shares of the company. The illegality and the fraud consisted, I think, entirely in the use which was made of those paid-up shares, and in the manner in which Mr Hartmont and his friends went about the sale of those shares. In the first place, it was by fraudulent representation they got the shares of this company into the market at all,—by imposing upon the authorities of the Stock Exchange, and obtaining a settling-day and quotations. It is alleged very decidedly in the record here that the Messrs Lawson were participant in that

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conceived that they had a right to make a claim against Messrs Lawson and Son or their estate in bankruptcy, on the ground that they had a right as against fraud. Then the holders of those shares took means to raise their value in the market to an entirely fictitious amount by misrepresentation and by fictitious sale; and again, it is alleged on the record very strongly that the Messrs Lawson, and particularly Mr Henry Graham Lawson, who is specified by name as being engaged in this transaction, were largely implicated in this fraudulent sale, and had made large profits thereby. Now, there is not one single word of evidence from beginning to end to connect any of the Messrs Lawson either with the imposition practised upon the Stock Exchange or with the subsequent fraudulent transactions in the stock market. The evidence upon that point is an entire blank, and the Messrs Lawson themselves, who were examined, declared that they never held a share for their own behoof, and never sold a share of the stock. In these circumstances I confess I think the appellants have entirely failed to make out their case against Messrs Lawson. What case they may have against other parties, or in any other form, or in any other Court, it is not for me to say; but in order to success as claimants in this sequestration upon the estates of Messrs Lawson it was indispensable that they should shew that the £65,000 which they claimed was a debt owing by Messrs Lawson to them because it was the price which they had been paid under a fraudulent contract of sale,—a contract of sale which they had been induced to enter into by the fraud of the Messrs Lawson.

But there are difficulties in the case, if it were at all necessary to enter into them. I confess I do not very well see upon what ground it is the appellants' company think that that £65,000 is to be paid in cash upon the annulling of this sale. That £65,000 in cash never was paid by the company. What they actually delivered as the price of the concession of Alto Vela was 6500 shares of the company,—paid-up shares, no doubt; but were these shares ever worth £65,000 at any time? Were they worth £65,000 at the time of the sale, or were they ever really of that value? That the shares were nominally of that value at one time in the market, and of much higher value, is no doubt true. But that was brought about by the fraud of parties with whom the Messrs Lawson have nothing to do,—I mean by proceedings with which the Messrs Lawson have nothing to do; and therefore it would be a very great difficulty and obstacle in the way of these appellants, even if they had succeeded otherwise in the foundation of their case, to shew how this debt, for it is claimed as a debt, of £65,000, can possibly be owing. Again, if the sale is to be annulled, even on the ground of fraud, there must be, I apprehend, a *restitutio in integrum*, and if there is to be a *restitutio in integrum* on one side, there must be equally so on the other. Now, is this company in a condition to retransfer the concession of Alto Vela to the Messrs Lawson or to anybody else representing the vendors in that transaction? They certainly are not, because it is abundantly clear that by their own proceedings and transactions with the San Domingo Government they have now finally lost this concession. But really these subordinate considerations I do not dwell upon, because I think the true ground of judgment here is that the appellants have entirely failed to bring home to the Messrs Lawson that fraud of which they complain, and which, they say, induced the company to enter into this contract.

I think it is very much to be regretted that we have not had the advantage of a judgment of the Lord Ordinary upon this question. It is a case of very considerable importance, and although I confess I do not entertain any doubt about the conclusion to which I think we should arrive, it has required a very considerable amount of consideration.

LORD DEAS.—I so entirely concur in the observations of your Lordship that it is not necessary for me to add almost anything. The leading ground of this claim is fraud upon the part of Messrs Lawson, and the character in which they are said to have committed that fraud is that of vendors of the concession of the island of Alto Vela, the party or parties upon whom the fraud is said to have

them to rescind a contract which had been entered into for the transfer or sale to the Phosphate Company by Messrs Lawson and Son of a certain concession, been committed being the purchasers—the company or shareholders; and the fraud alleged consisted entirely of concealment, with the exception of certain misrepresentations said to have been made in the deed and in the prospectus. Now, in order that concealment may be a fraud by a seller upon a purchaser it must be concealment of something from the purchaser, and if the purchaser knows everything that can be known it is impossible that it can be concealment or fraud. There cannot be concealment from him if there is no concealment. Consequently, I do not see how, if the purchaser here, or those acting for and representing the purchaser, knew everything that the seller knew, there can possibly be that kind of fraud which alone is alleged here. That concealment, after all, seems to consist in a very small matter. It is concealment of the fact that they had not wrought or carried away from that island 10,000 tons in a year, and concealment of the fact that the Government of San Domingo had manifested their discontentment with that. Now, there is no concealment of the fact that they had not carried away 10,000 tons per annum; and as to the other concealment of the effect of that on the Government, the Government had not at that time manifested any dissatisfaction whatever with that fact. On the contrary, as your Lordship has pointed out, the Messrs Lawson were allowed to go on working and carrying away the guano, and the Government were accepting the lordships from time to time, and up to the time when this sale was effected there was no appearance of dissatisfaction, far less an intimation that the Government had availed itself of the option to annul the concession. The Government up to that time did not want to avail themselves of it. It was not a condition—it was not an irritancy in the deed, that if they did not carry away 10,000 tons per annum the concession was to be null. There was nothing of that kind. It was merely an option on the part of the Government that if that happened they might take advantage of it to annul the concession. But they had not only not availed themselves of the option, but it is clear as the sun that they did not want to avail themselves of it. A reasonably advantageous transaction had been entered into for them, and probably also for the parties taking the concession. It was better for the Government to get the substance sold and carried away and paid for than to let it lie there unproductive, as it had done for centuries,—probably longer than we think the world existed. And therefore, even if they were getting less than a fair lordship, it was important for the Government that a transaction of this kind should go on; and it is quite plain that they were very well pleased with the parties who they then supposed held the concession—viz. the Messrs Lawson. I daresay they knew just as much about the respectability of the position of the Messrs Lawson as we know here. They had an active agent apparently, who, I think, behaved throughout this matter with great temper and good sense; and in place of taking the first opportunity of exercising the option and getting rid of good tenants, he was anxious to keep them, and not desirous, apparently, to exchange them for a French company which offered to come forward. The transaction might, no doubt, have been a very good and a very profitable transaction for the original shareholders, who paid £10 per share. They might have been able to get a very good percentage on their money out of it, and, so far as we can see, they would have got a very good percentage out of it if they had had sufficient capital to carry it on. But what would have been a very good return to them would not have been so to gentlemen who paid £59 or £60 per share, and who might not have much capital left behind in order to carry on the affair. So far as we see, the only thing that prevented the Messrs Lawson from carrying on this concession themselves, and making a large profit by it, was the want of such a large amount of capital as was found to be necessary to carry it on, and which led them to think they had better get out of it in the best way they could, in place of going on with a thing that they had not capital to manage. But if they, or the company, had had a sufficient amount of capital to carry it on, there is no reason in the proof to hold that it would not have paid reasonably well. It was

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with some incidental rights, relating to the guano island belonging to the Government of San Domingo. The Phosphate Company, conceiving they had not originally a bubble. We see nowadays speculations of various kinds; we hear of mines being represented as capable of yielding great wealth when there is no mineral in them at all. That was not said to be the state of this island, or of this concession. The thing was there, and it was a reasonable speculation for anybody with sufficient capital to go through with it. As regards the position of Messrs Lawson, it is very necessary to see how it was that they were brought into this matter at all. Hartmont and other two associates had got the concession before Messss Lawson ever heard of it. They had got the concession in June 1868. Then Mr Hartmont seeks for and gets an introduction to Messrs Lawson, and, according to his account of it, he pays a large sum of money to get that introduction. He says in his evidence,—"Ogle and Begbie were interested with me in the Alto Vela concession from the beginning. (Q.) Do you mean that they paid so much money to you? (A.) They had paid no money to me. (Q.) Had they given you services? (A.) Yes. (Q.) Then that was the value of their services? (A.) Yes. (Q.) What were the services for which they got the £15,000 stock? (A.) Their services were from the beginning of 1868. They introduced me to Messrs Peter Lawson and Son, and when I was in San Domingo they looked after my business in London. (Q.) Anything more? (A.) No. (Q.) What was the nature of the business that they attended to during your absence? (A.) Freighting ships." So that they got £15,000, according to this evidence, for two services—one, apparently, the freighting of ships when he was abroad, and the other to introduce him to Messrs Lawson. I do not say it is proved that he had any sinister object in that, but it certainly looks very odd, because the first thing he does is to represent the concession of the island of Alto Vela in these glowing colours to Mr Graham Lawson. It is not necessary to notice any of the other Messrs Lawson here except Mr Graham Lawson, because if anybody was to blame they were all less to blame than he. He conducted the whole matter, and if there was a fraud it would lie on him and on nobody else. Well, Mr Hartmont represents the island in glowing terms to Mr Graham Lawson, and gets him, on the part of the firm, to agree to take the concession off his hands, upon the footing and condition that they shall disburse all the money. He is not to pay a penny, nor to become liable for a penny. They are to take all the liability, and to make all the disbursements, and he is to have one-third of the profits in name of commission, stipulating at the same time expressly that there is to be no partnership. He is merely to get a commission, but a commission to the extent of a third of the whole profits, they taking the whole risk, making all the disbursements, and paying all the expenses. That is the position into which Hartmont gets with reference to Messrs Lawson and Son. Whether or not he meant to defraud Messrs Lawson, it is plain that they were not meaning to defraud him, or looking to any unfair advantage at that time. Matters go on, and then Messrs Lawson find, not that they have got a bad bargain, so far as we can see, but that they had expended a large sum of money, £35,000 or £39,000. That they did expend a very large sum there can be no doubt, and it seems to have been all entered in their books from day to day in the most regular and accurate manner; and there is no dispute about the expenditure, except £2000 or £3000 less or more. They then found they had not the very large capital necessary to carry on with, and they wrote the letter to which your Lordship has referred. I do not say it is evidence, but it was written at that time to a gentleman who was acting for them, and there is no doubt they were truly representing the state of matters as then existing. In that letter they say they had been led to form an idea of getting a company to take it off their hands, because, they said, "we cannot go on working Alto Vela without help, and to pay handsomely it ought to be worked well." That is exactly what the engineer wrote,—that by laying down railroads and increasing the plant it might be made a very profitable and paying concern. That is the position in which they are when they want, very naturally, to get rid of this speculation, which is too heavy for them. Then, un-

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this right against the estate of Lawson and Company, applied in the ordinary way to prove a claim or debt against the estate in the month of March 1873. doubtedly, Hartmont takes advantage of their necessities to get into his hands the formation of a company, seeing, very likely, what he could make of it if it were left to him. And he makes a bargain with the Messrs Lawson, that although the value of the concession might be estimated fairly at £65,000 their share of it is only to be £17,000. Upon the footing of relieving them of all further risk in the matter he says, We will make the price £65,000, but my associates are to get the whole of that, except £17,000. It is there, I think, that there comes in the main thing that could be laid to the charge of the Messrs Lawson,—I mean, that although they may not have had any fraudulent intention themselves, the question arises whether it was so negligent on their part to allow Mr Hartmont to lead them into the leading-strings into which he had got them for his own purposes,—whether they should not have seen through the thing to a certain extent, and seen that he was a man who might make a wrong use of matters after he got them into the position into which he wanted to get them. There is a difficulty there undoubtedly,—whether in point of law they were entitled to be so negligent, and just to do whatever was dictated to them by Hartmont, and whether they ought not to have seen what might come out of it, and whether there should not be a liability upon that ground. But that would be a very different liability,—a liability upon negligence; and I do not think it was pressed on us in argument that in point of law any negligence of that kind would lay the foundation of this claim. That is not the ground on which it is put. It is upon the ground of fraud, and the motive of the fraud is distinctly stated on this record. There is no fraud without a motive. You may not be able to discover the motive, but the fraud requires to be very clear in itself if you cannot discover any motive for it. But when the party charging the fraud tells you the motive, you are bound and entitled to take it that that was the motive; and if that motive is not proved, but disproved, then that surely goes very deep into the question whether there can be said to be fraud at all. Now, it is distinctly alleged on record that the object of the Messrs Lawson in entering into this fraud was to make profit by it in the way that the other parties seem to have done. But there is no more remarkable part of this case to my mind,—no part of it that makes me more cautious to throw any doubt on the honesty of the Messrs Lawson,—than this, that while they had the opportunity, if they had chosen, not only to have made money by it, but to have made money by it to an amount that would have released them from all their difficulties, they did not sell one single share in the market at a premium, as these other parties did. It is perfectly plain that if they had chosen to stipulate that they should get paid-up shares, with the power to go into the market and sell them at a profit if they thought proper, they would have got them. There would have been no objection whatever to give them a large amount of shares, which they could have gone into the market and sold. If they had stipulated for that, and got it, there seem to be no bounds almost to the amount of money that they might have made. Mr Hartmont tells us himself that in one hour he sold 1000 shares at £56; so that he made £56,000 in a single hour. How many more transactions of that kind he had he does not tell us. How much money there is in his pocket I do not know. The misfortune is that when money gets into one's pocket in that sort of way it very often burns a hole in it, and it does not remain long there; but if he has kept that in his pocket, he must be a very rich man; and if he could make £56,000 in that way in a single hour is it not clear as the sun that the Messrs Lawson, if they had chosen to stipulate for it, might have gone into the market and sold the shares for £100,000 or £200,000 of profit, and relieved themselves from all their difficulties. But not having availed themselves of that power to the extent of a single share, and that being the motive falsely alleged against them, it seems to me a very startling thing to say that, in the circumstances of this case, we are to reduce the contract upon the ground of fraud. I have only to add that I entirely agree with your Lordship in the remark that it is very much to be regretted that we have not had the judgment of the Lord Ordinary in this case.

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They made their claim before the trustee in the sequestration; and in that claim they stated that they were about to file a bill—in point of fact had prepared a bill to be filed—in the Court of Chancery in England, alleging their

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LORD ARDMILLAN.—I am of the same opinion on the merits of this case, which are now before us for disposal on the proof. The sequestration is here, and is proceeding, and in the sequestration this question has arisen. I feel bound to say that the getting up of this company, the preliminary arrangements in regard to it, the preparation and issuing of the prospectus, and the terms of it, the prior agreement among some of the parties, the large sums paid for promotion-money, and the ultimate sale to the Phosphate Company, were to a large extent the offspring of a fraudulent intention, and the execution of a fraud against the public. In regard to the conduct of some of the parties engaged and acting together in these proceedings I fear there can be no doubt of its fraudulent character. But I entirely agree with your Lordship in thinking that actual personal fraud on the part of any of the Messrs Lawson has not been instructed. The claimants have failed to prove their averments of fraud against the Messrs Lawson, or any of them. The object and purpose of the fraud appears to have been to give to the scheme a false and deceptive attraction, to run up the shares to a premium and sell them at a high price; and this object was probably attained by several, certainly by Mr Hartmont, who says that his motive was "purely philanthropic," but who at the same time sold 1000 shares at £56 a share—shares issued at £10 a share, and of which the last price obtained appears to have been £2, and dear at the money—and who admits that he had besides that dealt largely in the shares. But no shares were so held or so disposed of by Messrs Lawson, or by any of them; and if Mr Graham Lawson, who was the party immediately acting—the discretion and judgment of whose conduct cannot be defended—had really shared and carried out the fraudulent aims of those who got up the concern, he had ample opportunity; for then, as Lord Deas has well observed, he might have made a large fortune, for he could easily have obtained any number of shares, and could easily have sold them at a very high premium, but he did not sell one either at a premium or otherwise. He did not do so, or attempt to do so, and while I admit his indiscretion, I cannot perceive any fraud in his conduct. If there had been here an action by *bona fide* shareholders who were deceived and defrauded by the parties to the transactions, that would have presented a very different question for decision, and then there would have been an action against the company. It is most important that the public be protected against the fraud of parties acting in combination, in the manner here explained, for the getting up of a company and the disposing of shares. But we have no such case here. Whatever fraud there was in this transaction was fraud on the part of the purchasers as well as on the part of the vendors; and the party who received the subject sold was just as fully in the knowledge of everything as the party who transferred the thing sold. There was no deception between the two. If both were fraudulent, the public was the common victim. But these claimants now before us do not represent the public; and those whom they do represent were not deceived, and not wronged, for they were themselves parties to whatever fraud was perpetrated on the public. My great difficulty is that these claimants, who are in the position of pursuers, have not explained, though asked repeatedly to explain, who were deceived or who were wronged. They talk about the fraud on the part of those who got up the concern, and of those who entered into this transaction; but whom did these parties deceive that is now here? No one. The only parties deceived were the unfortunate parties who bought at a high premium afterwards—not the parties now before us. The company, and those who represent the company, were not deceived. I think the public were undoubtedly deceived, and that the getting up and promotion of the company as instructed by the evidence was a fraudulent device; but it was a fraud on the public. These claimants, however, do not represent the public, nor do they represent any one entitled to restitution.

On the other points I have nothing to add.

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case against the estate of Lawson and Son, and against other persons as to whom they conceived that they were entitled to similar relief. In point of fact the bill in the Court of Chancery in England had not been filed, but it was filed shortly afterwards—I think in the course of a month or two.

On, I think, the 24th of June in that year, within a day or two of the time when, according to the Scotch bankruptcy law, the trustee of the estate would be bound to make what is called his first deliverance—to pronounce his first judgment—on the debts claimed before him, lest the trustee should decide this case the company withdrew their claim, and then, having tided over the first deliverance of the trustee, they re-introduced their claim on the 28th of June, four days afterwards, and kept it alive. The suit in the Court of Chancery in England was in the meantime going on. The respondent Molleson, the trustee, appeared in that suit and protested against the jurisdiction, and said that the proceedings in the sequestration were pending in Scotland, and that the claim ought to be decided there. That was in the month of July 1873, and from that time until the following January it appears that no proceedings were taken in the English Chancery suit. I daresay the delay could be accounted for by the difficulty of getting the answers from the other defendants. But in the meanwhile in Scotland the sequestration and the proceedings under it were going on, and the trustee, having before him a claim made by the Phosphate Sewage Company to prove against the estate, was obliged to adjudicate upon that claim. He did adjudicate upon it, and adjudicated adversely to the Phosphate Sewage Company. He expressed his opinion that they had no right to make the claim.

Thereupon the Phosphate Sewage Company appealed to the Court of Session—an appeal which it was competent to them by the law of Scotland to institute. By the law of Scotland, under an appeal of that kind, it becomes the course, if the case is one worthy of solemn litigation, that the parties have an opportunity of lodging a condescendence and answers, and a proof is given to them. A condescendence was lodged by the Phosphate Sewage Company, and was followed by pleas in law on their part and on the part of the trustee, Molleson. That condescendence and answers are, to all intents and purposes, as your Lordships will observe, the pleadings in an English suit. They were just as much the pleadings of the parties in Scotland as the bill and answer are the pleadings between the parties in England, and to the condescendence your Lordships must look for the allegation of the case upon which the Phosphate Sewage Company found their right to a claim against the estate of Lawson and Son.

The condescendence gives a narrative of the transaction with regard to this concession, and so far as the narrative relates to those transactions I will not delay your Lordships by going through it. But when I examine the condescendence for the purpose of discovering what is the fraud or the misrepresentation by reason of which the Phosphate Sewage Company say they have a right to rescind the bargain made with Messrs Lawson and Son, I find that the allegations amount to these:—There are three grounds, and only three, by reason of which it is alleged in the condescendence that the contract should be rescinded. The first is this, that in a prospectus for the purpose of founding and obtaining subscribers for shares in the Phosphate Company, to be formed for the purpose of taking over this concession, it was alleged that the vendors had expended more than £39,000 up to that time in connection with the island of Alto Vela, the island as to which the concession had been given. The

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vendors were Messrs Lawson and Son. The second ground was that at the time the concession was professed to be sold by Lawson and Son to the Phosphate Sewage Company the concession had in point of fact become void, because the quantity of guano which Messrs Lawson and Son, the concessionaries, were bound to export every year had not been exported. And the third ground alleged was that certain dealings had taken place on the Stock Exchange with regard to the shares which had been given by the Phosphate Sewage Company as the price for the transfer of the concession.

Now, as to the first of these grounds, very little was said in argument at your Lordships' bar on the allegation in the prospectus. Even supposing that Messrs Lawson and Son were to be connected with that prospectus—of which I am bound to say I have not seen any evidence satisfactory to my own mind—the allegation in the prospectus was this, that the exporters had expended more than £39,000 up to that time, not in any particular mode of expenditure, but in connection with the island of Alto Vela. And the books of Messrs Lawson and Son having been produced, there is no doubt that that statement is true to the letter. They kept an account of all their expenditure as to the island from the time they became connected with it, and there is no doubt their money accounts shew the expenditure of upwards of the sum of money here mentioned. Whether other items by way of credit ought to be taken into account might be a question if the whole account had to be taken. But what we have to deal with is simply this allegation, which cannot be stated to be in any way a false allegation, or one containing misrepresentation.

My Lords, I will take the third ground next—with regard to the dealings in the shares—because that again has been very little argued at your Lordships' bar, for, in point of fact, my Lords, that is not a part of the case which can have any bearing whatever upon the validity of the contract between Messrs Lawson and Son and the Phosphate Sewage Company. Whether it is the case or not that shares given by the Phosphate Sewage Company as the price for the concession were handled or used improperly—used for the purpose of a fictitious value being run up with regard to them on the Stock Exchange—that is a matter subsequent to the contract altogether. It may be a matter as to which the shareholders in the Phosphate Company may have some claim to redress, but it is not a matter which will in any way go to void a contract which had actually been made before that time, and the validity or invalidity of which must be judged of anterior to the transactions in these shares.

Then, my Lords, I come, in the third place, to the ground which I reckoned as the second amongst the three, namely, the allegation that at the time of the contract the concession had become invalid by reason of the fact that there was not a proper export of guano. Now, the matter stands in this way: The concession contained this clause (the 7th article):—"In the event of the concessionaries not exporting the minimum quantity stipulated in article 3" (the minimum quantity being 10,000 tons of guano, or guanito, or phosphate of lime, annually), "the Dominican Government shall have the right to declare the present concession void, and to take such measures as it may think proper." The concession was not to be void, but there was to be a right in the Government of San Domingo to declare the concession void under those circumstances. My Lords, at the time when the contract with the Phosphate Sewage Company was made it appears that the 10,000 tons per annum had undoubtedly not up to that time been exported. A short time, a year or two, had elapsed before the

contract was made, and what course the Government of San Domingo would have taken in consequence, if matters had rested there, might be very doubtful. It does not appear that any price, any gross sum, was paid for this contract in the first instance, which therefore the Government of San Domingo might have retained and held as forfeited. The Government of San Domingo were deeply interested in promoting the continuance of a concession which would bring in to them the royalties which were to be paid upon the exportation of guano. It cannot be said to be a matter of certainty, but it is probable from what we find here that it would not be their interest or intention to take advantage of this clause enabling them to forfeit that contract.

But, my Lords, without dwelling upon that, what your Lordships find is this, that those persons who were acting on behalf of the company, and whose acts on behalf of the company are not in any way impeached on the face of this condescendence, although they have been impeached at your Lordships' bar—those persons, acting on behalf of the company, and for whose acts the company must be responsible, as they take advantage of their acts, were perfectly alive to the fact that the 7th clause of the concession was to the effect that I have read, and they made it one of the requisitions with regard to the title on the sale, that evidence should be given that the minimum quantity of guano had been exported, and that therefore the concession had not become voidable. The answer given to that was not an assurance of any matter of fact, but a statement that the purchasers must rest upon the covenants for title, and that covenants for title would be given. My Lords, when we remember what is done every day—as I took the liberty of reminding the learned counsel at the bar, with regard to sales of leaseholds—when we look at what the circumstances of this particular case were with regard to the Government of San Domingo, it appears to me by no means a strange or unnatural course which was taken in this instance with reference to this question of the voidability of the contract. But at all events it is sufficient to say that there is nothing in the matter which brings home to Messrs Lawson and Son any misrepresentation, any concealment, any fraud, for which the contract can, as to them, be voided.

Those, my Lords, are the grounds, and, so far as I can find, the only grounds, in the condescendence upon which it is sought to have it declared that the contract with Messrs Lawson and Son should be rescinded, and that they should be made liable to hand back any benefits they had received under it. But I must mention, in order to make clear what further I have to say, that two more grounds have been alleged at your Lordships' bar, and have been stated at the bar to be grounds which have come into prominence in the litigation in England, and to have been pressed in the litigation—and, as we were told, pressed with success against some or all of the defendants. It is said that in the price paid to Lawson and Son upon the occasion of this purchase by the Phosphate Company—a price which altogether amounted to £65,000—there was included £15,000 which did not go either into the funds of Messrs Lawson and Son or into the hands of those other persons who had interests along with them in the concession—I mean Hartmont and Co., and Ogle—but went, on the contrary, into the hands of two persons of the name of Engelbach and Keir, and that Engelbach and Keir were themselves acting as agents for the Phosphate Sewage Company, and were professing to constitute—to "get up," as it is called—that company; and then it is said that £15,000 having thus been appropriated by those who were acting as agents for the Phosphate Sewage Company with the

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vendors were Messrs Lawson and Son. The second ground was that at the time the concession was professed to be sold by Lawson and Son to the Phosphate Sewage Company the concession had in point of fact become void, because the quantity of guano which Messrs Lawson and Son, the concessionaries, were bound to export every year had not been exported. And the third ground alleged was that certain dealings had taken place on the Stock Exchange with regard to the shares which had been given by the Phosphate Sewage Company as the price for the transfer of the concession.

Now, as to the first of these grounds, very little was said in argument at your Lordships' bar on the allegation in the prospectus. Even supposing that Messrs Lawson and Son were to be connected with that prospectus—of which I am bound to say I have not seen any evidence satisfactory to my own mind—the allegation in the prospectus was this, that the exporters had expended more than £39,000 up to that time, not in any particular mode of expenditure, but in connection with the island of Alto Vela. And the books of Messrs Lawson and Son having been produced, there is no doubt that that statement is true to the letter. They kept an account of all their expenditure as to the island from the time they became connected with it, and there is no doubt their money accounts shew the expenditure of upwards of the sum of money here mentioned. Whether other items by way of credit ought to be taken into account might be a question if the whole account had to be taken. But what we have to deal with is simply this allegation, which cannot be stated to be in any way a false allegation, or one containing misrepresentation.

My Lords, I will take the third ground next—with regard to the dealings in the shares—because that again has been very little argued at your Lordships' bar, for, in point of fact, my Lords, that is not a part of the case which can have any bearing whatever upon the validity of the contract between Messrs Lawson and Son and the Phosphate Sewage Company. Whether it is the case or not that shares given by the Phosphate Sewage Company as the price for the concession were handled or used improperly—used for the purpose of a fictitious value being run up with regard to them on the Stock Exchange—that is a matter subsequent to the contract altogether. It may be a matter as to which the shareholders in the Phosphate Company may have some claim to redress, but it is not a matter which will in any way go to void a contract which had actually been made before that time, and the validity or invalidity of which must be judged of anterior to the transactions in these shares.

Then, my Lords, I come, in the third place, to the ground which I reckoned as the second amongst the three, namely, the allegation that at the time of the contract the concession had become invalid by reason of the fact that there was not a proper export of guano. Now, the matter stands in this way: The concession contained this clause (the 7th article):—"In the event of the concessionaries not exporting the minimum quantity stipulated in article 3" (the minimum quantity being 10,000 tons of guano, or guanito, or phosphate of lime, annually), "the Dominican Government shall have the right to declare the present concession void, and to take such measures as it may think proper." The concession was not to be void, but there was to be a right in the Government of San Domingo to declare the concession void under those circumstances. My Lords, at the time when the contract with the Phosphate Sewage Company was made it appears that the 10,000 tons per annum had undoubtedly not up to that time been exported. A short time, a year or two, had elapsed before the

contract was made, and what course the Government of San Domingo would have taken in consequence, if matters had rested there, might be very doubtful. It does not appear that any price, any gross sum, was paid for this contract in the first instance, which therefore the Government of San Domingo might have retained and held as forfeited. The Government of San Domingo were deeply interested in promoting the continuance of a concession which would bring in to them the royalties which were to be paid upon the exportation of guano. It cannot be said to be a matter of certainty, but it is probable from what we find here that it would not be their interest or intention to take advantage of this clause enabling them to forfeit that contract.

But, my Lords, without dwelling upon that, what your Lordships find is this, that those persons who were acting on behalf of the company, and whose acts on behalf of the company are not in any way impeached on the face of this condescendence, although they have been impeached at your Lordships' bar—those persons, acting on behalf of the company, and for whose acts the company must be responsible, as they take advantage of their acts, were perfectly alive to the fact that the 7th clause of the concession was to the effect that I have read, and they made it one of the requisitions with regard to the title on the sale, that evidence should be given that the minimum quantity of guano had been exported, and that therefore the concession had not become voidable. The answer given to that was not an assurance of any matter of fact, but a statement that the purchasers must rest upon the covenants for title, and that covenants for title would be given. My Lords, when we remember what is done every day—as I took the liberty of reminding the learned counsel at the bar, with regard to sales of leaseholds—when we look at what the circumstances of this particular case were with regard to the Government of San Domingo, it appears to me by no means a strange or unnatural course which was taken in this instance with reference to this question of the voidability of the contract. But at all events it is sufficient to say that there is nothing in the matter which brings home to Messrs Lawson and Son any misrepresentation, any concealment, any fraud, for which the contract can, as to them, be voided.

Those, my Lords, are the grounds, and, so far as I can find, the only grounds, in the condescendence upon which it is sought to have it declared that the contract with Messrs Lawson and Son should be rescinded, and that they should be made liable to hand back any benefits they had received under it. But I must mention, in order to make clear what further I have to say, that two more grounds have been alleged at your Lordships' bar, and have been stated at the bar to be grounds which have come into prominence in the litigation in England, and to have been pressed in the litigation—and, as we were told, pressed with success against some or all of the defendants. It is said that in the price paid to Lawson and Son upon the occasion of this purchase by the Phosphate Company—a price which altogether amounted to £65,000—there was included £15,000 which did not go either into the funds of Messrs Lawson and Son or into the hands of those other persons who had interests along with them in the concession—I mean Hartmont and Co., and Ogle—but went, on the contrary, into the hands of two persons of the name of Engelbach and Keir, and that Engelbach and Keir were themselves acting as agents for the Phosphate Sewage Company, and were professing to constitute—to "get up," as it is called—that company; and then it is said that £15,000 having thus been appropriated by those who were acting as agents for the Phosphate Sewage Company with the

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knowledge of Lawson and Son, the Phosphate Sewage Company had a right to repudiate the whole of the bargain, and that Lawson and Son, being privy to the mode in which Engelbach and Keir had acted, having allowed them to act as they did, must also be held liable to have the contract rescinded as against them. The second ground was this, that throughout the deeds which completed the sale of the concession to the Phosphate Sewage Company, Messrs Lawson and Son were treated as the vendors, and the only vendors, whereas Hartmont, and his partners Begbie and Ogle, had interests, and that the public at large were induced to look with more favour upon the company, thinking that the property came from and was sold by Lawson and Son, than they would have looked upon it had they known that there were other proprietors who got part of the purchase-money, that is to say, the persons whose names I have mentioned.

My Lords, I do not propose to ask your Lordships to go into an examination of the validity of these grounds for relief. I may say that upon the materials before your Lordships it is very difficult indeed to be satisfied that Lawson and Son are to be affected in any way with the knowledge that the £15,000 to which I have referred was paid to, was taken by, and was intended for, Engelbach and Keir. And with regard to the other ground, as to the persons who appeared to be the vendors, it seems to me to be a very violent assumption to say that, without more, the fact that those who have a prominent interest in property to be sold appear to be the only vendors selling the property, and that the other persons who have an interest, and who are to receive a part of the purchase-money, are not named or made conveying parties upon the face of the deed, is necessarily a badge or indication of fraud. But, my Lords, it is sufficient to say that those are not grounds alleged upon the face of this condescendence, or this pleading, for any relief whatever in the sequestration in Scotland.

My Lords, in passing from the condescendence to the pleas, your Lordships will find that upon the condescendence, and without referring to the words of the pleas themselves, the issues that were taken were these:—The first issue was this—It was alleged that the suit having been instituted in England, the Court in Scotland ought to sist the proceedings there with regard to this claim, ought not to proceed upon it, but ought to wait for the adjudication upon the case of the Phosphate Sewage Company in a suit in the Court of Chancery, putting aside a dividend to await the result of that litigation. That was the first issue. The second issue was this, that the grounds of relief alleged in the condescendence—those three grounds to which I have specifically adverted already—afforded a reason why the contract should be rescinded and the Phosphate Sewage Company allowed to prove against the estate of Lawson and Son for the purchase-money upon the rescission of the contract. Now, my Lords, if the first of those issues, namely, the issue raised by the first and second pleas, that the proceedings ought to be sisted until the result of the proceedings in the Court of Chancery in England was known, were to succeed, of course your Lordships need not take any account of the other pleas as to the grounds of relief alleged in the condescendence.

My Lords, I will consider first the case for relief arising upon the first two pleas. Those pleas are these—the first plea says—"The present proceedings should be sisted until the issue of the chancery suit referred to, as in the said suit the same questions are raised as in this process, and will fall to be determined in a case in which the present respondent is a compearing party." And

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the second plea is,—"The amount of the foresaid first dividend, and of any subsequent dividends effeiring to the appellant's claim, ought to be set aside to meet the issue of the said suit in Chancery; and an order should be pronounced upon the respondent to that effect."

Now, my Lords, I ask upon what grounds are those pleas to be maintained? There is a bankruptcy in Scotland—the assets to be administered are in Scotland, and the trustee, who is the guardian of those assets, is in Scotland. The persons who make a claim against those assets go to Scotland, and make their claim in Scotland, and they do all that before any proceedings whatever are instituted in England. They are allowed a condescendence, and they are allowed proof in Scotland. They may state any case which they have to allege upon their condescendence, and they may prove it upon their proof. They have a diligence by which they can recover all the documents which are in the possession of the defenders, and, as we observe here, they have the advantage of examining the persons who are principally concerned in the transactions which are impeached.

My Lords, if in that state of things there is any want of power in the Court of Scotland to adjudicate upon a case of this kind, then it may well be that the proceedings should be arrested or stayed in order that some other Court, which has the power, may adjudicate upon the claim which is made. But is there any want of power in the Scotch Court? The learned Judges say there is not. The learned Judges unanimously tell us that it is the common practice of the Courts in Scotland, where a claim is made in a sequestration to constitute a debt, or to constitute a liability to damages, to admit the party claiming to constitute that claim if he is able to do so. A full opportunity has been afforded to the parties here to constitute their claim, if they are able. If they have not alleged in their condescendence as much as they have alleged in their bill in Chancery in England it is their own act, and one for which no person but themselves is answerable. My Lords, I am bound to say that it appears to me that it would be casting upon the jurisdiction of the Court of Bankruptcy in Scotland, and upon the administration of the bankruptcy law in Scotland, a very considerable and a very grave reproach, if your Lordships were to accede to the argument that there is any want of power in the Court of Scotland to adjudicate in a case of this kind.

But then it is said that there are other persons who are parties to the suit in England, and that it is much more convenient that the matter should be adjudicated upon once for all in the presence of all parties. My Lords, I say, in the first place, it would be a very grave question whether the adjudication of the Court in England would not be examinable in Scotland, so far at all events as the judgment of a foreign Court is examinable. But I by no means accede to the proposition, at least as a self-evident proposition, that it is convenient to have this adjudication in the presence of all the parties concerned. Your Lordships have been told that the circumstances under which upon a claim of this kind proof is admitted in Scotland upon a bankruptcy are extremely different from the circumstances under which it is admitted in bankruptcy in England. The Court in England is asked to declare, not merely that Messrs Lawson and Son are liable, but that there is to be a right to a particular proof against their trustee in a Scotch sequestration. How is the Court of Chancery in England to tell what is the course in Scotland with regard to proof, or what is the kind of proof which, according to the Scotch law of sequestration, ought to

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be allowed? The case against Messrs Lawson, be it well founded or be it not well founded, is one which can be perfectly well separated from the case against the other parties, who are said to be liable to the Phosphate Sewage Company; and I can see no reason why the case, if there is power in the Scotch Court to adjudicate upon it, should not be adjudicated upon there. And I repeat, I also see no reason to doubt that there is perfect power in the Scotch Court to adjudicate upon it.

Therefore, my Lords, I submit to your Lordships that the first two pleas in this case entirely fail, and that the Court in Scotland were right—the Lord Ordinary in the first instance, and the Court of Session afterwards—in holding that there was no ground for sisting the proceedings, and that the claim must be tried upon its merits.

Then, my Lords, upon the merits of the claim this other plea is alleged (the fourth)—"The sale of the concession in question having been fraudulently made to the appellants' company by the said firm of Peter Lawson and Son and individual partners thereof, for the purpose and in the circumstances condescended on, and the same having been annulled, the appellants are entitled to be reimbursed the sum paid therefor, with interest, all as contained in the appellants' claim, and the respondent should be ordained to admit the said claim accordingly." The fifth plea is,—"The said concession having, to the knowledge of the said Peter Lawson and Son, and individual partners, been at the date of the said sale liable to be forfeited, and having been subsequently declared void in respect of what had occurred prior to the said sale, the appellants are entitled to have repetition of the purchase-price paid by them, and they ought to be admitted as creditors accordingly." Your Lordships will observe that those two pleas are both of them in terms founded upon what is alleged in the condescendence, and I have already referred to what is alleged in the condescendence and submitted to your Lordships, that it does not found a case for relief against Messrs Lawson and Son.

My Lords, to what I have said I have very little more to add, but I must call your Lordships' attention to another circumstance connected with the case. On the materials before your Lordships I own that it appears to me that if there were not those objections to the claim of the Phosphate Company to which I have already referred, there would have to be considered another very serious objection, arising from the delay which took place before any claim was made to rescind the contract in question. The contract is completed in the year 1871—I think in the month of May of that year; the claim to rescind it is made early in the year 1873. There are certain vague allegations as to the company's having been in ignorance—there is an allegation that what first came to their knowledge was a communication from the Government of San Domingo which resulted in a notice or threat to forfeit the concession. Now, my Lords, upon that I must make this observation. Your Lordships find that from the middle of 1871, when the company was formed, when they either took possession or were entitled to take possession of the concession and the place where it was to be worked, until the date of this communication from the Government of San Domingo, the matter was in the hands of the Phosphate Company themselves. It was for them to take care that they kept alive the concession by exporting the necessary quantity of guano. There is no evidence that they might not have done so. There is no evidence whatever as to what the state of the island was, or the quantity of guano or guanito that might have been obtained. In

point of fact they did not apparently export the necessary quantity; but it would rather appear from the communication to which I have referred, from the Government of San Domingo, that their claim to forfeit the concession was as much for what had been omitted to be done after the concession came into the hands of the Phosphate Company as for anything that was omitted to be done before that time; and it would appear to me that the great probability (to say nothing more) in the case is that if the Phosphate Company had adhered to the terms of the concession from the time they came into possession no forfeiture of the concession whatever as against them would have been made.

But apart from that, my Lords, I want to know what is the justification given for the delay in making any claim to rescind the contract? Everything which ought to have been known, or could have been desired to be known, with regard to the subject-matter, must have been in the hands of the agents of the Phosphate Company from the time that company was formed. It has been said, No doubt the agents of the Phosphate Company knew this—the directors and the secretary and the other officers knew it; but it is said, they were all more or less implicated in what has been termed the conspiracy—the scheme to defraud the company at large. My Lords, I have to look at the condescendence in the present case upon that subject, and I find in the condescendence no allegation whatever of that kind; and I find upon this condescendence a perfect blank as regards any explanation of the delay between the middle of the year 1871, when the company was founded, and the beginning of the year 1873, when the claim to rescind this contract was made. Perhaps it is not necessary in this case to ground any decision upon this delay, but if it were necessary it appears to me that the delay alone would be fatal, upon the allegations with which we have to deal, to the case of the appellants.

My Lords, I will add one word more to what I have said. I have anxiously endeavoured in what I have laid before your Lordships to avoid even the appearance of expressing any opinion whatever upon the litigation which has been proceeding in the Court of Chancery in England. That litigation is not in any way before your Lordships. Your Lordships are called upon to pronounce an opinion upon the proceedings in Scotland, and upon these proceedings only. I say that, because your Lordships were informed by the learned counsel at the bar that the proceedings in England are not yet terminated, but are, at all events in some respects, the subject of a rehearing or appeal. It is therefore most important that your Lordships should not be supposed, upon pleadings which are not before you, and upon evidence which is not before you, to give any opinion which might lead to misapprehension and misconstruction elsewhere. The opinion which I have ventured to express is formed upon the Scotch pleadings in the sequestration and upon the evidence taken in Scotland, and upon that alone.

I need not say, my Lords, after what I have expressed, that the advice which I shall offer to your Lordships is to affirm the interlocutors which are appealed against here, and to dismiss the present appeal, with costs.

LORD CHELMSFORD.—As I agree entirely with all that has been said by my noble and learned friend, the few observations which I propose to add will relate solely to the question as to the refusal to sist the proceedings by the Court of Session.

The appellants, the Phosphate Company, proceeded under the Scotch sequestra-

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tion to make a claim of a debt from the bankrupts' estate upon the ground of their being liable to damages for being parties to a fraudulent transaction by which the company were deceived into purchasing a worthless concession of a guano island in San Domingo. The trustee decided against the claim. The appellants appealed in regular course against the decision. The Court of Session considered all the circumstances of the transaction, and exonerated the bankrupts from being implicated in the fraud, and affirmed the trustee's deliverance.

The appellants assert that the Court of Session being informed that there was a proceeding in Chancery in England to rescind the sale and to make the bankrupts and others liable in damages to the whole extent of the purchase-money, the Court of Session ought to have sisted the proceedings until the determination of the Chancery suit. The appellants hardly go the length of saying that the Court of Session was bound to sist the proceedings, but only that they should, in the exercise of a just and proper discretion, have done so. But the Court having regular possession of the proceedings, there was no reason why they should hold their hands until it should be known how the English Court would deal with the suit before it. They were competent to decide whether the trustee had properly rejected the claim, and, fully examining the evidence and all the circumstances, they determined that if there had been a fraud committed there was no evidence to shew that Messrs Lawson were implicated in it, in which, I think, they came to a right conclusion. This certainly constituted a sufficient reason against remitting the case to another forum, and for affirming the deliverance of the trustee.

LORD SELBORNE.—My Lords, I am of the same opinion. I take it to be quite clear that the Scotch jurisdiction in a Scotch bankruptcy is exclusive, and that when in an Act of Parliament provision is made, as it is made, for establishing claims upon which the dividends cannot yet be uplifted according to law, that must *prima facie* mean according to the due course of law as that would be understood in the Courts of Scotland. I am far from saying that there might not be cases imagined in which, from the nature of the subject in litigation, or other circumstances, a proceeding in a foreign Court might be regarded by the Courts in Scotland as a satisfactory way of ascertaining the legal rights of parties; as for example, when, according to the nature of the contract between them, some foreign law was to determine those rights, it might in that case well be considered that the country whose law was in question would in its own Courts be best able to inform the Courts in Scotland of the proper application of their law to the facts of the case. Again, if a claim depended upon a joint cause of action only against a bankrupt in Scotland and other persons who were in England, and if there were pending a suit or action in England against those joint parties, some of whom would not be amenable to the Scotch jurisdiction, I am not prepared to say that the Scotch Courts might not be proceeding in a very proper manner in desiring to see what the result of that action might be before proceeding themselves to determine the claim. But in any case, even if that course should be taken, and properly taken, the ultimate determination of the claim, with or without the benefit of the materials afforded by the adjudication of a foreign Court, must be with the proper forum of bankruptcy in Scotland.

At the most, therefore, it can be no more than a question of judicial discretion,

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and for my part I think the proposition one very difficult to follow which the appellants are obliged to advance, and which really is this—that where the demand, though several, against the Scotch bankrupts, is made in respect of transactions in some of which they and others are implicated, and in others of which others perhaps and not they are implicated, but which are such as may be considered as against all the parties concerned in them, by an English Court in an English Chancery suit, that on account of the very intricacy and number of the questions (which from the nature and from the proceedings in the Court of Chancery in England may be combined in one suit), for that very reason it is more consistent with justice in a Scotch bankruptcy to sist the proof there until all the questions in the English Chancery suit against all the parties to that suit shall have been determined.

Now, I will not undertake to say that no case may exist in which the Court of Session in Scotland, exercising a judicial discretion, might think fit to take that course; but I do say that it is a proposition by no means self-evident, and not commending itself to my reason, and on those principles of judicial discretion, which it is a miscarriage of justice not to follow, the Court in Scotland, being informed that there is a Chancery suit pending in England against the trustee in a Scotch bankruptcy and a dozen or twenty other persons, involving such a number of issues as were in question here, are to delay the administration in bankruptcy as between all the persons interested in that administration in Scotland until that English suit has been brought to its conclusion. Happily we live in times in which, even if that proposition were advanced, it might still be hoped that the delay might not be more than two or three years, or perhaps four or five, if the matter were ultimately brought to this House for determination. But we all know that if a proposition be sound in point of law it must have been equally as sound thirty or forty or fifty years ago as it is at the present time; and I need not remind your Lordships of the length and nature of the delay which might have occurred in the winding up of a Scotch bankruptcy if such proceedings had occurred then.

My Lords, I do not say that the Court of Session in Scotland might not, if they had thought fit, have delayed this proof, but in the exercise of such discretion as they have they determined not to do so. They determined that the merits should be gone into upon regular pleadings and regular proof before them, which has been done; and I can hardly conceive a greater miscarriage of justice than it would be if, after a complete suit has been instituted and fought out to the end on pleadings and proof in Scotland for the purpose of determining this question between these parties, your Lordships were now to turn round upon a point of discretion and to say—All that is to go for nothing; there ought to have been a sisting of the proceedings in the Court of Session; the Court of Session must take into consideration what has been done in the English suit; after being informed of the decision of the English Courts, which perhaps have not yet considered that suit, and ascertained whether or no those proceedings are final, they must then determine whether or not they are to bind them in Scotland, and whatever may be the result of any such consideration all that has yet been done in Scotland is to go for nothing. My Lords, I am happy to find that none of your Lordships are of opinion that it is our duty to take that course.

Then I come to the case upon the merits, and I entirely agree with your Lordships that we must deal with the facts before your Lordships *secundum*

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allegata et probata, as we find them upon this record. I am bound to say that, looking at the long inventory of the evidence, including a great number of documents which it has not been thought necessary to print in the printed case or appendix, I see no reason to suppose that there was any lack of material before the Court in Scotland for the necessary purposes of justice.

Well, then, what is the case? The case, stated at the highest, is one of fraud. Now, supposing fraud were established *prima facie* upon this evidence against other persons, and not against the Lawsons, could your Lordships come to the conclusion that the Lawsons were to be answerable for the fraud of others unless they appeared to have personally derived a profit or benefit from that fraud? My Lords, I know of no principle on which in a Court of Equity, or in a Court administering equity, such a conclusion could be arrived at upon the facts of this case. It appears to me that, if there was any fraud, the Lawsons are not shewn to have participated in it, or to have derived any benefit from it; because, my Lords, as far as benefit is concerned this appears sufficiently pleaded by them upon the condescendence, and established upon the evidence. In real truth it has been the foundation of part of the argument of the appellants at the bar that before the final deeds or instruments were executed by which the concession in question was agreed to be sold to the company, and conveyed, if that is the proper term, to the company by the Lawsons before these transactions, although subsequent to the original contract of the 21st December 1870 with Engelbach, the Lawsons had by arrangements with Hartmont parted with all beneficial interest in the sale to the company, and consequently when the company carried that sale into effect the whole consideration passed into other hands, with the exception, in form only, of a certain number of shares which were transferred to them, but of which shares, upon the evidence, they were trustees only for Hartmont, and which afterwards were sold not for their benefit, but for Hartmont's. So stand the facts upon the evidence. Consequently, if the Lawsons were not personally participating in, or cognizant of, any fraud, and were not personally *lucrati* by any fraud of others, I know no principle of equity by which they could be held responsible in repetition or in damages for any such fraud. Now, my Lords, what is the fraud alleged? It is not that Engelbach, who was the purchaser as an agent for the company, received an improper bonus or benefit: for no such case is even suggested in any part of the condescendence. And, my Lords, I may say that, although it does come out in the evidence that Engelbach did receive some benefit, even if it had been upon such a condescendence open to the appellants to prove the knowledge of that by the Lawsons, and to fix the Lawsons with a liability on that account, there appears to me to be nothing in the proof from which any such knowledge of the Lawsons of any such arrangement with Engelbach ought to be considered proved, or to be inferred. The absence of any distinct allegation upon the condescendence is a very ample reason why your Lordships should not take the statement which was made by Mr Ogle, that he understood the original arrangement to which the Lawsons were parties to have included this payment to Engelbach, as a proof of that fact. The Lawsons were asked no questions about it. Ogle said that whatever arrangements of that kind were made were not negotiated by him; and there is not upon the condescendence, as I have said, a suggestion of any such case. Under those circumstances, it appears to me that that part of the case must be laid aside entirely, as not really arising before your Lordships.

What is there in the rest? There is an allegation in the condescendence stopping

considerably short, as I read it, of what is in the bill in Chancery, although the bill is for certain purposes referred to in the condescendence. There is an allegation in the 8th paragraph that Hartmont and Begbie, Peter Lawson and Son, and Ogle, "well knowing (as the fact was) that through their default the concession had become and was then voidable and liable to forfeiture, determined to form a joint stock company for the purpose, amongst other things, that the company should purchase the said concession from them at the price of £65,000. For this purpose they entered into communication with 'Engelbach and Keir,' and a provisional committee was formed, consisting of Begbie, Engelbach, Keir, and a Mr William Lewis Grant, for the purpose of carrying the said scheme and design into effect."

Your Lordships will observe that in that paragraph of the condescendence a statement is made inconsistent with the argument at the bar that the sum of £65,000 was arrived at by attributing £50,000 to the interest of the Lawsons and £15,000 to Engelbach; for the condescendence tells us that that sum was arrived at by Hartmont and Lawson and Ogle as partners, having in view their own benefit, and before they got into communication with Engelbach at all. So far, therefore, the statement in the condescendence negatives the argument from the amount of the purchase-money which was ingeniously pressed upon your Lordships at the bar. But it alleges that, with the knowledge that through their fault the concession was voidable and liable to forfeiture, they determined to form a joint stock company. In a later paragraph the bill in Chancery is referred to in a manner which may perhaps entitle the appellants to say that they ought to have the benefit in this appeal of any allegations in that bill, "a printed copy of which bill is signed by the deponent and the said Justice of the Peace as relative hereto, and is herewith produced and held as repeated *brevitatis causa*." That bill, my Lords, goes beyond the allegation in the condescendence in this respect, that it alleges the fraud—the substantial fraud which it sets out—to consist in the intentional concealment of the fact that the concession was voidable and liable to forfeiture from the persons who became shareholders of the company. But the bill also says that the facts relative to the concession, and to the manner in which it had been worked, the concession itself, and all the other documents of title, were perfectly well known to the provisional committee, and in fact to all the persons who originally formed and constituted the company, and who included other persons besides those who were the partners, or connected with them as partners.

My Lords, in the case before your Lordships of Overend, Gurney and Company v. Peek, Lord Westbury, dealing with a somewhat similar state of allegation, expressly said, that as far as the facts were concerned, if all the facts were disclosed at the time to the persons forming the company and the persons who negotiated for the future company, and if, as was there the case, and as is the case here, on the very face of the memorandum of association the company was formed for the express purpose of making this purchase, whatever other point could be made, the point of concealment of those facts could not be made; that the company must be taken to have been formed with a full disclosure and knowledge of those facts. And accordingly we find that there was that disclosure, and that this purchase was expressly taken upon the footing of a covenant for title and with the knowledge of its voidable quality. Therefore, my Lords, all allegation of fraud on that ground falls to the ground; and, unless the point of failure of consideration by reason of the subsequent avoidance of that

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contract by the Government of San Domingo can be made good under, I think, the fourth plea in law, the whole case entirely fails.

But, my Lords, as to that the case stands thus:—More than a year after the concession had been acquired by this company, they remaining in possession during the whole of the time, the Government of San Domingo write and communicate through their agent in this country to the company a note, which is stated, I think, in the 54th paragraph of the bill and elsewhere in the proceedings. That note contains these passages—"The Dominican Government takes into consideration the fact that neither in the course of the year 1870," which was before the sale, "nor in that of the year 1872," the greater part of which was after the sale, "have the grantees complied with this most essential clause of their contract. In consequence thereof the Government has the right from this moment to declare the said grantees as having forfeited their concession. This right the Government reserves to itself, even in the event in which the minimum quantity stipulated for were to be reached by the grantees in future. The Government, however, is quite disposed to enter into fresh arrangements with the said grantees with the view of saving to the latter the above forfeiture, provided the future interest of the Government is not prejudiced thereby."

Upon that statement it appears to me, my Lords, to be quite impossible to say that the ultimate forfeiture of the contract was solely or directly due or necessarily to defaults which had occurred before this sale took place; more especially as in the evidence of Mr Peach, the chairman of the company, he says distinctly that during the whole working by the company the necessary quantity was not worked. He is asked, "Though the concession had been subsisting all through last year you would not have been bringing phosphate home? (A.) We could not have brought home more when we have so large a quantity which we find no use for. (Q.) Suppose the concession had been handed over to you with the obligation on you to bring home 10,000 tons a-year, must you not necessarily have stopped fetching it home? (A.) Unquestionably. (Q.) Therefore you have, in reality, as a company, lost nothing as yet from the San Domingo Government having stopped the concession? (A.) We have lost in this way, that the company has got a bad reputation;" and so on. The result is that they did not attempt to work the concession so as to keep it alive, and it would necessarily have been forfeited if the San Domingo Government had been disposed to insist upon those terms, even if at the time of sale nothing had taken place by reason of which a forfeiture had been incurred.

My Lords, I do not inquire what may be the rights of the parties under that state of circumstances in any other point of view than that which is raised by this condescendence; but I do say, my Lords, that under these circumstances it is impossible that a case of repetition can be made upon the footing of failure of consideration and disappearance of the subject-matter of the contract.

INTERLOCUTORS appealed from affirmed, and appeal dismissed, with costs.

JOHN HOLMES, London—DAVIDSON & SYME, W.S.—LAURENCE, PLEWS, BOYER, & BAKER—STUART & CHEYNE, W.S.

CASES

DECIDED IN

THE COURT OF JUSTICIARY.

1875–1876.

JOHN WILSON, Petitioner.—*J. C. Smith.*
LORD ADVOCATE, Respondent.—*Burnet, A.-D.*

No. 1.

Oct. 20, 1875.
Wilson v. Lord Advocate.

Bail—Furtum grave—Statute 1701, *c.* 6.—*Held* that the crime of stealing from the person "a gold or other metal watch," aggravated by two previous convictions of theft, was a capital crime, and therefore not bailable, under the Act 1701, c. 6, on the mere demand of the accused.

Bail—Furtum grave.—Petition to be admitted to bail refused, in respect that the crime charged was a *furtum grave*, and therefore capital, and that the Lord Advocate had refused his consent to bail being accepted.

HIGH COURT. Lord Justice-Clerk. Lord Ardmillan. Lord Neaves. Justiciary Clerk.

THIS was a petition to be admitted to bail presented to the High Court of Justiciary by John Wilson, a prisoner in the prison of Ayr.

Wilson was charged with "the crime of theft, aggravated by his having been previously convicted of that crime, actor or art and part," in so far as upon the 24th day of September 1875 he had, from the pocket or person of a certain Robert Weir, stolen a gold or other metal watch, and had been previously convicted of the crime of theft."

On this charge, after the usual procedure, the Sheriff-substitute granted warrant of commitment.

Two extract convictions for the crime of theft were produced before the Sheriff-substitute purporting to refer to the petitioner.

The Lord Advocate refused consent to Wilson's being liberated on bail on the ground that the case was a daring case of pocket picking committed in Ayr Railway Station after the Ayr races, and that the prisoner was an Englishman, having command of considerable means, who could easily find bail, and who would in all probability fly the country if the opportunity were given him by admitting him to bail.

Wilson accordingly presented this petition to the High Court of Justiciary.

Argued for him;—(1) The Court had discretion to admit to bail in all cases,[1] and even if this were technically a case not bailable on the mere demand of the accused under the Act 1701, c. 6,[2] it was still a case in

[1] Thomson, July 15, 1871, 2 Coup. 103, 43 Scot. Jur. 561.

[2] The Act 1701, c. 6, enacts, "that all crimes not inferring capital punishment shall be bailable."

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which in modern times to refuse bail must be regarded as mere oppression. But (2) the crime charged was not a capital offence, and was therefore bailable. The warrant of commitment was what determined the nature of the charge, and it must be strictly read.[1] Now, here the charge was of stealing a gold or other metal watch, aggravated by having been previously convicted of theft. Since it was not stated how often the petitioner had been previously convicted, it must be assumed that there was only one previous conviction, and this was therefore neither a *furtum grave* nor a theft accompanied by two or more previous convictions such as under the old law inferred capital punishment.[2]

Argued for the Lord Advocate;—The application ought to be refused. Nothing had been advanced to shew that the Lord Advocate had not wisely and justifiably exercised his discretion in refusing bail. Without his consent, or without the direct interference of the Court, the crime was not bailable. The theft of a gold watch was in itself a *furtum grave* and a capital crime,[3] and so was any theft aggravated by two previous convictions.[4] Though the number of previous convictions was not stated in the warrant of commitment, nothing was there said which was inconsistent with there being more than one, and the Court were entitled to look behind it at the extract convictions produced to ascertain how many were really founded on.

Lord Ardmillan.—I do not entertain any doubt on the first point raised by Mr Smith. I do not think this application incompetent. I do not say that the Court could not, in the exercise of their discretion, authorise liberation on bail in this case if they thought that the nature and circumstances of the case really required it. But, while I think that there is nothing to preclude the Court from granting the prayer of this petition, were they satisfied that it was right to do so, still I must keep in view that a large discretion rests on the Lord Advocate, that the Court trusts him, and has every confidence that he exercises it well, unless good ground to the contrary be clearly shewn.

If this is a capital charge, according to the strict letter of the law, then the practice of restricting the pains of law does not, in relation to this question of bail, alter the category in which it is placed. In point of strict law the crime of stealing an article of value from the person, coupled with previous convictions, is a capital offence. That is the charge laid against the petitioner, for I cannot limit the words "having previously been convicted of that crime" to a single previous conviction, especially when I find that two extract convictions are produced. The petitioner is therefore charged with what is still a capital crime, requiring the pains of law to be restricted. The Lord Advocate, in the exercise of his discretion, refuses his consent to liberation on bail; and I see no grounds on which the Court would be justified in interfering.

Lord Neaves.—I frankly say that if there were any doubt whether or not this was a capital offence it would be our duty to apply our minds to that question. But I think that this is clearly a case which falls under the graver category. The charge is one of serious theft, and aggravated by previous conviction, which, with your Lordship, I cannot limit to a single conviction. That is in strict law a capital offence. It may be that the punishment is in practice always restricted, but that does not remove the crime from the category in which

[1] Hume, 2, 88. [2] *Ib.* 1, 91 and 95. [3] *Ib.* 1, 91. [4] *Ib.* 1, 95.

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it formerly stood. It still remains there, and the Legislature has left it there, and not improbably with the very view of preventing the offence from becoming a bailable offence. We have, at any rate, the analogy of the Acts 2 and 3 Will. IV. c. 123, and 5 and 6 Will. IV. c. 73, which, when taking away their capital nature from certain classes of forgeries, expressly left them non-bailable offences.

The law then has retained the offence here charged in the category of capital offences. And, though I do not doubt our power to admit to bail, no cause has been shewn why we should exercise that power in this case, and interfere with what appears to me the very wise discretion of the Lord Advocate. I think we have no alternative but to refuse this petition.

LORD JUSTICE-CLERK.—I concur in the opinions of your Lordships. It is quite true that in the present case the punishment of the crime with which the petitioner is charged is capital. The practice is certainly in every case to restrict the pains. But it does not follow that this practice of restricting the pains renders the offence a bailable offence. There are many important and serious offences, which, though they are not now punished, or even in some instances punishable, with death, are yet not bailable. And I think that it is the deliberate policy of the law to keep them so, unless special cause be shewn to the contrary. In this case no good cause has been shewn, and I am therefore quite satisfied to refuse this petition.

THE COURT pronounced this interlocutor:—"In respect that the offence charged is a *furtum grave*, and therefore a capital offence, and that the Lord Advocate has refused his consent to bail being accepted, refuse the petition."

WILLIAM CROAL, L.A.—J. A. JAMIESON, W.S., Crown Agent.—Agents.

No. 2.
Dec. 2, 1875.
Clendinnen v. Rodger.

ANDREW CLENDINNEN, Suspender.—*Moncreiff.*
PETER AND GEORGE RODGER, Respondents.—*Sol.-Gen. Watson—Muirhead, A.-D.*

Indictment—Relevancy—Fraud—Insolvency—Putting away Goods to defraud Creditors.—Held (*dis.* Lord Young) that an indictment which charged in the major premise "fraud, particularly the wickedly, fraudulently, and feloniously putting away, carrying off, or secreting by an insolvent *or other* debtor, of his funds or effects, with intent to defraud his creditors," was not relevant, by reason of the interjection of the words "or other" between "insolvent" and "debtor."

Observations (*per cur.*) on the cases of M'Rae, Sept. 17, 1867, 5 Irv. 463, and Sneden, April 10, 1874, *ante*, vol. i. (Just.) 19, 2 Coup. 532.

HIGH COURT. Lord Justice-General. Lord Justice-Clerk. Lord Deas. Lord Ardmillan. Lord Mure. Lord Young. Justiciary Clerk.

THIS was a suspension of a conviction obtained before the Sheriff of Selkirk and a jury at the instance of Peter and George Rodger, joint procurators-fiscal of Court, against Andrew Clendinnen, draper, Galashiels.

The major proposition of the indictment was

"That albeit, by the laws of this and every other well governed realm, fraud, particularly the wickedly, fraudulently, and feloniously putting away, carrying off, or secreting by an insolvent or other debtor, of his funds or effects, with intent to defraud his creditors, is a crime of an heinous nature, and severely punishable."

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The minor proposition was

"In so far as the said Andrew Clendinnen having commenced and carried on business as a draper and clothier in Galashiels, in the county of Selkirk, and having become indebted to various individuals or companies in certain sums of money, which he was unable to pay, or pretended to be unable to pay, and in particular to Stewart and M'Donald, warehousemen in or near Buchanan Street, Glasgow, in the sum of £193, 11s. 2d., or thereby; . . . . . and the said Andrew Clendinnen having become, or having pretended to become insolvent, and having on or about the 7th day of July 1875 executed a trust-deed for behoof of his creditors in favour of George Dunlop Cramond, writer in Galashiels, the said Andrew Clendinnen did, on the 19th day of August 1875, or on one or other of the days of that month, or of July immediately preceding, or of September immediately following, wickedly, fraudulently, and feloniously, with intent to defraud his said creditors, or such of the said companies as were his creditors, clandestinely put away, carry off, or secrete, or cause or procure to be put away, carried off, or secreted, from or from near the shop or premises then and now or lately occupied by him, in or near Bank Street, in or near Galashiels, in the county of Selkirk, the various articles specified and contained in inventory No. 1, hereunto annexed as relative hereto, or part thereof, forming part of his effects, and did, wickedly, fraudulently, and feloniously conceal the same, or cause or procure the same to be concealed in or near the dwelling-house or premises situated in or near Green Street, in or near Galashiels, in the county of Selkirk, then and now or lately occupied by Henry Elliot, then and now or lately a miller, then and now or lately residing there; and all this the said Andrew Clendinnen did, with intent to appropriate the same to his own use, and to defraud his said creditors, or such of the said companies as were his creditors."

The verdict of the jury was, "Find the panel guilty as libelled."

It was objected for the complainer;—(1) The major proposition of the indictment did not contain an indictable offence. The effect of interjecting the words "or other" between "insolvent" and "debtor" was that "insolvent or other debtor" must be read as simply equivalent to "debtor." Now, a debtor might put away his effects without being guilty of a crime. To charge a man with doing an innocent act "with intent to defraud" was not a relevant charge.[1] Insolvency was in truth the essence of the charge intended to be made, and without a specific averment of insolvency the charge was not relevant.[2] (2) If the charge was relevant it could only be so because the word "or" introduced a proper alternative. Then the charge being alternative the verdict was general, and therefore void from uncertainty.

Argued for the respondents;—The intent to defraud qualified the act of putting away goods by a debtor. It necessarily inferred the attempt to avoid paying just debts. A solvent debtor might do this just as well

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[1] Hume, 1, 28, *et seq.*; Lord Advocate v. Shepherd, April 26, 1842, 1 Broun, 325; Lord Advocate v. Ure, Feb. 15, 1858, 3 Irv. 10, 30 Scot. Jur. 310; Lord Advocate v. Hinchy, Sept. 30, 1864, 4 Irv. 561, 37 Scot. Jur. 24.

[2] Hume, 1, 172; Alison, 1, 362; Lord Advocate v. Neill, Feb. 3, 1873, 2 Coup. 395; Lord Advocate v. Sneden, April 10, 1874, 2 Coup. 532, *ante*, vol. i. (Just.) 19; Rae v. Linton, Dec. 11, 1874, *ante*, vol. ii. (Just.) p. 17; Hume, 1. 509; Alison, 1, 567; 1621, c. 18; 1696. c. 5; 54 Geo. III. c. 137, sec. 33; 7 and 8 Geo. IV. c. 20; Lord Advocate v. Dick, July 16, 1832, 5 Deas and And. 513; Lord Advocate v. O'Reilly, July 14, 1836, 1 Swin. 256; Lord Advocate v. M'Intyre, Sept. 14, 1837, 1 Swin. 536.

as an insolvent. To put property beyond the reach of creditors with the intention of defrauding them was a crime whether the debtor was solvent or insolvent.

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At advising,—

LORD JUSTICE-CLERK.—This suspension has been maintained on two grounds. The first objection to the conviction and sentence is, that the major proposition of the indictment does not contain a statement of an indictable offence. The second objection is, that the verdict was not effectual, because it proceeded on a charge which was alternative, and did not discriminate between the alternatives libelled, and was thus void from uncertainty.

As regards the last plea, I am of opinion that it is not well founded. There is no proper alternative in the major proposition of the indictment, which is this, that "fraud, particularly the wickedly, fraudulently, and feloniously putting away, carrying off, or secreting, by an insolvent or other debtor, of his funds or effects, with intent to defraud his creditors is a crime," &c. Though it certainly contains the disjunctive "or," this is not an alternative charge. The expression "insolvent or other debtor," is an amplification of the specification of the crime, and is used not to introduce an alternative but merely to enlarge the scope of the charge. A general verdict is therefore perfectly good if the major proposition is relevant.

There remains the other question, whether the major proposition as it stands charges an indictable offence. The major proposition amounts to nothing but this, that the putting away of his effects by a debtor with the intent to defraud his creditors is a crime. Now, is that an indictable offence? We have a long catalogue of precedents on this point in our books. I have considered them carefully, but I can find no instance in which the element of insolvency has been entirely omitted. Hume deals solely with such offences as committed by an insolvent or one in contemplation of bankruptcy. Fraudulent bankruptcy is a specific and definite crime. There was indeed one case lately (Lord Advocate v. M'Rae, Sept. 17, 1867, 5 Irv. 463) where Lord Neaves, at the Perth Circuit, sustained an indictment in the same terms as the present, but the report is meagre, and the case stands alone, and the general result of the whole series of authorities is that insolvency is an element in the offence which cannot be omitted. And as insolvency is excluded by the terms of this major the question remains whether the removal of his goods by a person who is solvent in order to defraud his creditors is a relevant article of dittay.

Crimes of this nature may be of three distinct classes. First, where a debtor, being insolvent, removes his effects from the reach of his creditors for the purpose of defrauding them; second, where a debtor, who is solvent, removes his effects from the reach of his creditors, as a part of a fraudulent design to make himself appear to be insolvent; third, where a debtor, whether solvent or insolvent, removes his effects for the purpose of defeating a specific right constituted in another, as in the case of a private trust-deed or a sequestration.

These are three crimes totally and essentially distinct. With regard to the first, though I participate in the doubts that have been expressed by Lord Young in the case of Sneden, I am not disposed to go against the long series of precedents in which it has been held a relevant charge. My doubt would have been whether, so long as there is no overt act by which creditors are injured, there has arisen any such absolute right in the creditors as to warrant its being said

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that the removal of his effects by an insolvent is a fraud upon that right. But though I cannot help expressing my doubts, the point seems to be conclusively ruled, and I am not prepared to go back on it. The defence of the relevancy of such a charge rests on the principle that if a man finds he is unable to pay his debts he is bound to make all his goods forthcoming to his creditors, and though his creditors have no vested or specific right, still they have an inchoate right, which it is unlawful for him to defeat or diminish by carrying off and putting away his goods.

When, however, we come to the case of a solvent man it is different. A solvent man is entitled to deal with his effects as he likes. The assumption is that his creditors will be paid, and they have no title to inquire what he does with them. Therefore for a solvent man to carry off and put away his effects is not in itself criminal. The adjecting of a criminal intent to an act itself innocent or indifferent does not raise the innocent act to the level of a crime.

A solvent man may indeed be guilty of an offence falling under the second category above mentioned. Being solvent he may attempt to evade payment by putting away his effects and pretending to be insolvent. But there the essence of the offence is not the putting away his effects, but the pretending to be insolvent, and without this element the charge is irrelevant. That is a totally different class of offence from the first, and certainly is not covered by this indictment.

As to the third class, however, where a debtor after granting a divesting deed has put away his effects with intent to defraud his trustee and his creditors, it matters not whether the debtor was solvent or insolvent. The fraud is the same. But there the essence of the crime is the fraud on the prior right, and this must appear in the major proposition.

What I have now stated was, I think, well exemplified in the recent case of Neill (Feb. 3, 1873, 2 Coup. 395), which embraced all the three classes of charges to which I have referred. The objection was stated that the indictment was inconsistent with itself, and, though I declined to sustain the objection, I put it to the prosecution to choose the alternative on which they meant to stand, and which they desired me to put to the jury.

On the whole matter, then, I think we must hold that the major proposition of this indictment is faulty by the adjecting of the words "or other" before "debtor," and that, therefore, the charge is not relevant.

Lord Deas.—I agree entirely with what has fallen from your Lordship, with this explanation, that I entertain no doubt at all that if the words "or other" had been omitted from the major proposition the libel here would have been a perfectly relevant libel. The relevancy of such a libel has been sanctioned and sustained again and again throughout a long series of cases, and it would be a lamentable view of our criminal practice if doubt could now be thrown upon what was done in these cases. I may just mention one of them, because it was tried at Glasgow when the Lord Justice-General, now present (then Lord Justice-Clerk), and myself were Judges on the Circuit, viz., the case of Margaret Smith or Eccles, Sept. 1866. Decisions and practice make the great body of our criminal law, which even a Judge upon Circuit, and still more a Sheriff, naturally holds it his duty to follow out. If there be a good objection to the relevancy of the major proposition of this libel I certainly cannot hold it to be obviated by reference to the minor. The major proposition of a libel or indictment must be

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correct and complete in itself. Our indictments have always been framed in a syllogistic form, and it has immemorially been held that each branch of the syllogism must be complete in itself. The major proposition sets forth that such an act or acts as it describes is or are contrary to law, and consequently punishable, and the description of the act or acts must be sufficiently explicit to enable the Court to see on the face of the libel that this is so, otherwise the Court can look no further. The minor proposition states what is alleged to have been done, and this description must be such as to amount to the crime or crimes set forth in the major. The conclusion is then deduced, that upon proof of the fact the accused ought to be punished with the pains of law. All this is purely elementary, but all the more important because of its being so. The syllogistic form of our indictments has been a great means of enabling the Court to enforce that precision which is the distinguishing feature of our criminal procedure, and which is so valuable for the information and safety of parties accused, and I should extremely regret its being relaxed or departed from. If, therefore, there is a flaw or defect on the face of the major proposition of this libel that flaw or defect must be fatal to the libel.

Now, while I can have no doubt that the relevancy of this libel would have been clear had the words "or other" not been introduced into the major proposition, I am of opinion that the introduction of these words vitiates the whole by reducing the major proposition to an allegation that it is a crime for any debtor, and in any circumstances, to put away, carry off, or secret his effects with intent to defraud his creditors. Now, that, I think, is too vague a proposition to be safely made the foundation of a criminal libel. I place no weight on the introductory words "wickedly, fraudulently, and feloniously." The allegation that what was done by the accused party was done "with intent to defraud his creditors" is more serious and creates more difficulty. These words make the question a narrow one. Still I think the allegation is too general to be safely proceeded upon. It is not confined to insolvent debtors nor to debtors on the eve of bankruptcy, nor to debtors in any specified position. It is quite conceivable that such acts by a debtor who pretends to be insolvent when he knows he is not so may be at least equally fraudulent as if he were actually insolvent. But if that was meant here it ought to have been so said. In short, I think there is too much novelty and vagueness in this major proposition to authorise its being sustained.

LORD ARDMILLAN.—I shall confine my observations entirely to the major proposition of this indictment. With that alone we have to deal. The major proposition must stand or fall by its own terms, and cannot be supplemented by reference to the minor. Our indictments are drawn, as Lord Deas has observed, in the form of a syllogism. If the major proposition is not complete, the syllogism is imperfect,—its coherence is destroyed.

Now, if the major proposition here is alternative, then the second objection taken is good, namely, that the verdict is general. But if the major is read as the Lord Justice-Clerk reads it, as not containing a proper alternative, then it must be taken *in mitiore sensu*. Where you have words occurring in an indictment connected by the disjunctive "or," if they do not introduce a proper alternative, they must be read in the sense most favourable to the panel. Read in that sense the charge amounts to this, that the putting away of his estate and effects by a debtor, whether solvent or insolvent, is a crime. No doubt the

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words "with intent to defraud his creditors" are added. But if the act itself is not criminal, the addition of these words will not make it criminal. Action, not intent, is within the sphere of criminal jurisprudence. Wisely and concisely did Lord Neaves say in the case of Hinchy (Sept. 30, 1864, 4 Irv. 561),—"The law does not take cognisance of things done that do not pass into overt acts. It has nothing to do with the intent of a party, or with his secret actions, till he does something that comes to the light of day." If the act libelled be the act of a solvent man, who is not pretending to be insolvent, he has committed no crime—for, if solvent, and not pretending to be insolvent, he may do what he likes with his own. To the act so libelled intent can never add the quality of guilt. Intent can never make that act a crime which is not one in itself. Of this we have innumerable examples in our law. An attempt to steal is no crime, though housebreaking with intent to steal is a crime, because there the housebreaking is an overt act, and a violent act, and the intent is reasonably and legally added as a quality. Forgery, even though the intent to defraud were proved, is not a crime, unless accompanied by the overt act of uttering. Perjury, a crime which is always with a bad intent, is not always within the reach of the law. But still more closely touching the present case, "attempt to defraud" has been found to be not an indictable offence; and, if the attempt is not, the intent cannot be. Unless, therefore, it is a crime for a solvent man to put away his goods, you cannot make it one by adding the words "with intent to defraud his creditors."

Accordingly, I read the libel as charging this offence against a debtor simply as a debtor, whether solvent or insolvent, and so reading it, I cannot hold it relevant.

True it is that it may be a fraud and a crime for a man who is really solvent to put away and conceal his effects for the purpose of pretending and inducing a false belief of insolvency, and then becoming bankrupt, or making a favourable settlement with creditors on that footing. But there the essence of the crime is the false pretence, the counterfeiting insolvency for a fraudulent purpose, and that must be specifically stated in the major proposition of the indictment.

I have only to add that I have no doubt that, assuming the insolvency of the debtor accused, and reading the alleged intent to defraud as applicable to the putting away his estate by such insolvent debtor, that part of the charge would be relevant. This has been long and conclusively settled, and I am not prepared to disturb it.

LORD MURE concurred.

LORD YOUNG.—The suspension is rested on two grounds, viz., (1) that the libel is irrelevant, and (2) that the verdict is ambiguous.

This objection to the relevancy of the libel applies to the major premise, and turns upon the effect of the words "or other" occurring between "insolvent" and "debtor," and for the insertion of which it is said, apparently with truth, there is no precedent, except one case upon Circuit, in which they were sustained (the suspender contends erroneously) by Lord Neaves. The words are undoubtedly material, for their insertion is exactly equivalent to the omission or suppression of the word "insolvent," by which they are immediately preceded, and which they in effect strike out. The words "an insolvent or other debtor" mean simply "a debtor," and the longer expression was probably em-

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ployed only to indicate more pointedly what would have been sufficiently indicated by the shorter, viz., that the solvency or insolvency of the prisoner was, in the prosecutor's view, immaterial to the charge.

The question for our consideration on this head therefore is, whether or not the word "insolvent" is essential to the charge. If it be, then the introduction of the word objected to is fatal—otherwise not.

The question must necessarily have been presented to the Sheriff before trial as I have now stated it. Coming, as it does, before us after verdict, it might have been contended that the objection, assuming it to be good, was cured by the verdict, had the terms of it been such as to shew that the jury had affirmed the insolvency of the prisoner. But the verdict being in general terms with reference to the charge as it stands in the libel there is no room for this contention, and it must be assumed that the jury took no account of the question whether the prisoner was solvent or not, regarding it as immaterial, no doubt under the direction of the Sheriff, whose Substitute also must have held this opinion when he sustained the words objected to and allowed them to stand in the libel.

The second ground of suspension, viz., that the verdict is ambiguous, need not therefore be separately considered, all that need or can be said on the subject being, that if the objection to the relevancy of the charge is good the verdict does not cure it. The validity of the charge and that of the verdict both depend on the same question, viz., whether or not it is essential to the offence with which the prisoner was charged, and of which he has been found guilty, that he should have been insolvent when he committed it; or, in other words, whether the offence is such as can only be committed by an insolvent debtor.

Now, the substance or gist of the offence in every case of the class to which this belongs consists in this, that a debtor dealing with his creditors, whether under the provisions of the Bankrupt Act or upon a private arrangement, has, while professing to make a full disclosure and surrender of his property for division among them, cheated, or attempted to cheat them, by fraudulently concealing and withholding part of it. I am myself of opinion that it is essential to the offence that something shall have occurred to impose upon the debtor the legal duty of disclosure and surrender, being a duty of another order and character than that which is upon every man to pay his debts according to his ability, and to regulate his expenditure and use his property with a due regard to the interests of those to whom he is indebted. The most familiar case is that of sequestration; but a private arrangement whereby the creditors agree to forego in their debtor's favour any of their rights, on condition of a fair disclosure and surrender of his property, which he on his part professes to make, is in my opinion equally available to impose the legal duty for a violation of which, by a fraudulent concealment and withholding of property, the debtor will be criminally responsible. In the case of Sneden at Dumfries, in the spring of 1874 (Couper, vol. ii. p. 532), I was of opinion that the essential feature of the offence did not exist, or at least was not well libelled, and therefore held the indictment irrelevant. Such a question, which must depend on the terms of the libel in the particular case, we have no occasion to consider here—(1) because no objection to raise it was stated to the Sheriff, or is presented to us by the bill of suspension, and after verdict it is, I think, no part of our duty to take such an objection, even if the terms of the libel appeared to afford grounds for it; and (2) because a trust conveyance in favour of creditors is libelled, which, although

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briefly and perhaps insufficiently described, yet being produced may have established, and probably did establish, the duty of surrender, which I desiderate as necessary to the crime. I therefore think that we must consider the only objection which the bill presents to us on the assumption that the offence is otherwise well charged, and that the prisoner has been properly convicted, provided only that it is such as a solvent debtor—which we must assume he may have been—could commit.

Of course no honest man, being able to pay his debts in full, will seek an arrangement with his creditors in any form, whether under the Bankrupt Act or otherwise. But a rogue may, and the purpose of every such arrangement being to procure to the debtor, at the expense of his creditors, the benefit of a forbearance from diligence and a settlement and discharge without full payment, I should think that the worst fraud of the class and kind which we are considering is that which is committed by a man of large but fraudulently concealed wealth. The fraud, as I have observed, consists in the cheat practised on the creditors by their debtor concealing and withholding a part of his effects, while professing to disclose and surrender the whole, as the condition of a benefit bargained for, or accorded by law on that footing; and I should have thought it clear that the extent to which any such fraudulent debtor had concealed and withheld his property on the one hand, or disclosed and surrendered it on the other, affected, not the legal character of the offence, but only the magnitude or heinousness of the particular instance of it. The mischief against which the law that punishes such fraud is directed is the injury thereby inflicted on the creditors, who are the victims of the fraud, and the measure of this injury is the value of the property which has been fraudulently concealed and withheld. It is greater or less in any particular case according to the extent of the debtor's property and the proportion which what he has dishonestly withheld bears to what he has honestly surrendered. The property which has been withheld, *plus* that (if any) which has been surrendered, together constitute the debtor's estate, and if sufficient to pay his debts in full he is solvent. But if, while professing to make full surrender according to his duty, he surrenders only enough to pay a small dividend, and fraudulently conceals and retains the balance, how shall he be acquitted of fraud, or how is the character, as distinguished from the degree, of his offence affected by the fact that the balance so fraudulently concealed and withheld was sufficient to pay his debts in full? It seems clear that the magnitude of the offence and the degree of the offender's criminality increase according to the amount of property concealed and withheld, at least up to the point of being sufficient, when added to what has been surrendered, to pay his debts in full; and I must profess my inability to appreciate any view of the offence according to which it changes with respect to its legal character, if indeed it does not entirely vanish when this point is reached, because of the offender's solvency thereby manifested.

By my judgment in the case of Sneden, and the observations which I have already made in this case, I have expressed with sufficient distinctness my opinion, to the effect that a criminal Court can take no account of the manner in which a debtor disposes of his property prior to the time when the law lays upon him a distinct obligation to disclose and surrender it. If when that time has come and is past he fraudulently keeps it in concealment with a view dishonestly to withhold it from those who are entitled to have it, his previous dealing with it may be good evidence against him. But if he shall then

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honestly disclose and surrender it, or if the time never arrives at all, it is, in my opinion, beyond the cognisance of a criminal Court to inquire where or with what intention, never fulfilled, he may previously have placed it. I say "intention never fulfilled," because the event with reference to which it was entertained, on the assumption I am making, never happened. But however this may be, I am unable to see how the circumstance of the debtor's solvency or insolvency affects the question. In every case of the kind it must be averred and proved that the prisoner did in fact conceal and withhold property from his creditors with intent to defraud them. But the act, the intention, and the mischief being precisely the same whether the perpetrator was solvent or insolvent, the reason, if there be any, for requiring the prosecutor to aver and prove that he was insolvent is certainly not obvious, and must depend on some other considerations than usually determine the materiality of a fact to the constitution of an offence. Are there any such? Insolvency in the sense of the Bankrupt Act is simply inability to meet liabilities, and a man may be insolvent and properly made bankrupt, and his estates sequestrated under the statute, whose estate, when realised, is found sufficient to pay every one, and leave a surplus. The question whether or not a man was solvent at a given time is, in the civil Court, and with a view to civil remedies, frequently attended with much difficulty, involving an investigation into the state and condition of his affairs. Why should there be such an investigation in the course of a criminal trial for fraud? No doubt insolvency opens certain civil remedies to creditors if they choose to resort to them in order to restrain their debtor in the use of his property. But if let alone, the insolvent debtor remains absolute proprietor of his estate, and no man is required by any rule of law to ascertain the state of his affairs before dealing with his lawfully acquired property as he pleases. A trader may, and frequently does, think he is solvent when a strict examination into his affairs would shew that he is not, and there are instances of an erroneous opinion in the opposite direction. It does, at first sight at least, seem strange that the success of a prosecution for deliberate fraud should depend on the result of an inquiry into the state of the panel's affairs, to ascertain whether or not he was in a condition, had he been honestly-minded, to pay his debts in full. Insolvency certainly does not impose upon a debtor a legal obligation to call his creditors together and surrender his property to them. If, finding it expedient, he shall determine to meet his creditors and seek an arrangement, and does so, his position with respect to his property is immediately changed, and the case presents one of the familiar occasions on which such a fraud as is here charged may be committed. The libel we are considering, as I regard it, charges a fraud by the prisoner in such circumstances, and after verdict I must assume that he in fact committed it by surreptitiously removing his property with intent to defraud his creditors, to whom he was bound to surrender it. It is suggested that nevertheless, and for aught that appears to the contrary, the property which he so surreptitiously and with fraudulent intent removed and concealed was sufficient to pay his debts in full; in other words, that he may have been solvent. I cannot agree in thinking that this is a favourable suggestion for him, or that he can take benefit from it. I cannot hold that the prisoner is entitled to be acquitted on the law or the fact—because it may possibly be true that his fraudulent act and purpose were so extensive that his victims were cheated, or intended by him to be so, out of the difference, not between one dividend and another, but between a small dividend and full

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payment, which his fraudulently concealed and withheld estate is able to afford. That he surrendered sufficient to pay his debts in full might have been an answer to the charge on the fact of fraud, but that the amount fraudulently retained would, if honestly surrendered, have afforded full payment, is, I think, very clearly no answer at all. If two debtors, the one solvent and the other not, remove their property, and themselves with it, to a place abroad, or to an obscure retreat in this country, each with intent to defraud his creditors by leaving them unpaid, are we to announce it as law that the one commits a crime and the other not? For my part I can see no distinction between them except this, that the solvent debtor is the greater rogue of the two—not as regards the quality, but only the degree of his roguery. Whether or not the criminal law will reach either must, in my view, depend on considerations to which I have already sufficiently adverted; but assuming no distinction between them except that the one was solvent and the other not, I am clearly of opinion that it extends to both or neither.

I therefore think that the Sheriff was right in holding that the insolvency of the prisoner was not necessary to the offence with which he was charged, and that he properly repelled the objection to the libel, and passed sentence on the verdict.

Lord Justice-General.—I think it right to say that I concur in holding that the major proposition of this indictment is irrelevant, by reason solely of the presence of the two words "or other." If these words were not there, the major would be a relevant proposition. That is a matter so settled, both by decision and practice, that it is in vain now to attempt to deal with it as an open question.

The major of the indictment as it stands charges the putting away of his goods and effects by a debtor, whether solvent or insolvent. Now, it may be a fraud of a serious nature for a solvent man to put away his goods, so as to reduce himself to a state of apparent insolvency. But though that may be a very serious fraud, I certainly should not libel it in terms of the major proposition of this indictment. The essence of that crime is the pretending to be insolvent when really solvent, and that must appear on the face of the major proposition.

Upon the point before us I entertain no doubt whatever. Indeed, I do not think it would have deserved the attendance of a full bench had not the relevancy of the ordinary form of this indictment, where the words "or other," which occur here, are omitted, been called in question by a recent decision of one of your Lordships.

Lord Neaves was absent.

This interlocutor was pronounced:—"Find that the major proposition of the libel is irrelevant; therefore pass the bill: Suspend the conviction and sentence complained of *simpliciter*, and decern: Find the respondents liable in expenses," &c.

Dove & Lockhart, S.S.C.—J. A. Jamieson, W.S., Crown Agent.—Agents.

JOSEPH DAWSON WORMALD, Petitioner.—*Fraser—Mair.*
THE LORD ADVOCATE, Respondent.—*Sol.-Gen. Watson—Gloag, A.-D.*

No. 3.
Dec. 3, 1875.
Wormald v. Lord Advocate.

Crime—Breach of Trust or Theft—Bail.—A prisoner was committed on a charge of breach of trust or alternatively of theft, based upon the allegation that he had been employed by a person to uplift money and apply it to a particular purpose, and that he had not so applied it, but had appropriated it to his own use. Bail having been refused by the Crown, the prisoner applied to the Court to be admitted to bail, on the ground that the petition on which the warrant of commitment had been granted did not set forth facts which constituted theft, but only breach of trust, and that the charge of theft had been added simply to deprive him of the benefit of being admitted to bail.

Held that the facts alleged might either fall within the category of breach of trust or theft, according to the circumstances, and petition refused.

HIGH COURT. Full Bench. Justiciary Clerk.

THIS was an application to be admitted to bail presented by Joseph Dawson Wormald, W.S.

The petitioner set forth that he had been originally incarcerated in the prison of Edinburgh on 20th November 1875, on a charge of falsehood, fraud, and wilful imposition; that, having been admitted to bail by the magistrates of the city of Edinburgh, before an opportunity was given him of finding bail, he was again on 30th November committed to the prison of Edinburgh on a charge of breach of trust or theft; and that the Crown had refused to consent to his being admitted to bail.

The petition for the second warrant of commitment set forth, as the ground of the charge of breach of trust or theft, that the prisoner had uplifted from the Bank of Scotland a sum of £404, 11s. 6d., and from the Union Bank a sum of £236, 11s. 11d., the property of Andrew Donaldson, by whom he had been employed as agent to invest these moneys on heritable security, and had appropriated them to his own purposes.

The prisoner contended that the charge of theft had been added to the charge of breach of trust in the second petition for warrant to commit simply to make it a non-bailable offence, and to prevent him getting out of prison to prepare for his defence and otherwise attend to his interests; that the procurator-fiscal had acted maliciously and oppressively in inserting the charge in his petition for warrant of commitment, and that it was not competent for the magistrate to grant warrant of commitment on a charge of theft on a petition which only disclosed the *species facti* which constituted breach of trust.

LORD JUSTICE-CLERK.—We are not now considering the question of the relevancy of an indictment, but an objection to the petition on which the warrant of commitment has followed. This is an application by the prisoner to be admitted to bail, first, on the ground that the petition did not set forth any circumstances out of which an offence which is not bailable could emerge; and, in the second place, on an appeal to the equitable power of the Court in the circumstances of the case. If we were scanning the petition as if it were an indictment, it might be that the allegation in point of fact, which is very general, savours so much of breach of trust as to leave little room for a charge of theft. But then we are not considering any such question. The petition contains a general allegation that at a particular time a Mr Donaldson entrusted the prisoner with certain sums of money for a particular purpose, and that he did not apply them to that purpose but appropriated them to his own uses and purposes. Whether that may turn out in point of fact to be theft or breach of

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trust it is impossible for us at present to say, and therefore, upon that ground, I think we should not interfere in the matter. If the charge of theft had been inserted in the petition in order to prevent the offence from being bailable, without any reasonable ground in the facts stated, we might interfere, but where the question is between breach of trust and theft, the division or partition between which is so very narrow, we should be quite wrong if, at this stage, we were to come to a decision as to which of these two categories the crime ought to be presented under. I am therefore for refusing the application on these grounds. In regard to the other ground upon which the application is rested I do not think it would be right in us to entertain it. The Crown will consider the matter, and I feel certain will not act oppressively.

LORD JUSTICE-GENERAL, LORD DEAS, LORD ARDMILLAN, LORD YOUNG, and LORD MURE concurred.

LORD NEAVES was absent.

THE COURT refused the petition.

WM. OFFICER, S.S.C.—J. A. JAMIESON, W.S., Crown Agent.—Agents.

No. 4.
Dec. 8, 1875. Stewart v. Edwards.

ROBERT STEWART, Appellant.—*Balfour—Asher.*
ANDREW EDWARDS (for the Police Commissioners of Partick), Respondent.—*Sol.-Gen. Watson—Brand.*

General Police and Improvement Act, 1862 (25 *and* 26 *Vict. c.* 101), *sec.* 130.—*Held* that the 130th section of the General Police and Improvement Act, 1862, which required "owners of common stairs," &c, to make, on the requisition of the Police Commissioners, "provisions for lighting such common stair," &c. "in a suitable manner, and for that purpose to provide and erect all necessary lamps, and alter, repair, and renew the same," did not impose on the owners the duty of supplying gas or other illuminating substance.

HIGH COURT. Lord Justice-General. Lord Justice-Clerk. Lord Ardmillan. Lord Mure. Justiciary Clerk.

THE question raised in this appeal, under the Summary Prosecutions Appeals Act, 1875, from the judgment of the Police Commissioners of the burgh of Partick, was, whether the appellant, Robert Stewart, as owner of house property in a burgh (to which the General Police and Improvement Act, 1862, applied), which included common stairs or passages, was bound, under the provisions of the 130th section * of that statute, when required by the Police Commissioners of the burgh, "to provide gas as well as gas pipes and jets or burners for lighting the said common stairs and passages."

It was contended for the appellant that the 130th section required the owner to "make provisions for lighting," and specified what these pro-

* 25 and 26 Vict. c. 101 (The General Police and Improvement Act, 1862), sec. 130, enacts,—"The owner or owners of common stairs or passages or private courts, or of lands or premises having a right of access by any common stair or passage or private court, shall, when required by the commissioners, within seven days next after service of an order for that purpose, make provisions for lighting such common stair or passage or court in a suitable manner, and for that purpose provide and erect all necessary lamps, and alter, repair, and renew such lamps to the satisfaction of the commissioners; and in default of compliance with any such order, such owner or owners shall be liable to a penalty not exceeding forty shillings for every day that he or they shall so make default."

visions were, namely, "to provide and erect all necessary lamps, and alter, repair, and renew such lamps," while the 131st section laid upon the occupant the duty of cleaning and lighting the lamps so erected; and that this duty laid on the occupant necessarily implied the supplying of the illuminating substance. Further, that this was made clear by the terms of the 126th section, which, when providing for the lighting of public streets, carefully distinguished between the making provision for lighting, and the actual lighting or entering into contracts for lighting by means of oil or gas or other illuminating substance.

Argued for the respondent;—The case of the Police Commissioners providing for the lighting of public streets, and that of a private owner providing for the lighting of a common stair or private court, were very different. In the former case no one but the commissioners who supplied the lamps could supply the gas. But in the latter case the commissioners might be satisfied that one or two lamps were sufficient for a common stair or court in which a dozen or twenty different families resided. It was impossible that the Legislature could have intended to devolve the responsibility of supplying gas for the common stair or court upon the occupants as a body. For there was no provision for arranging for rateable payments for the gas consumed. The attempt would be utterly unworkable, and the commissioners would never know who was responsible, or against whom they were to proceed in the event of failure. Whereas, if the owner provided the gas, the occupants might be trusted in their own interest to light it.

LORD JUSTICE-GENERAL.—There runs through all the clauses of the General Police Act relating to lighting a distinction between two duties, the one of making provision for lighting, the other of lighting after such provision has been made. To make provision for lighting plainly implies the supply of the fixed materials—gas-pipes, lamps, burners, &c.—which are necessary. While to light as plainly implies the supplying of the illuminating material and the keeping it lighted. Now, it would be very extraordinary if the sections of this statute which deal with the matter of lighting should invert the ordinary arrangement between landlord and tenant, which is, that the owner supplies the fixed and permanent apparatus for holding or conveying the illuminating substance, while the occupant supplies the illuminating substance which is to be consumed, and lights it when required. If it was the intention of the statute to invert the ordinary rule for general police considerations, then one would expect that this should be clearly provided. But I find no such thing. On the contrary, it is plain that the statute adopts the general rule. I therefore think that the determination of the commissioners must be reversed.

LORD JUSTICE-CLERK, LORD ARDMILLAN, and LORD MURE concurred.

THIS interlocutor was pronounced:—"Reverse the determination of the magistrate, and remit the case to him to dismiss the complaint, and find the appellant entitled to expenses in this Court: Remit the account thereof to the Clerk of Court to tax and report, and decern."

J. W. & J. MACKENZIE, W.S.—RONALD, RITCHIE, & ELLIS, W.S.—Agents.

No. 5.

Dec. 8, 1875.
Donaldson v. Linton.

JAMES DONALDSON, Appellant.—*D.-F. Watson—R. V. Campbell.*
THOMAS LINTON, Respondent.—*M'Laren—Brown.*

Public-House Certificate, breach of—Public-Houses Acts Amendment Act, 1862, schedule (A), No. 2.—In an appeal against a conviction for breach of a public-house certificate by selling exciseable liquor to a child "apparently under fourteen years of age," *held* that though there would be no breach of certificate committed by supplying liquor to such child when he is a messenger for an adult, yet the publican is not entitled to assume, without inquiring and satisfying himself, that the child is the messenger of an adult.

HIGH COURT. Lord Justice-General. Lord Justice-Clerk. Lord Ardmillan. Lord Mure. Justiciary Clerk.

THIS was an appeal presented to the High Court of Justiciary on a case stated under the "Summary Prosecutions Appeals (Scotland) Act, 1875," for James Donaldson, public-house keeper, Edinburgh, against Thomas Linton, procurator-fiscal of the Edinburgh Police Court.

The appellant had been convicted by the Sheriff in the Police Court of breach of certificate by selling exciseable liquors in his premises, No. 7 Hamilton Place, Stockbridge, on 28th October 1875, to Robert Matheson, aged eight years or thereby.

One of the conditions of a public-house certificate (25 and 26 Vict. c. 35, schedule (A), No. 2) is that the publican "do not sell or supply exciseable liquor to girls or boys apparently under fourteen years of age."

The appellant's public-house on the day in question was in charge of his daughter-in-law, Mrs Helen Ross or Donaldson, and an assistant, Sarah Weir. The facts set forth in the case by the Judge in the Police Court were—"The boy Robert Mathieson, being a boy between eight and nine years of age, and apparently under fourteen years of age, was sent alone into the appellant's shop about ten o'clock in the forenoon of the day libelled, and at his request was supplied with half a gill of whisky put into a bottle, and for which he paid twopence-halfpenny for the whisky, and a penny for the bottle. The boy Mathieson in so acting had been sent to the shop by another boy, William Mason, who had also supplied him with the money for the whisky and bottle. Mathieson was asked no questions in the shop as to whom the liquor was for, he was not known in the shop, and he left the shop carrying with him the bottle containing the whisky, which he handed to the boy Mason in a neighbouring street, out of the sight and knowledge of the person in charge of the appellant's shop. Mason, with other boys then present, drank the whisky, Mathieson not getting any part thereof. The person in charge of the appellant's shop had on the same day, about an hour previous to Mathieson's visit, refused to sell whisky when Mason, accompanied by two or three other boys, but not by the boy Mathieson, had come in a party into the shop for it. Mason was about thirteen years of age. He was a message boy in the employment of a licensed grocer in the neighbourhood of appellant's shop. Mrs Helen Ross or Donaldson and her assistant, Sarah Weir, stated in evidence that their custom in managing the shop was to supply boys and girls with exciseable liquors when they believed that they came only as messengers for adults, and to refuse such supply when they knew, or had reason to suspect, that it was for the children themselves and their own consumption. Mrs Helen Ross or Donaldson further stated, that in this particular case she believed that the boy Mathieson was acting only as such messenger, and that the drink supplied to him was not for his own consumption.

"The questions of law for the opinion of the Court of Justiciary were:—(1) On the facts stated, were the spirits sold by the appellant to the boy

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Robert Mathieson, contrary to the terms and intent of the appellant's certificate? (2) Is it necessary, to constitute the breach of certificate libelled, for the prosecutor to prove that exciseable liquors were sold to the boy Robert Mathieson for himself and his own consumption? (3) Was it a sufficient defence for the publican that, under the circumstances above stated, he believed the boy to be a messenger, and that the liquor supplied was not to be consumed by him or other boys under fourteen years of age?"

LORD JUSTICE-GENERAL.—This is a very clear case. The appellant has been convicted under the Public Houses Act of 1862 of a breach of his certificate, in respect that on 28th October last he sold whisky to a child of eight years of age.

The *species facti* as disclosed in the complaint laid against him were that "he did, in his licensed premises at Hamilton Place aforesaid, sell spirits or other exciseable liquors to Robert Mathieson aged eight years or thereby," &c. That appears to me to be a relevant charge. True, it might perhaps be more correct, and in the general case even necessary, to add "and apparently under fourteen years of age," but in the case of so young a child as Mathieson that was hardly requisite. The facts alleged were found proved.

Now, I do not think that the mere fact of sale to a child apparently under fourteen years of age is itself conclusive. For I would not carry the operation of the statute so far as to say that, if the child comes as a messenger from an adult, and the publican is satisfied that he is such messenger, yet the publican if he supplies the child with liquor is to be held to have committed a breach of certificate. Nor would I say that if the publican knows the child to be in the habit of coming as a messenger from a certain adult, he is not entitled to trust to that use without making any special inquiry. But what I am clear of is this, that the publican is not entitled to sell to a child apparently under the age of fourteen years without inquiring and satisfying himself that the child is truly a messenger for an adult.

Now, how do the facts in this case stand? The child entered the shop, and asked for so much whisky, and tendered the price. The whisky was thereupon put into a bottle and given to the child, who took it away. The child was unknown to those in charge of the shop. They had never seen him before. They asked no questions, made no inquiry, and took no steps to satisfy themselves whether the child was a messenger or not.

Under these circumstances I entertain not the slightest doubt that a breach of certificate was committed, and that the Sheriff's judgment in the Police Court was sound.

LORD JUSTICE-CLERK, LORD ARDMILLAN, and LORD MURE concurred.

THE COURT pronounced this interlocutor:—"Answer the first question in the case in the affirmative, and the second and third questions in the negative: Affirm the determination of the inferior Judge: Dismiss the appeal: Find the appellant liable in expenses," &c.

ALEX. WYLIE, W.S.—GRAHAM & JOHNSTON, W.S.—Agents.

No. 6.

Dec. 16, 1875.
Black v. Bradshaw.

EBENEZER STOTT BLACK, Appellant.—*Gloag, A.-D.*
DAVID BRADSHAW, Respondent.

Pouching—Day Trespass Act, 1832 (2 *and* 3 *Will. IV. c.* 68), *sec.* 1—*Person residing with Tenant.—Held* that a person who resided with his sister on a farm of which she was tenant, and who assisted her in the management thereof without remuneration except his board, was not, as regarded the said farm, protected from the operation of the Day Trespass Act by reason of the provision in the first section thereof, which allows a person charged with a trespass to prove, by way of defence, any matter which would have been a defence to an action at law for such trespass.

HIGH COURT.
Lord Justice-General.
Lord Justice-Clerk.
Lord Ardmillan.
Lord Mure.
Justiciary Clerk.

THE respondent, David Bradshaw, designed in the appeal as "lately a flesher, and now or lately residing at High Glenluig in the parish of Mochrum and county of Wigtown, or at Low Glenluig in the parish of Mochrum foresaid," was charged at the instance of the appellant, Ebenezer S. Black, procurator-fiscal in the Justice of Peace Court, Wigtownshire, with a breach of the Day Trespass Act, 2 and 3 Will. IV. c. 68, committed on the farm of High Glenluig above mentioned.

A preliminary plea was taken for the respondent founded on section 1 of the Act 2 and 3 Will. IV. c. 68,* to the effect that being a member of the family of the tenant of the land he could not be guilty of the offence charged.

This plea the Justices, after proof led, sustained.

The procurator-fiscal took an appeal under the Summary Prosecutions Appeals Act, 1875.

The facts stated in the case, as proved to the satisfaction of the Justices, were, that the respondent was the brother of Mrs Livingstone, the tenant of the farms of High and Low Glenluig; that Mrs Livingstone was a widow without children, and resided on the farm of Low Glenluig; that the respondent resided with her there, and had done so for at least five years; that he assisted her in the management of Low Glenluig, and worked occasionally on both that farm and High Glenluig without receiving wages; that he lived in family with Mrs Livingstone, and received his board from her; that he was not bound as a servant or to continue with Mrs Livingstone longer than he felt inclined.

The question of law stated for the opinion of the Court was,—"Whether the respondent, in the circumstances stated, is guilty of the offence of trespass under the Day Trespass Act, 2 and 3 Will. IV. c. 68?"

Argued for the appellant;—The tenant was the only person who could not commit an offence under the Day Trespass Act.[1] It had been held that a farm servant was not excluded from the provisions of the Act,[2] and the position of the respondent was even less favourable than that of a farm servant.[3]

No appearance was made for the respondent.

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* 2 and 3 Will. IV. c. 68, sec. 1, enacts, ". . . . . Provided always that any person charged with any such trespass shall be at liberty to prove, by way of defence, any matter which would have been a defence to an action at law for such trespass."

[1] Smellie v. Lockhart, June 1, 1844, 2 Broun, 194; Kinnoul v. Tod, Dec. 15, 1859, 3 Irv. 501, 32 Scot. Jur. 154.

[2] Selkirk v. Kennedy, Dec. 14, 1850, J. Shaw, 463; Reaper v. Duff, Feb. 6, 1860, 3 Irv. 529, 32 Scot. Jur. 478.

[3] Porter v. Duff, March 22, 1858, 3 Irv. 57, 30 Scot. Jur. 518.

At advising,— No. 6.

Dec. 16, 1875. Black v. Bradshaw.

LORD JUSTICE-CLERK.—In this case the respondent, Bradshaw, was charged before the Justices of Peace for the county of Wigtown with a breach of the Day Trespass Act. The Justices came to the conclusion that the respondent, from the circumstance of his residence on the farm on which the trespass was libelled as committed, could not be guilty of an offence under the Act.

Though the brother of the tenant, the respondent does not seem to have had any official position in regard to the farm. He assisted in the management, and even sometimes himself worked, but he was free to go or come as he pleased, and to do as much or as little as he liked. Whether at the time of the charge he had any other occupation does not appear from the case stated, but apparently at one time he was a flesher. It is in fact impossible to distinguish his position from that of an ordinary visitor, though his visit may have been one of a long duration. The question is whether under these circumstances he comes under the provisions of the Day Trespass Act.

Were the question open I should hold it to be one of difficulty. A tenant has been held to be excluded while a farm servant has been held to be included within the category of possible offenders under the Act. Now, it is not easy to draw a logical distinction between these two cases. The question in both was, how far was the panel committing a trespass on the occasion libelled by being on the land. And the argument for the panel in both was that the offence charged could only be committed by a person who had no right whatever to be upon the land, and it is somewhat difficult to see why the argument should have been accepted in defence of the one and rejected in the case of the other.

But the question is concluded by authority. On the one hand the tenant has been held not to be within the provisions of the Act. It is true indeed that in the case of Smellie (2 Broun, 194) Lord Mackenzie did say that every one with the leave of the tenant would be in the same position as the tenant himself, but the Court has not followed that *dictum* out to its conclusion. For on the other hand it was found in the case of Selkirk (J. Shaw, 463) that a farm servant did come within the provisions of the Act.

Now, the respondent here was not even in the position of a farm servant. There was not the same necessity or call for him to be on the land. He was not there in respect of his ordinary occupation, and cannot therefore be in a more favourable position than a farm servant. He does not, in my opinion, differ from a mere stranger who may happen to be residing with the tenant. I think, therefore, the appeal should be sustained.

LORD ARDMILLAN concurred.

LORD MURE.—I also concur. And I think that there are provisions in the statute which warrant a distinction being drawn between the case of a tenant and that of a farm servant or a visitor, and more especially because there are certain powers conferred on the tenant or occupant authorising him to do certain things towards carrying the Act into effect.

LORD JUSTICE-GENERAL.—I am of the same opinion. I am quite satisfied, and very much on the grounds stated by Lord Mure, that the distinction between a tenant and a farm servant is a sound one.

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THE COURT pronounced this interlocutor:—"Answer the question in the case in the affirmative: Reverse the determination of the Justices; remit the matter to them with this opinion, and direct them to proceed in consistency therewith: Find no expenses due, and decern."

J. AULDJO JAMIESON, Crown Agent.—Agent.

No. 7.

Mar. 1, 1876.
M'Adam v. Laurie.

WILLIAM M'ADAM, Appellant.—*Lang.*
WILLIAM KENNEDY LAURIE, Respondent.—*Mackintosh.*

Game—Day Trespass Act, 2 and 3 Will. IV. c. 68—Trespass—Rabbits—Tenant's Power of delegating right to kill Rabbits.—The tenant of a farm, who resided at a distance, put his daughter and her husband into the farm to manage it. *Held* that the rabbits not being reserved to the landlord, the tenant was entitled to authorise his son-in-law to kill rabbits, and that the son-in-law was, in virtue of the tenant's authority, exempted from the provisions of the Day Trespass Act.

HIGH COURT. Lord Justice-Clerk. Lord Ardmillan. Lord Young. Justiciary Clerk.

THIS was an appeal to the High Court of Justiciary under the Summary Prosecutions Appeals Act, 1875, from the Justice of Peace Court of the stewartry of Kirkcudbright.

The case stated set forth that the appellant, William M'Adam, had been charged at the instance of the respondent, William Kennedy Laurie, of Woodhall, with a contravention of the Day Trespass Act (2 and 3 Will. IV. c. 68), sec. 1, inasmuch as on 3d September 1875, he did "unlawfully enter, and was, without leave of the said William Kennedy Laurie, found trespassing upon the lands known as the farm of Cullenoch, in the occupation of George Henderson and James Henderson, or one or other of them, in the parish of Balmaglin, the property of the said William Kennedy Laurie, in search or pursuit of game."

That the appellant denied the charge of trespassing in pursuit of game, but admitted that he had on the day libelled killed three rabbits on the farm of Cullenoch, and maintained that he was entitled to do so, his wife being tenant of the farm, and he having written permission from her to kill rabbits thereon, which he produced, and in the event of its being found that his wife was not tenant of the farm, the foresaid George Henderson being so, and he having also written permission from him to kill rabbits thereon, which permission he produced.*

That the appellant managed the said farm of Cullenoch, and, with his wife, who was a daughter of George Henderson, occupied the farm-house. That they and their family were the only persons resident upon it. That George and James Henderson occupied other farms at a considerable distance from Cullenoch, and resided there.

That it was admitted by the respondent that the tenant of the farm of Cullenoch was entitled to kill rabbits thereon, there being no reservation of them in the lease.

That it was proved that the appellant was found trespassing on the farm of Cullenoch as libelled.

That the Court found it established that George Henderson was tenant of the farm of Cullenoch.

That the Court found the appellant guilty of the contravention charged, "upon the ground that the said George Henderson could not grant him

* It was at the time of the prosecution and of this judgment of the Court of Justiciary a depending question in the Court of Session whether the appellant's wife or George Henderson was tenant of the farm of Cullenoch.

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permission to kill rabbits on said farm, so as to protect him from prosecution under the Day Trespass Act."

The question of law submitted to the Court was:—"Can the appellant, in the circumstances stated, be convicted of the trespass libelled?"

It was stated for the respondent when the case came to be argued before the Court of Justiciary that the admission that the rabbits were not reserved to the landlord in the lease of Cullenoch was erroneous, and made by his agent *per incuriam*, and he offered to produce the lease. The Court, however, declined to look at it.

It was also stated for the respondent that the letters founded upon by the appellant, both from his wife and from George Henderson, giving him permission to kill rabbits, were granted after the date of the offence libelled. This appeared to be the case from the dates they bore. The letter from George Henderson, however, was to the effect that the appellant "has had, and now has," such permission.

Argued for the appellant;—Taking it that George Henderson was tenant of the farm, still it was admitted that he did not reside on it, but put his daughter and the appellant, her husband, into it, to manage it. As a tenant was held not to invade any person's right by being on his farm in pursuit of game, so neither did a person put into the management of a farm by an absentee tenant. The latter could not any more than the former be guilty of a contravention of the Day Trespass Act. Further, a tenant who has right to kill rabbits is entitled to delegate that right to any one, and particularly to his manager, when he himself does not reside on the farm. Otherwise he could neither keep down rabbits nor claim against his landlord for damages in respect of them.

Argued for the respondent;—The appellant, as merely manager of the farm, must be held to be in the position of a farm servant, and to be capable of a contravention of the Day Trespass Act.[1] The tenant who, though contrary to the fact, must in this case be held to have right to kill rabbits, was not entitled to delegate that right, and even if he was so entitled he had not in point of fact so delegated it at the date of the offence libelled, but only attempted to do so *ex post facto* for the purpose of the defence to this prosecution.

LORD YOUNG.—There was here no trespass in any admissible sense of the word. The ordinary meaning attached to the word "trespass" is the entering upon land where you have no right to be. The appellant was certainly not guilty of trespass in that sense.

But for the decisions which have been pronounced on the point I should be inclined to say that trespass upon land in pursuit of game meant trespass in the ordinary sense above noticed, and not trespass upon a right attaching to land. But the only other admissible sense of the term trespass is that in which it is frequently popularly employed—namely, transgression—invasion of the rights of others. Now, there was nothing of that sort here. Even assuming that the true tenant of this farm was the appellant's father-in-law, surely he was entitled to put him into the farm to manage it, and, at the same time, to communicate to him the right which he had to kill rabbits. Had the rabbits been reserved to the landlord then there might have been a trespass upon the landlord's right, and that would have raised a different question. But the case stated to us assumes that the rabbits were not reserved to the landlord.

[1] Earl of Selkirk v. Kennedy, Dec. 14, 1850, J. Shaw, 463; Black v. Bradshaw, Dec. 16, 1875, *supra*, p. 18.

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A suggestion was made in the course of the argument that the permission to kill rabbits granted to the appellant by his father-in-law was an after-thought to meet the exigencies of the defence. But the suggestion does not commend itself to my mind. There was no reason why leave should not have been given all along. It was the most natural thing in the world that it should be so, and there was no necessity for its being in writing. On the whole matter, therefore, I am clearly of opinion that the conviction was bad, and ought to be set aside.

LORD ARDMILLAN.—I do not think there can be any doubt that the presence of the accused on the ground, if innocent, is not in itself a trespass; and, therefore, the prosecutor must prove that the accused by his conduct shewed that he was truly a trespasser. Now, even setting aside the question whether the appellant's father-in-law or his wife is the tenant of this farm, at any rate it is stated as a fact, and we must so accept it, that the rabbits were not reserved. The tenant had therefore right to kill them, and having this right he was not bound to exercise it *proprio manu*. He was entitled to employ a man to keep down rabbits. If, then, he gave his son-in-law, who resides on the farm, authority to kill rabbits on the farm, that son-in-law could not be convicted of poaching by trespassing in pursuit of game, by reason of his acting under that authority.

LORD JUSTICE-CLERK.—The first thing pleaded by the respondent was that the Justices had found the appellant guilty of trespassing as libelled, and that we must infer that they had satisfied themselves on the evidence of that fact. But I cannot look at that as a finding in fact. It is rather, I think, an inference in law from the facts set out in the case, which bear the appellant's admission of having killed three rabbits, but say nothing about any other evidence of the contravention libelled. Therefore the case comes to this, that the appellant, being the husband of the occupant of the farm, killed these rabbits with permission of the tenant, who was not himself the occupant, and the question is, Is the appellant therefore liable to be convicted under the Day Trespass Act? I am of opinion that he is not. The appellant's wife occupied the farm, and the appellant managed it. Even without leave of the principal tenant he was entitled to kill and keep down the rabbits, if nothing were said to the contrary. But the rabbits were not reserved by the landlord, and the appellant had the leave of the tenant. I concur therefore in thinking that the answer we must give to the question put to us by the inferior Court is that the appellant cannot, in the circumstances stated, be convicted under the Day Trespass Act.

THIS interlocutor was pronounced:—"Answer the question in the negative: Reverse the determination of the Justices, and remit the case to them to dismiss the complaint: Find the appellant entitled to expenses in this Court: Remit the account thereof," &c., "and decern."

DANIEL TURNER, S.L.—RUSSELL & NICOLSON, C.S.—Agents.

No. 8.

Mar. 4, 1876. Simpson v. Lord Advocate.

ALEXANDER SIMPSON, Petitioner.—*Macdonald—J. A. Reid.*
THE LORD ADVOCATE, Respondent.—*Muirhead, A.-D.*

Crime—Running Letters—Criminal Letters.—A person was apprehended on 30th October, and committed to prison on 6th November 1875, on a charge of

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theft. On 18th December the prisoner obtained letters of intimation, which were intimated to the Crown on 20th December 1875. On 17th February 1876 the prisoner was served with an indictment citing him before the High Court of Justiciary on 28th March, these dates being respectively the fifty-ninth and ninty-ninth days from the date of the prisoner commencing to run his letters. On the averment that he had been already four months in prison, and that he believed it was not the intention of the Crown to proceed to trial on the 28th March 1876, but to apply for warrant to serve criminal letters on him under 1701, c. 6, and try him at the Dundee Spring Circuit Court, the petitioner craved the Court, before granting warrant for serving criminal letters upon him, to appoint him to appear and shew cause why such warrant should not be granted.

Petition *refused*—and observed that even if the petitioner had made out a case of hardship the Court would not interfere with the issuing of criminal letters, but would only require the Crown to give notice to the petitioner before a warrant of recommitment was applied for with a view to the service of the letters.

HIGH COURT. Lord Justice-Clerk. Justiciary Clerk.

THIS petition, presented to the High Court of Justiciary, set forth that the petitioner, Alexander Simpson, joiner, Dundee, was on 30th October apprehended and on 6th November 1875 committed for trial on a charge of theft.

That bail was refused and the case remitted for trial before the Sheriff and a jury, but that this order for trial was countermanded.

That on 11th December 1875 the petitioner applied to the High Court of Justiciary to be admitted to bail, but that the application was refused.

That on 18th December 1875 the petitioner obtained letters of intimation, intimation of which was made to the Crown authorities on 20th December 1875. That no step was, however, taken by the Lord Advocate until the 17th February 1876, being the fifty-ninth day after the intimation of the letters, when the petitioner was served with an indictment charging him with theft, and citing him to appear before the High Court of Justiciary on 28th March 1876, being the fortieth day from the date of citation, and the ninty-ninth day from the date of the intimation of the letters.

That the petitioner had reason to believe that it was not the intention of the Crown authorities to proceed with his trial on the 28th March 1876, but to apply for warrant to serve criminal letters upon him under the Act of 1701, c. 6, and under these letters to try him at the Dundee Spring Circuit Court.

That the petitioner had already been four months in prison, and would have been five months by the 28th March 1876. That since the date of his commitment no additional charge had been brought against him, nor had anything occurred to prevent the Crown bringing him to trial, and in particular that nothing had since occurred which could warrant the Crown in delaying the trial, or of a kind contemplated by the Act 1701, c. 6, the whole information on which the Crown were proceeding having been in their possession from the first.

That in delaying his trial for the period of five months the Crown authorities had acted oppressively, and should be granted no further delay beyond the 28th March 1876.

And that in the circumstances he was entitled to be heard before a warrant for serving criminal letters upon him was granted.

The prayer of the petition was,—"May it therefore please your Lordships, after such intimation to the Lord Advocate as to your Lordships shall seem proper, to appoint the petitioner, before any warrant is granted for serving criminal letters upon him, to appear, by his agent or counsel, before your Lordships, and to state to your Lordships the grounds upon which he humbly entreats said warrant should not be granted."

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The petition was, on 1st March, appointed to be intimated to the Lord Advocate, and was heard on 3d March.

At advising,—

LORD JUSTICE-CLERK.—This petition is substantially of the nature of a caveat that criminal letters should not issue on a bill without notice to the petitioner. There is at present no application for criminal letters on the part of the Crown. On the contrary, the prisoner has been indicted for trial before this Court on the 28th of this month. If I thought that the petitioner had disclosed a case of hardship I should not have interfered with the issuing of criminal letters, which by long practice does not require the intervention of a Judge, but I might have required the prosecutor to give reasonable notice to the prisoner before a warrant of recommitment was applied for with a view to the service of the letters. But seeing that the Dundee Spring Circuit, at which the prisoner may probably be tried, commences on the 29th of this month, and looking to the terms of the prisoner's declaration, which I have read, there is no case stated which calls for the interference of the Court.

THE COURT refused the petition.

RONALD, RITCHIE, & ELLIS, W.S.—J. A. JAMIESON, Crown Agent.—Agents.

No. 9.

Mar. 27, 1876. Lord Advocate v. Wormald.

HER MAJESTY'S ADVOCATE.—*Sol.-Gen. Watson—Gloag, A.D.*
JOSEPH DAWSON WORMALD.—*Fraser—Mair.*

Indictment—Theft—Relevancy.—In an indictment charging alternatively theft and breach of trust, it was stated in that part of the minor which related to the charge of theft that the panel, being a law-agent, and having been entrusted by a client to uplift a sum belonging to him, deposited in bank, for the special purpose of investing the same in heritable security, did then steal and theftuously away take the said sum. *Held* that this was a relevant charge of theft.

HIGH COURT. Lord Justice-General. Justiciary Clerk.

JOSEPH DAWSON WORMALD was charged with the crime of theft, as also breach of trust and embezzlement, "in so far as (1) you, the said Joseph Dawson Wormald, being a writer to Her Majesty's signet, and being, time first after libelled, in practice as a law-agent in Edinburgh, in partnership with Charles Anderson, sometime law-agent in Edinburgh, under the name and firm of Wormald and Anderson, writers to the signet, and the said firm of Wormald and Anderson having been employed as law-agents for Andrew Donaldson, causeway-layer, now or lately residing in or near Buccleuch Street, Edinburgh, and you, the said Joseph Dawson Wormald, having, as law-agent of the said Andrew Donaldson, or otherwise, become aware that he, the said Andrew Donaldson, had certain sums of money belonging to him deposited in his name in the bank of Scotland at Edinburgh, and in the Union Bank of Scotland at Edinburgh, did, on various occasions in the months of August and September 1871, represent to the said Andrew Donaldson, who was at that time an inmate in the Royal Edinburgh Asylum for the Insane at Morningside, near Edinburgh, that the said sums should be uplifted from the said banks and invested in his name on heritable or other sufficient security; and the said Andrew Donaldson having, in consequence of your representations as aforesaid, on or about the 8th September 1871, authorised and entrusted you as law-agent foresaid, or the said firm of Wormald and Anderson, to uplift the said sums belonging to him, and deposited in his name in the Bank of Scotland and Union Bank of Scotland as aforesaid, for the special purpose of investing the same, when so uplifted, in his name on heritable

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security, with the exception of £100 thereof; and having instructed and entrusted you so to invest the said sums, with the exception foresaid, when you so uplifted the same, and you, the said Joseph Dawson Wormald, having, on the authority foresaid, on or about the 8th September 1871, uplifted and received, on behalf of the said Andrew Donaldson from the Bank of Scotland at the office of the said bank in Bank Street, Edinburgh, the sum of £404, 11s. 7d. sterling, being the amount contained in a deposit-receipt of the said bank in name of the said Andrew Donaldson, dated 11th February 1871, and interest thereon, you did, on the said 8th day of September 1871, or on some other of the days of that month, or of the month of October immediately following, and within or near the premises of the said bank in Bank Street aforesaid, or within or near the premises in Princes Street, Edinburgh, then occupied by the said Wormald and Anderson, or elsewhere in the city of Edinburgh to the prosecutor unknown, wickedly and feloniously steal and theftously away take the said sum of £404, 11s. 7d. sterling: or otherwise you, the said Joseph Dawson Wormald, did fail to invest the said sum of £404, 11s. 7d. sterling, or any part thereof, on heritable security in the name of the said Andrew Donaldson, or to account therefor to the said Andrew Donaldson, and you did, time and place above libelled, wickedly and feloniously, and in breach of the trust reposed in you as aforesaid, embezzle and appropriate to your own uses and purposes the said sum of £404, 11s. 7d. sterling, the said sum of money so stolen or embezzled and appropriated by you, as above libelled, being the property or in the lawful possession of the said Andrew Donaldson, and consisting of bank or banker's notes, and of gold, silver, and copper or bronze money, or one or more of them."

There was a similar charge in regard to another sum of £236, 11s. 11d.

Objected for the panel;—On the face of the indictment there was manifestly no obligation on the panel to deliver the money *in forma specifica*, and therefore there could be no relevant charge of theft.[1]

Replied for the Crown;—In the case of Climie, relied on for the panel, there was great difference of opinion on the bench, and the case was a special one. The mere fact that a certain amount of trust was connected with the possession of the money was not in itself sufficient to take appropriation of the money by the person so entrusted out of the category of theft.[2] The libel disclosed with sufficient plainness that the panel had obtained control over Donaldson's deposit-receipt, not that he might become his banker, but for the sole purpose of investing the money.

LORD JUSTICE-GENERAL.—The objection raises a somewhat nice and delicate question—perhaps not one of very great practical importance, in so far as the interests of the prisoner are concerned, for the crime remains practically the same in character whether it be theft or breach of trust. But still it is necessary, the question having been raised, that I should dispose of it. Assuming the statement in the minor proposition in as far as regards the charge of theft, the whole amounts to this—that Mr Donaldson had money in the bank to the amount of £600, that he was advised by Mr Wormald, as his law-agent, that it would be desirable to have that money invested in heritable security, and that in consequence of that he granted the necessary authority to Mr Wormald, as his law-agent, to invest the money in heritable security for him, and that in order to

[1] Climie, May 21, 1838, 2 Swinton, 118.

[2] M'Intosh, Feb. 2, 1835, 13 S. 1168; Murray and Tait, Nov. 18, 1829, cited in Alison's Criminal Law, vol. i. p. 251; Smith and Wishart, May 18, 1842, 1 Broun, 342.

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enable Mr Wormald to carry out his instructions, Mr Donaldson endorsed in his favour certain deposit-receipts which he held for the money. Now, the duty of a law-agent, in these circumstances, clearly was to seek for an heritable security, and when he had found one, then to uplift the money from the bank and pay it to the borrower. But he certainly had no authority in the circumstances disclosed in the indictment to uplift that money until he had obtained an heritable security. Therefore, when he uplifted the money without having obtained the heritable security he did an act which was not authorised by Mr Donaldson at all, and the statement is that in such circumstances he uplifted the money on the 8th September 1871, and on that day stole the money. Now, in these circumstances, I am driven to the conclusion that this is a relevant charge of theft.

THE objections to the libel were accordingly repelled, and the libel found relevant.

J. A. JAMIESON, Crown Agent.—WILLIAM OFFICER, S.S.C.—Agents.

No. 10.

April 4, 1876. Barlas v. Chalmers.

WILLIAM BARLAS, Appellant.—*Millie.*
WILLIAM CHALMERS, Respondent.—*Muirhead, A.-D.*

Administration of Justice—Trespass—Question of Civil Right.—In a criminal prosecution before a Justice of Peace Court, for fishing for salmon without leave of the proprietor, the accused admitted having fished for salmon on the day and at the place libelled, but maintained that as a member of the community of Perth he had a right to fish at the place libelled, and in support of his contention produced a copy, admitted to be correct, of a royal charter in favour of the citizens of Perth, and offered to prove that possession had followed upon the charter of the right to fish for salmon at the place libelled from the date of the charter to the present period.

The Justices stated their opinion that they could not go into the question of heritable right, and, on the ground that a *prima facie* title had been produced by the complainer, convicted the accused. *Held*, that a question of civil right being involved, the Justices should have either sisted procedure or dismissed the complaint, and—conviction *quashed.*

Perth Circuit. Ld. Ardmillan. Ld. Craighill.

ON 23d September 1875 a complaint under the Summary Procedure Act, 1864, was presented to the Justices of Peace for the county of Perth by William Chalmers, solicitor in Perth, on behalf of the Tay District Board, against William Barlas, ironmonger, Perth, in which the accused was charged with having contravened "The Salmon Fisheries (Scotland) Act, 1868," and the Act 7th and 8th Vict. c. 95,* incorporated therewith, "in so far as upon Saturday the 4th day of September 1875, or about that time, the said William Barlas did wilfully take, fish for, or attempt to take or aid or assist in taking, fishing for, or attempting to take salmon, grilse, sea-trout, whitling, or other fish of the salmon kind in or from the river Tay, at a part of said river near to or between the fishing station on the left bank of said river, commonly called or known by the name of 'Thumbie' station, in the parish of Scone and county of Perth, and the fishing station on the right bank thereof, commonly called or known by the name of 'Muirton' station, in the parish of Perth and county foresaid, and that without having a legal right or permission from the Right Honourable the Earl of Mansfield, proprietor of the salmon-fishings there, and did on said occasion take or kill fish of the salmon kind."

* 7 and 8 Vict., c. 95, sec. 1, quoted *infra*, p. 28.

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Upon the 28th September 1875 Barlas compeared before the Justices, and pleaded not guilty.

The procedure before the Justices sufficiently appears from the following excerpts from the minutes of procedure;—"The complainer put in an extract registered disposition by the Earl of Kinnoull to the Earl of Mansfield, dated 10th April, and registered in the General Register of Sasines 20th September 1875." . . .

At an adjourned diet on 13th October 1875, the defender's agent "stated that the defender had a right to fish for salmon at the place libelled without permission from the Earl of Mansfield, and denied that the Earl of Mansfield was exclusive proprietor of the salmon-fishings there. The defender also admitted that he did fish for and kill salmon on the day and at the place libelled, in virtue of his own right to do so. . . .

"The defender's agent here put in a printed copy of a charter by King James VI. in favour of the town of Perth, dated 15th November 1600, and a translation thereof. Mr Chalmers, the prosecutor, admitted the correctness of the copy charter produced, and the defender's agent offered to prove that possession had followed upon that charter of the right to fish for salmon at the places mentioned in the complaint from the date of said charter to the present period, and also of the salmon-fishings themselves at these places, and tendered for examination the following witnesses" (here follows a list of the witnesses tendered). . . .

"The Justices refuse to allow such a proof, as they are of opinion that they cannot go in this case into a question of disputed title, and they are satisfied that a *prima facie* title has been produced and made out by complainer, which is all that is necessary for the decision of this case of trespass or fishing without leave of a proprietor. . . .

"At Perth, the 13th day of October 1875 years, the Justices, in respect of the admissions by defender and evidence adduced, convict the said William Barlas of the contravention charged against him as libelled, and therefore adjudge him to forfeit and pay to the complainer the sum of ten shillings of modified penalty for the said contravention, together with the sum of two pounds as modified expenses, and ordain instant execution," &c.

Barlas appealed to the Circuit Court of Justiciary, under the 30th section of the Salmon Fisheries Act, 1868.

Argued for him;—The Justices, while refusing to go into the question of disputed title, had virtually decided that question against the accused.

LORD ARDMILLAN.—The appellant questions the right of the complainer to prosecute him for fishing in the Tay. He pleads that, as a citizen of Perth, he has an ancient right to fish for salmon in the place libelled. The complainer, or prosecutor, produces a recent title in favour of Lord Mansfield. A dispute having arisen as to the title, the Justices had two courses to choose between, and either of them would have been a competent course. They might, on the one hand, have said, "This case involves a question of heritable right, and we cannot convict until that question is tried in the ordinary way in which such civil questions are tried," and they might have sisted procedure; or, on the other hand, they might have dismissed the case, as involving a question which they could not competently decide. The latter, I think, would have been the most appropriate course, for the object is, obviously, to try the question of right, and a conviction on this prosecution, without disposing of the question of right, must be most unsatisfactory. I am of opinion that the conviction, obtained without ascertaining the rights of the parties, is liable to serious objection, and should be quashed accordingly.

No. 10. LORD CRAIGHILL concurred.

April 4, 1876. Barlas v. Chalmers.

THIS judgment was pronounced:—"Sustain the appeal, recall the judgment complained of, and discharge and annul *in toto* the conviction recorded against the appellant: Find the appellant entitled to expenses; modify the same to the sum of £5, 5s., for which and the dues of extract decern against the respondent."

WILLIAM YOUNG, Perth.—PARTY.—Agents.

No. 11. WILLIAM GRANT, Appellant.—*D.-F. Watson—Balfour.*
NICHOLAS WRIGHT, Respondent.—*Innes.*

May 31, 1876. Grant v. Wright.

Crime—Contravention of Salmon Fisheries Act, 1844 (7 *and* 8 *Vict. c.* 95).—A fisherman was charged with a contravention of the Salmon Fisheries Act, 1844, sec. 1, by unlawfully and wilfully taking, fishing for, or attempting to take sea-trout by means of set lines. It was stated in defence, that, finding sea-trout upon lines which, as he averred, he had baited and set for flounders in a bay or estuary of the sea frequented by both kinds of fish, he had appropriated them. He was acquitted by the Sheriff after evidence led. In an appeal under the Summary Prosecutions Appeals Act, 1875, at the instance of the prosecutor, *held* that the question whether the respondent had *wilfully taken* the fish, in contravention of the statute, was one of fact for the inferior Judge; that there was no question of law for the Court; and appeal *dismissed.*

HIGH COURT. Lord Justice-Clerk. Lord Young. Ld. Craighill. Justiciary Clerk.

THIS was an appeal on a case stated under the Summary Prosecutions Appeals Act, 1875, from the Sheriff Court of Elginshire.

The case set forth that the respondent, Nicholas Wright, was charged at the instance of the appellant, William Grant, writer in Elgin, who prosecuted for the Local Fishery Board, with having been guilty of an offence within the meaning of the Act 7 and 8 Vict. c. 95,* in so far as, on Friday, 31st March 1876, he did unlawfully and wilfully take, fish for, or attempt to take, one or more salmon, &c., by means of set lines, in or from the estuary of the river Findhorn, at a place near Elvin Point, and opposite the village of Findhorn, without a legal right or permission from the proprietor of the salmon-fishings there.

That at the trial, which took place under the Summary Procedure Act, 1864, before the Sheriff-substitute (D. Macleod Smith), on 7th April 1876, the respondent pled not guilty, and that evidence was led to the following effect:—

"Elvin Point is on the west side of the estuary of the Findhorn, about opposite to the village of Findhorn, which is on the east side of the estuary. The distance between the village and Elvin Point is about half a mile. The estuary expands inland for about two miles beyond the village into what is known as the bay of Findhorn, which is covered by the tide at high water to the extent of several square miles." . . . .

"On the occasion in question, about eight o'clock in the morning, the respondent and another man were seen from the village of Findhorn hauling fishing lines at Elvin Point, and coming across in a coble from there to the village. On arrival at the village side of the estuary they

* The Salmon Fisheries (Scotland) Act, 1844 (7 and 8 Vict. c. 95), sec. 1, enacts that, "if any person, not having a legal right or permission from the proprietor of the salmon fishery, shall, from and after the passing of this Act, wilfully take, fish for, or attempt to take, or aid or assist in taking, fishing for, or attempting to take, in or from any river, stream, lake, water, estuary, firth, sea loch, creek, bay, or shore of the sea, or in or upon any part of the sea within one mile of low-water mark, in Scotland, any salmon, grilse, sea-trout, whitling, or other fish of the salmon kind, such person shall forfeit and pay," &c.

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saw one of the salmon fishery constables and the village constable and the manager of the salmon fishery waiting for them. They thereupon tried to go away again with the coble and its contents, but she was seized hold of by the salmon fishery constable. The respondent taking with him one of the fishing lines and a basket thereupon jumped into the water. The line, on being taken hold of by the constable, broke, and on the part of it retained by the constable there were found three sea-trout. There were ten trout on the other part of the line which remained in the basket, some of which were sea-trout, and the witnesses were uncertain as to the description of the remaining three. There were also some flounders in the coble. The lines were ordinary haddock lines, baited with sand eels."

It was contended on behalf of the respondent that he was fishing for flounders in the ordinary manner, in a place where the public were entitled to fish for them, and that he was not fishing for sea-trout or other fish of the salmon kind, but that the trout having come upon his lines, he was entitled to appropriate them.

The Sheriff also stated that "it was proved that the estuary and bay of Findhorn are frequented by flounders, and that it has been the custom to take them there from time immemorial. It was also proved that sea-trout frequently came upon the lines so set, and that it has been the practice of the fishermen so finding them to appropriate them. On the other hand, some of the witnesses expressed an opinion that the place where the respondent was seen hauling the lines was, from the nature of the bottom, a more likely place for trout than for flounders. In point of fact, however, both kinds of fish were got there."

The Sheriff assoilzied the panel, whereupon the prosecutor took this appeal.

The question of law stated for the opinion of the Court was:—"Whether the respondent, professing to be fishing for flounders, and having fished in a manner adapted for that purpose in the estuary of the Findhorn at a place, stated by some of the witnesses of the complainer to be more likely for catching sea-trout than flounders, but which was, in point of fact, frequented by both kinds of fish, and one or more sea-trout having come upon his line, and having been there found by him, and having been taken by him from the line and appropriated, has thereby rendered himself liable to the penalties of the statute founded on in the complaint?"

After hearing counsel for the appellant,—

LORD YOUNG.—I do not think it is necessary to call for a reply. The question was put to the counsel for the appellant at an early stage of the case, what exactly was the error in law complained of? His answer was that the Sheriff had gone wrong in holding that a person finding fish of the salmon kind upon his line and wilfully appropriating them, did not wilfully take them, and was not therefore guilty of an offence under the statute.

I cannot accept that answer as satisfactory. I cannot assent in the least degree to the view that an offence under the Act is committed by merely taking a fish of the salmon kind—say a sea-trout—which comes upon the taker's line, while he is lawfully and innocently fishing for other fish. By the statute founded on it is made an offence punishable by fine, &c., wilfully to "take, fish for, or attempt to take, or aid or assist in taking, fishing for, or attempting to take" fish of the salmon kind. Whether upon any occasion a person has wilfully taken or attempted to take such fish is *prima facie* at least a question of fact to be determined by the magistrate. It may be that in dealing with this

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question of fact the magistrate may fall into an error in point of law. But the error in point of law must be of a different complexion, in order to entitle the party to the remedy of appeal to this Court, from the error of coming merely to a wrong conclusion on the evidence submitted to him.

On this evidence, of which the Sheriff has given a precis in the case, I think it is not improbable that any one of your Lordships would have arrived at a different result. I do not say that your Lordships would have done so, but only that it is not improbable. But that would be a totally different thing from holding that the Sheriff has proceeded on an error in point of law. For that would be to hold that the Sheriff had taken an erroneous view of the meaning of wilfully taking fish of the salmon kind.

Designedly, and with a certain intent, is, I conceive, the meaning of "wilful," as used in the statute. Whether the party so acted was a question of fact. It is not for the magistrate to give to the Court a general account of the evidence, as he might to a private friend, and ask, "in your view of the law should I have convicted." But even on this lengthy statement it does not appear to me that the Sheriff had an erroneous view on this point, that to constitute an offence under the Act the thing must have been wilfully done.

Mr Balfour stated to us that if the appellant, finding a salmon on his line, even in a dead or moribund condition, took it off and put it in his creel, that that amounted to wilful taking; but that if finding it there, he threw it into the water, or into a ditch, or sent it to the owner or lessee of the fishery, with a message expressive of regret that it had come in the way of his line, that that would not have amounted to wilful taking. But if he took it wilfully he is not relieved of the consequences by the manner in which he disposed of it.

On the whole matter, it is a question of fact on the evidence, whether, under any circumstances, a party is guilty of an offence under the Act. But this question of fact is for the magistrate and not for the Court, and it is not on such a narrative of evidence as we have here that we are to interfere.

I may add, with reference to one statement in the Sheriff's note, that taking fish contrary to an Act of Parliament does not hinder the fish becoming the property of the taker as *feræ naturæ*, and that this is the origin of the clause of forfeiture of the fish taken introduced into most of the statutes for the protection of salmon-fishings.

LORD CRAIGHILL concurred.

LORD JUSTICE-CLERK.—In order to prevent misapprehension, I am anxious to explain that I by no means say that the species or class of facts stated in this case may not justly lead to the conclusion, in point of fact, that the accused wilfully fished for salmon. It cannot be denied that the respondent was at one time in the possession of these fish, having taken them off the hook, or having them on the hook of the line which he had set. That is a fact which, coupled with other facts, may prove that the taking—the catching—was wilful. The Sheriff must decide first on the fact, which depends on the evidence, and if he had decided that the facts did prove the statutory offence, we could not have interfered. The only question of law really involved seems to be whether, if the capturing or attempt to capture be innocent, and the fish is brought to land innocently, the subsequent appropriation of the fish amounts necessarily, and by itself, to the offence provided for in the statute. I am of opinion that the statutory offence implies and requires wilful capturing, or wilful attempt to

capture, and that if this was not proved to the satisfaction of the Sheriff his judgment contains no error in law which we are called on to rectify. No. 11.

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THIS interlocutor was pronounced:—"In respect the facts stated do not raise any question of law for the opinion of the Court, affirm the determination of the inferior Judge, dismiss the appeal: Find the appellant liable in expenses," &c.

HORNE, HORNE, & LYELL, W.S.—BOYD, MACDONALD, & LOWSON, S.S.C.—Agents.

HENRY NIXON, Inspector of Poor of Port-Glasgow, Pursuer and Respondent.—*Brown.*
DAVID CALDWELL, Inspector of Poor of Ayr, Defender and Appellant.—*Rhind.* No. 12.

June 1, 1876.
Nixon v. Caldwell.

Process—Jurisdiction—Small Debt Act (1 *Vict. c.* 41).—*Held* that it is competent for the Sheriff in the Small Debt Court to entertain an action by an inspector of poor for recovery of payments of aliment to a pauper not exceeding £12, notwithstanding that it may be necessary to determine incidentally the question of the pauper's settlement.

The inspector of poor of the parish of A raised an action in a Sheriff Small Debt Court against the inspector of poor of the parish of B for payment of £1, 15s. of aliment paid by the pursuer to a pauper alleged to have a settlement in the parish of B. The defender denied the alleged settlement, and pleaded that the action was incompetent in the Small Debt Court, as the decision required the determination of the question of the pauper's settlement, and involved the future liability for the pauper's aliment. *Held* that the action was competent.

THIS was a small debt appeal certified by Lord Mure from the Circuit Court at Ayr.

HIGH COURT. Lord Justice-Clerk. Lord Young. Ld. Craighill. Justiciary Clerk.

On 22d July 1875 the respondent, Henry Nixon, inspector of poor of the parish of Port-Glasgow, raised an action in the Sheriff Small Debt Court at Ayr against the appellant, David Caldwell, inspector of poor of the parish of Ayr, concluding for the sum of £1, 15s., as per account. The account contained seven items of 5s. each, paid as stated therein, "as aliment (by the parochial board of Port-Glasgow, from date of statutory notice on 5th December 1874 to intimation of pauper being struck off, sent on 24th February 1875) to the pauper Jane M'Geary or Heaney, whose settlement is in the parish of Ayr."

The defender objected that the action was incompetent in the Small Debt Court, (1) in respect that whilst nominally the demand in the action was payment of a debt, the real question to be decided was the question of settlement, a matter which it was not competent to decide in that Court; and (2) in respect that the determination of the question of the pauper's settlement would involve the determination of continuing liability* of the parish of Ayr for future aliment to the pauper.

The Sheriff held the action competent, and, on a proof, determined that the pauper's settlement was in the parish of Ayr, and decerned in favour of the pursuer for the sum sued for.

The defender appealed to the next Circuit Court of Justiciary, and Lord Muir certified the case to the High Court, in respect of the judgment in

* It was averred by the defender that the pauper had been struck off the roll with the object of creating jurisdiction in the Sheriff to try the case, and that on the expiration of the last fortnight, for which the aliment sued for in this action was given, she again became chargeable, and renewed notice of chargeability was at once sent by the pursuer to the defender. This notice, dated March 1875, was produced in process.

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the case of Caldwell v. Collins, September 1, 1875, 3 Poor-Law Mag. (new series), 530.[1]

LORD JUSTICE-CLERK.—This is an important question, and is raised perhaps in a purer form than in any case to which we have been referred.

I put aside the averment, on the one side, that the pauper had been struck off the roll, and on the other side that the pauper, if struck off the roll at all, was so struck off with a view to the action, and was again placed on the roll at the termination of the last fortnight for which the aliment is sued for. Passing by that, the question is, whether an amount of aliment, which I must assume in this inquiry to be due, can be sued for in the Sheriff Small Debt Court. I am of opinion that if it can be sued for at all in an inferior Court it can be sued for in the Sheriff Small Debt Court. It is a debt or demand not exceeding the value of £12.

The first objection of the defender is, that though the amount sued for is less than £12, and nothing more than £12 can be demanded under the summons, and therefore the action is *ex facie* competent, yet the competency depends on what is stated in defence, namely, that the defender's parish is not the parish of the pauper's settlement. That, it is said, raises a question which cannot competently be determined in a Small Debt Court. Now, I cannot think that the competency of any action can depend on what the defender states in defence to that action, although, of course, the Judge, being competent to entertain the action, may yet give effect to the defence, and dismiss the action. If in this case the defender had admitted the pauper's settlement but disputed the amount due, or maintained that the relief ought not to have been given, there would have been little doubt as to the competency of the action. If the Sheriff has jurisdiction over the process, is not that conclusive, whatever may be stated in defence? Putting aside all question as to how far future liability is involved in the decision, I have arrived at the opinion that the action is competent. At the same time, if the defender is not satisfied with the decision of the Sheriff on the question of settlement which he has raised, and if he thinks the matter of sufficient importance to justify the course, this Court is always open to him, and he may come here with a declarator.

But it is said, in the second place, that the decision in this case virtually decides the question of continuing liability, and that therefore the summons involves a great deal more than is actually concluded for in it. Now, here I would draw attention to the distinction between the words used in the Small Debt Act,—"All civil causes . . . . . wherein the debt, demand, ... in question shall not exceed the value of . . . . . ," and those used in the Sheriff Court Act, 1853, limiting the reviewable causes to "causes not exceeding the value of ." Now, in the latter case the value of the cause may be a great deal more than the pecuniary amount actually concluded for, and therefore the amount of the debt or demand in question has not been held conclusive, in such cases, of the competency of review. But in the former case there is nothing to entitle us to go beyond the pecuniary conclusion in the summons in judging of the abstract competency of the action in the Sheriff Small Debt Court. It is

[1] *Authorities referred to.*—Lindsay v. Barr, June 23, 1826, 4 S. 748; Drummond v. Hunter, Jan. 12, 1869, 7 Macph. 347, 41 Scot. Jur. 203; Macfarlane v. Friendly Society of Stornoway, Jan. 27, 1870, 8 Macph. 438, 42 Scot. Jur. 209; Robertson v. Melville, Feb. 24, 1860, 22 D. 893, 32 Scot. Jur. 375; Anderson v. Gill, Dec. 22, 1860, 23 D. 250, 33 Scot. Jur. 111.

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another question whether the Sheriff, in the exercise of his discretion, will entertain the action, or will not rather say to the parties, I must sist this action until you determine this important question on which it turns in a more deliberate manner. But it is a matter for the Sheriff's discretion. If he chooses to entertain it, it cannot be said that the action is incompetent; and I should be sorry to come to any conclusion that would lead to this result, that the small debt jurisdiction could not be made available in the case of any payment falling due periodically where one of the termly payments has fallen into arrear. Generally speaking, there is no question as to liability raised in such cases, but only as to amount. But even where there is a question of liability raised, it would be a most unfortunate thing if the matter could not be summarily disposed of, leaving the settlement of the ultimate right to be decided, if the parties wish it, in a competent Court.

LORD YOUNG.—I am of the same opinion. I must, however, confess that there are some features in the case which at one time occasioned a measure of doubt in my mind.

I would first call attention to what appears to me to be the leading point in the appeal, namely, that we are tied down to a hard and dry question of jurisdiction. The case comes before us under the Sheriff Small Debt Act, and in cases brought under that Act appeal is only competent (setting aside corruption, malice, and oppression, as having no place here) "on such deviations in point of form from the statutory enactments as the Court shall think took place wilfully, or have prevented substantial justice from having been done, or on incompetency, including defect of jurisdiction of the Sheriff." It is only under the ground of defect of jurisdiction that the appellant's case can possibly be brought. It is only if there is want of jurisdiction in the Sheriff over this process, or the parties to it, that the appellant can prevail.

Now, on the face of the summons, the Sheriff has jurisdiction. The cause is a civil cause. The debt sued for does not exceed £12. The ground on which the debt is demanded may apply to other demands which are future or contingent, and may be conclusive of them so far as the Sheriff Small Debt Court is concerned, but nevertheless the debt sued for is under £12, and the Sheriff, *prima facie* at least, has jurisdiction.

The question is, whether, when it appears from the nature of the defence that the Sheriff is asked to determine a question which might involve continuing liability, and might go a certain length to establish it, his jurisdiction ceases.

One can conceive many cases in which it would be very proper for the Sheriff to supersede consideration of a small debt case, and refuse to apply himself to the consideration of an important question incidentally raised, and having a wide application, but necessary to be determined for the decision of the case before him. For instance, were it answered to a summons against a man for necessary furnishings made to his wife, that the woman in question was not his wife, I can conceive that the Sheriff, if he believed the defence to be seriously stated and insisted upon, might very properly sist procedure until the question was determined in an appropriate action.

But all that does not touch the question of jurisdiction, but only the propriety and expediency of its exercise in a particular case before something else is done; and even so the Sheriff must always be on his guard against such defence being stated for the mere purpose of temporarily avoiding his jurisdiction.

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But though the Sheriff has this power in his discretion to supersede consideration of a cause, it does not follow that he is not at liberty to proceed in a cause within his jurisdiction if he considers that he can do complete justice in it without waiting for the determination of any point raised in a more deliberate manner. Of that matter he is the sole judge, and with his discretion we cannot interfere. If he has competent jurisdiction our review is excluded.

LORD CRAIGHILL concurred.

THIS interlocutor was pronounced:—"Dismiss the appeal: Find no expenses due therein, and decern."

W. K. THWAITES, S.S.C.—ADAM SHIELL, S.S.C.—Agents.

No. 13.

June 30, 1876.
Nicol v. M'Callum.

DUNCAN NICOL, Appellant.—*Balfour—J. P. B. Robertson.*
ARCHIBALD M'CALLUM, Respondent.—*D.-F. Watson—Asher.*

The Harbours, Docks, and Piers Clauses Act, 1847 (10 *Vict. c.* 27), *secs.* 81 *and* 82.—In virtue of their powers under the Harbours, Docks, and Piers Clauses Act, 1847, which is incorporated in the Greenock Port and Harbours Act, 1866, the Greenock Harbour Trustees appointed and licensed a sufficient number of persons as weighers within the limits of the port and harbour of Greenock. By the 82d section of the first-mentioned Act it is provided that where a sufficient number of meters and weighers have been appointed by the trustees, masters of vessels and owners of goods discharged at the port shall not employ any person other than a weigher or meter licensed by "the trustees, or appointed by the Commissioners of Customs, to weigh or measure the same;" and if in such case any person other than a meter or weigher, licensed by the trustees, or appointed by the Commissioners of Customs, shall weigh or measure any such goods as aforesaid, such person, as well as the person by whom he shall be employed, shall incur a penalty.

Held that the object of the provision was to exclude the employment for hire of unlicensed weighers, but not to prevent merchants and others weighing their own cargoes by the hands of their own clerks.

HIGH COURT. Lord Justice-Clerk. Lord Young. Ld. Craighill. Justiciary Clerk.

THIS was an appeal on a case stated under the Summary Prosecutions Appeals Act, 1875, by one of the magistrates of the burgh of Greenock.

The object of the proceedings raised in the Burgh Court was to determine whether or not shipowners and merchants were bound in weighing their cargoes at the port of Greenock to employ the licensed weighers appointed by the harbour trustees.

The Greenock Port and Harbours Act, 1866, which incorporated generally the Harbours, Docks, and Piers Clauses Act, 1847, appointed the Magistrates and Town Council of Greenock, along with nine trustees elected by the shipowners and ratepayers, trustees of the harbour of Greenock.

The Greenock Port and Harbours Act, 1866, sec. 38, empowered the harbour trustees to appoint "meters and weighers, and all other officers authorised by the Harbours, Docks, and Piers Clauses Act, 1847, herewith incorporated."

The Harbour, Docks, and Piers Clauses Act, 1847 (10 Vict. c. 27) enacted, sec. 81,—"Where, under the special Act, the undertakers (*i.e.* the harbour trustees) shall have the appointment of meters and weighers, the undertakers may appoint and license a sufficient number of persons to be meters and weighers within the limits of the harbour, dock, and pier, and remove any such persons at their pleasure, and may make regulations for their government, and fix reasonable rates to be paid or

other remuneration to be made to them for weighing and measuring goods." No. 13.

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Sec. 82.—"When a sufficient number of meters and weighers have been appointed by the undertakers, under the powers of this and the special Act, the master of any vessel, or the owner of any goods shipped, unshipped, or delivered within or upon the harbour, or dock, or pier, shall not employ any person other than a weigher or meter licensed by the undertakers, or appointed by the Commissioners of Her Majesty's Customs, to weigh or measure the same; and if in such case any person other than a meter or weigher licensed by the undertakers, or a meter or weigher appointed by the Commissioners of Her Majesty's Customs, shall weigh or measure any such goods as aforesaid, such person, as well as the person by whom he shall be employed, shall for every such offence be liable to a penalty not exceeding five pounds, and the weighing or measurement of any such goods by any such person shall be deemed illegal."

The facts set forth in the case were—The Greenock Harbour Trustees had in March 1876, in virtue of the statutory powers conferred on them, duly appointed and licensed a sufficient number of persons to be weighers within the limits of the port and harbours of Greenock, and these appointments were thereafter duly notified to the public by advertisements.

The harbour trustees had made and published bye-laws for the government of the licensed weighers so appointed, and had fixed rates for the remuneration, and had prescribed the duties to be performed by them.

Though cargoes of timber, grain, oil, and other articles, the contents of which are ascertained by measurement, were unshipped within the limits of the port and harbour of Greenock, the harbour trustees had not appointed meters as well as weighers under their statutory powers.

In the case selected to try the question in dispute between the harbour trustees and the shipowners and merchants of Greenock a vessel had arrived at the port of Greenock with a cargo of sugar, of which 1940 bags were consigned to Messrs Robert Fraser and Company. The whole of the cargo was to be ascertained by the process of weighing. The rest of the cargo was duly weighed by a licensed weigher upon beams and scales belonging to the harbour trust. Robert Fraser and Company, however, refused to employ a licensed weigher to weigh the portion of the cargo consigned to them. Instead thereof the appellant, Duncan Nicol, a clerk in the employment of Robert Fraser and Company, attended at the discharge of the portion of the cargo belonging to them, and performed the functions of weigher, seeing to the adjustment of the beams and scales, which belonged to Robert Fraser and Company, his masters, and not to the harbour trustees, superintending the porters employed to assist in the manual operations of weighing and recording the weight.

The harbour trustees, through the respondent, Archibald M'Callum, procurator-fiscal of Court, prosecuted Duncan Nicol before the magistrates of the burgh of Greenock (who had police jurisdiction over the limits of the port and harbour under the Greenock Police and Improvement Act, 1865, and the Greenock Port and Harbours Act, 1866, sec. 85) for an offence under the 82d section of the Harbours, Docks, and Piers Clauses Act, 1847.

The magistrate "found on the evidence adduced that the appellant had weighed the said goods, and contravened the clause in the Act founded on, and ordained him to pay a modified penalty of 63s., and failing payment to be imprisoned for the period of five days."

An appeal was taken, and the following questions of law were stated

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for the opinion of the Court of Justiciary:—"(1) Whether the inferior Judge, as one of the magistrates of Greenock, had jurisdiction, and could competently try and decide upon the foresaid complaint, in respect that he is one of the trustees of the port and harbours of Greenock? (2) Whether, the said trustees not having appointed or licensed meters in virtue of the powers conferred on them by the 81st clause of the said Harbours, Docks, and Piers Clauses Act, 1847, and the Greenock Port and Harbours Act, 1866, the appellant was guilty of an offence within the meaning of the first-mentioned Act? (3) Whether, under the circumstances stated, the inferior Judge was justified in finding that the appellant was the weigher of the said sugar within the meaning of the Harbours, Docks, and Piers Clauses Act, 1847, and the Greenock Port and Harbours Act, 1866."

LORD YOUNG.—I do not think it necessary to call for a reply on the part of the appellant in this case. On the first question submitted to us we intimated that we did not require argument from the respondent, as we were satisfied that there was no valid objection to the jurisdiction.

On the second question I have no difficulty either. I am very clearly of opinion that if there was a sufficient number of weighers appointed and licensed by the harbour trustees under their statutory powers it forms no ground of defence to a complaint for not employing one of these licensed weighers that licensed meters have not also been appointed by the trustees for measuring a totally different class of cargoes.

The real question is the third, "Whether, under the circumstances stated, the inferior Judge was justified in finding that the appellant was the weigher of the said sugar within the meaning of the Harbours, Docks, and Piers Clauses Act, 1847, and the Greenock Port and Harbours Act, 1866?" Now, the facts of the case seem to be as follows:—A portion of a cargo of sugar was consigned to Robert Fraser and Company, and when it was being discharged from the ship they sent one of their clerks to superintend the weighing of the sugar on beams and scales which belonged to them, but were within the precincts of the Greenock port and harbours. For so acting the clerk was prosecuted at the instance of the harbour commissioners for an offence within the meaning of the 82d clause of the Harbours, Docks, and Piers Clauses Act, 1847, which is incorporated in the Greenock Port and Harbours Act, 1866. He was convicted, and has taken an appeal to this Court under the Summary Prosecutions Appeals Act, 1875.

The question is, whether the appellant, in so obeying his employers' orders, was guilty of the statutory offence. I am of opinion that there is no good ground for holding that he was. If it could be held that Robert Fraser and Company, by sending their clerk to superintend the weighing of their sugar, were acting illegally, the proper course for the harbour commissioners to take would be to prosecute them and not their clerk—to prosecute the persons employing the unlicensed weigher, and not their clerk acting under their orders. But I cannot hold that a merchant sending down one of his own clerks to weigh his own sugar is guilty of a contravention of the statute.

The meaning of the statutory provisions are undoubtedly, as contended for by the counsel for the respondent, to provide a trustworthy staff of weighers and meters at the ports to which those provisions apply. But to effect this end, all that it is thought necessary to do is to prevent interlopers, in whom the harbour com-

missioners have no confidence, and in whom they cannnot invite the public to place confidence, from putting themselves forward and engaging in the work. The commissioners are therefore empowered to appoint and license a sufficient number of weighers and meters, and the public are prohibited from employing any other than the licensed weighers and meters so appointed, and any would-be interlopers are excluded, firstly, by subjecting themselves in a penalty if they accept employment as meters or weighers within the limits of the port and harbours, and, secondly, by subjecting any person who employs them in a like penalty.

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But a merchant who sends his own clerk to weigh his own cargo for his own satisfaction is not within these statutory provisions at all, and they were not intended to prohibit his doing so. The provisions of this statute may be instructively compared with the provisions of the Hackney Carriage Acts, or the regulations regarding street porters. None but licensed hackney carriages or licensed porters are allowed to ply for hire in any street, railway station, &c., but that does not prevent a person using his own carriage or carrying his own luggage, or instructing his servant or clerk to meet him and carry it for him.

These are the views which I take of these statutory provisions anent licensed weighers. As the respondent's counsel very properly said, it is for the public convenience that a staff of thoroughly trustworthy weighers should be kept up. But that is done by preventing unlicensed persons hiring themselves out in the capacity of weighers, not by preventing the owner of goods from weighing them himself, or by the hands of his clerk, which is just the same thing. If he employs any one for the purpose, it must be a licensed weigher. It is not incumbent on him to have his goods weighed at all, neither is there anything to prevent him weighing them himself.

LORD CRAIGHILL.—I concur. The facts set forth in the case do not appear to me to involve a contravention of the statute. All that the appellant did was to employ his clerk to weigh his goods upon his own scales after they were landed from the ship. This was a thing done for his own satisfaction; and by the result, others, unless of consent, could not be affected. When weighing or measuring is necessary, that freight or shore dues, or other charges on the cargo, may be ascertained, the provisions of the statute presumably will be followed. The merchant cannot elude, and much less can he prevent resort to their operation, when this is desired by others concerned. And all that the 82d section prohibits is, as I think, the employment in such a case of unlicensed meters or weighers when a sufficient number of licensed meters or weighers have been appointed.

The LORD JUSTICE-CLERK concurred.

THIS interlocutor was pronounced:—"Answer the first question in the case in the affirmative; with reference to the second question, find that if the trustees had appointed a sufficient number of weighers it would not be a defence against a charge of weighing in contravention of the Act that the trustees had not also appointed meters; and answer the third question in the negative: Reverse the determination of the magistrate: Find the appellant entitled to expenses," &c.

MASON & SMITH, S.S.C.—WILLIAM ARCHIBALD, S.S.C.—Agents.

No. 14.

June 30, 1876.

Arthur v. Peebles.

THOMAS ARTHUR, Suspender.—*M'Kechnie.*
JOHN KIDD PEEBLES, Respondent.—*Balfour.*

Indictment—Relevancy—Day Trespass Act, 2 and 3 Will. IV. c. 68, sec. 1.—The Day Trespass Act, 2 and 3 Will. IV. c. 68, sec. 1, makes it an offence to "commit any trespass by entering or being in the daytime upon any land, without leave of the proprietor, in search or pursuit of game," &c.

Held that a general conviction proceeding upon a complaint which charged the panel with having in the daytime committed a trespass, "by entering or being without leave of the proprietor in and near to a field on the farm of K" in pursuit of game could not be sustained.

HIGH COURT. Lord Justice-Clerk. Lord Young. Ld. Craighill. Justiciary Clerk.

THIS was a suspension of a sentence pronounced in the Justice of Peace Court of Lanarkshire at Airdrie against the suspender, Thomas Arthur, on a complaint at the instance of the respondent, John Kidd Peebles, procurator-fiscal, charging him, and also another panel, Abraham Burton, with having been guilty of an offence, under the 1st section of the Day Trespass Act (2 and 3 Will. IV. cap. 68), "in so far as, upon Monday, the 15th day of May 1876 years, the said Thomas Arthur and Abraham Burton, defenders, did both and each or one or other of them, in the daytime, within the meaning of the foresaid statute, section 1st, commit a trespass by entering or being without leave of the proprietor in and near to a field on the farm of Kirkstyle, in the parish of Old Monkland and county of Lanark, the property of the Rev. Sholto Douglas Campbell Douglas of Rosehall, in the said parish and county, and occupied by James Buchanan, a farmer, residing at said farm of Kirkstyle, in search or pursuit of game, or of deer, roe, woodcocks, snipes, quails, landrails, wild ducks, or conies, and did kill a hare on said field."

The suspender was tried on the complaint, and in respect of the evidence adduced was convicted "of the offence charged," and was adjudged to forfeit a sum of penalty and expenses, and in default of payment to be imprisoned for a period of six weeks.

The main ground of suspension relied on was that while the complaint in part was not relevant, in respect that it libelled as an offence under the statute the commission of a trespass by entering or being without leave of the proprietor "near to" as well as "in" a field on the farm of Kirkstyle, &c.,—the former of which did not amount to an offence under the statute, while the latter did,—yet the conviction was general.*

LORD CRAIGHILL.—The conviction complained of was obtained under the 1st section of the 2d and 3d Will. IV., c. 68, which enacts that "if any person whatsoever shall commit any trespass by entering or being in the daytime upon any land without leave of the proprietor in search or pursuit of game," &c., he shall incur a penalty not exceeding two pounds. Plain it is that to render a complaint relevant what is set forth as having been done must be a thing prohibited. The more closely the words of the statute are followed the safer will be the libelling; but assuming that the *ipsissima verba* are not indispensable the substituted words must be full and no more than full equivalents. If these

* In explanation of the form of the complaint it was stated that the facts of the case, as disclosed on the evidence, were that the suspender and the other panel, Abraham Burton, had been found in pursuit of game, by sending in a lurcher into the field libelled to kill hares, and a retriever to fetch them out when killed, while they themselves did not enter the field but remained on the road which skirted it.

No. 14.

June 30, 1876.
Arthur v. Peebles.

either understate or overstate the elements of the offence there is the danger, if not the certainty, of miscarriage.

The question which on this occasion has to be decided is, whether what is alleged in the complaint is the thing contravention of which constitutes the statutory offence. The allegation is that the suspender did, on the date specified, "in the daytime, within the meaning of the foresaid statute, section 1st, commit a trespass, by entering or being without leave of the proprietor in and near to a field on the farm of Kirkstyle" in search or pursuit of game. This libelling appears to me to be unwarranted by the words of the statute, and consequently is, in my opinion, erroneous and irrelevant. In the first place, it is ambiguous. What is the meaning of "in and near to a field"? The suspender could not be in two places at one and the same time, and therefore we are forced to inquire whether the meaning of the charge against him is that without leave of the proprietor he was in the field, which is the thing prohibited, or that he was only "near to" the field, which is the thing not prohibited. The complaint does not furnish an answer; and upon this ground alone it must, as I think, be held irrelevant. But that is not all; for, in the second place, the allegation is misleading. To say the least, it suggests that being near to a field without leave of the proprietor is a contravention of the statute; and upon this view proof may have been adduced, and the conviction complained of may have been pronounced. The error committed in framing the charge is without excuse, for there is nothing in the words of the statute by which its commission can be explained. But this consideration is comparatively immaterial. It is enough for our judgment that error there has been, and that by this error the suspender may have been prejudiced, or more plainly, improperly convicted. For these reasons the conviction complained of must, as I think, be quashed.

LORD YOUNG concurred.

LORD JUSTICE-CLERK.—I may say that it is not without reluctance that I concur in your Lordships' judgment. My inclination, certainly, was to hold the words "and near to" as superfluous, and to read the words "in and near to" as really meaning simply "in," for I do not think that it was intended to libel two separate offences.

My mind is, however, reconciled to your Lordships' view by the consideration that the being near to any land without leave of the proprietor in pursuit of game is certainly not an offence under the statute, and that the mind of the Court may possibly have been misled by the form in which the complaint is stated, and have been satisfied with evidence that the panel was merely "near to" without being "in" the field in question, without leave of the proprietor, in pursuit of game.

THIS interlocutor was pronounced:—"Pass the bill; suspend the conviction and sentence complained of *simpliciter;* ordain the complainer to be instantly set at liberty; and decern: Find the respondent liable in expenses," &c.

R. A. VEITCH, S.S.C.—C. S. TAYLOR, S.S.C.—Agents.

No. 15.

June 30, 1876.
Kay v. Kelso Local Authority.

JOHN KAY Junior, Suspender.—*Balfour—Moncreiff.*
THE KELSO LOCAL AUTHORITY, Respondents.—*Strachan.*

Process—Suspension—Summary Prosecutions Appeals Act, 1875, 38 *and* 39 *Vict. c.* 62, *secs.* 3 *and* 9.—A having been convicted in the Sheriff Court on a summary complaint, applied to the Sheriff, under the Summary Prosecutions Appeals Act, 1875, sec. 3, to state and sign a case for appeal. After the case was prepared by the Sheriff-clerk in terms of the statute, but before it was adjusted and signed by the Sheriff, A lodged a minute withdrawing his application for a case. He afterwards brought a suspension of the Sheriff's judgment.

Held that he had not appealed in the sense of that and the 9th section of the Act, and that the suspension was not excluded.

HIGH COURT.
Lord Justice-Clerk.
Lord Young.
Ld. Craighill.
Justiciary Clerk.

A COMPLAINT was laid before the Sheriff of Roxburgh, at the instance of the Local Authority of Kelso, against Mr George Home Munro Binning Home, proprietor of Softlaw, and his tenant, John Kay junior, for a contravention of the 16th section (sub-section F) of the Public Health (Scotland) Act, 1867.

The Sheriff convicted Mr Home and his tenant, the present suspender, inflicted a modified penalty, and pronounced an order upon them *ad factum præstandum.*

The date of the Sheriff's final interlocutor in the case was 26th February 1876. On 29th February both Mr Home, and the suspender John Kay junior, applied to the Sheriff, under the 3d section of the Summary Prosecutions Appeals Act,* to state and sign a case for appeal.

On the same day a case was prepared by the Sheriff-clerk and handed to the parties; but before it was adjusted and laid before the Sheriff for signature the suspender, John Kay junior, on 4th March, lodged a minute

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* The statute, 38 and 39 Vict., c. 62, sec. 3, enacts—"On an inferior Judge hearing and determining any cause, either party to the cause may, if dissatisfied with the Judge's determination in point of law, appeal thereagainst, notwithstanding any provision contained in the Act under which such cause shall have been brought excluding appeals against or review in any manner of way of any determination, judgment, or conviction, or complaint under such Act, by himself or his agent applying in writing within three days after such determination to the inferior Judge to state and sign a case, setting forth the facts and the grounds of such determination for the opinion thereon of a superior Court as hereinafter provided; and on any such application being made the following provisions shall have effect:—

"1. The appellant shall not be entitled to have a case stated and delivered to him, unless within the said three days he shall

"(1) Lodge in the hands of the clerk of Court a bond with sufficient cautioner for answering and abiding by the judgment of the superior Court in the appeal, &c.;

"(2) Pay the clerk of Court his fees for preparing the case, &c.

"2. The clerk of Court shall, within four days after caution or consignation and payment being found or made as aforesaid, prepare the case, and submit the same in draft to the parties or their agents.

"3. Should the parties or their agents fail to agree as to the terms of the case, the inferior Judge shall settle the same.

. . . . . .

"5. The appellant shall, within three days after receiving the case, give notice of appeal in writing, together with a copy of the case, to the respondent, and shall, within the same time, transmit the case by post to, or cause it to be lodged with, one of the clerks of the superior Court, together with a certificate under the hand of himself or of his law-agent of intimation as herein required having been made to the respondent."

withdrawing his application for a case for appeal. His name was accordingly struck out of the draft case which had been prepared. Mr Home prosecuted the appeal in his own name, and on 17th March 1876 succeeded in getting the Sheriff's determination reversed, so far as he was concerned, by the High Court of Justiciary. No. 15. June 30, 1876. Kay v. Kelso Local Authority.

John Kay junior afterwards brought this suspension of the Sheriff's judgment.

It was objected by the respondents that the suspension was incompetent, *inter alia*, on the ground that the suspender having taken an appeal under the Summary Prosecutions Appeals Act, 1875, sec. 3, was barred by sec. 9 of that Act from afterwards bringing a suspension.*

LORD JUSTICE-CLERK.—A strict interpretation must always be given to a provision which like this cuts off a common law remedy. There was here certainly an attempt at appeal, but it never came to maturity. Before the appeal can be said to have been taken it fell by the withdrawal of the application to the inferior Judge to state a case.

It was pleaded that, on a party's applying to the inferior Judge to state and sign a case under section 3 of the Summary Prosecutions Appeals Act, 1875, the party has appealed in the sense of the 9th section of that Act, and must be taken to have abandoned all other method of review. I am not, however, prepared to give such a strict interpretation to the statute. My impression is that, unless the procedure provided in the statute for an appeal on a case stated is followed forth to a point which places the case in the hands of a competent Court of review, the common law remedy is not cut off.

LORD YOUNG and LORD CRAIGHILL concurred.

THE COURT accordingly repelled the objection.

DAVID HUNTER, S.S.C.—MACKENZIE, INNES, & LOGAN, W.S.—Agents.

PETER M'INTYRE, Appellant.—*Mair—Campbell Smith.*
THOMAS LINTON, Respondent.—*M'Laren—W. A. Brown.*

No. 16. July 21, 1876. M'Intyre v. Linton.

Public-house—Certificate—9 *Geo. IV. c.* 58, *secs.* 19 *and* 21.—A tenant of a hotel obtained in February 1876 a transfer of the certificate for the sale of exciseable liquors granted to his predecessor for the year from 15th May 1875 to 15th May 1876, and at a licensing Court held on 11th April 1876 the magistrates granted him a new certificate from 15th May 1876 to 15th May 1877. Upon 4th May 1876 he was convicted of having on Sunday, 23d April, sold exciseable liquors to persons not being lodgers or travellers, and his certificate was adjudged to be void and null from the date of the conviction. *Held* that the forfeiture was only applicable to the transferred certificate under which the hotel-keeper was then trading, and did not affect the new certificate which was only to come into force upon 15th May 1876, and that therefore a conviction against him for selling exciseable liquor in July 1876 without a certificate was bad.

Expenses.—Observations (*per* Lord Deas) on awarding and modifying expenses in appeals to the Court of Justiciary.

* Section 9 provides that "any person who shall appeal under the provisions of this Act from any determination of an inferior Judge, from which he is by law entitled to appeal, in any other manner of way, to any superior or other Court, shall be taken to have abandoned such title to appeal in any such other manner of way as aforesaid."

No. 16.

July 21, 1876. M'Intyre v. Linton.

HIGH COURT. Lord Deas. Lord Young. Lord Mure. Justiciary Clerk.

PETER M'INTYRE, tenant of the Queen's Hotel, Greenside Street, Edinburgh, was charged before the Police Court of Edinburgh, at the instance of Thomas Linton, superintendent of police and procurator-fiscal of Court, with having on 1st July 1876 sold exciseable liquor within the said hotel without having first obtained a certificate in terms of the Public Houses Acts Amendment (Scotland) Act, 1862.

The defence was that the accused had a subsisting certificate at the date of the sale complained of.

The facts were as follows:—In February 1876 a certificate for the sale of exciseable liquors in the Queen's Hotel, granted in favour of the former tenant for the year from 15th May 1875 to 15th May 1876, was transferred by the magistrates to M'Intyre. At the Licensing Court held at Edinburgh on 11th April 1876, upon an application by M'Intyre for a renewal of the certificate transferred to him as above mentioned, he obtained a certificate for the sale of exciseable liquors in the said hotel in Greenside Street, Edinburgh, for the year from 15th May 1876 to 15th May 1877. On 24th April 1876 a complaint was presented by the procurator-fiscal to the Police Court, Edinburgh, charging M'Intyre with a breach of his certificate by keeping open his hotel at Greenside Street on Sunday, 23d April 1876, and selling exciseable liquors to several persons, not being lodgers or travellers;* and on 4th May 1876 the Judge officiating in the Police Court convicted him of the offence charged, being a first offence, and besides imposing a fine adjudged his certificate to be void and null from the date of the judgment.†

In virtue of his renewed certificate granted on 11th April 1876, M'Intyre obtained on 16th May an Inland Revenue license, and thereafter recommenced to sell exciseable liquors.

The officiating Judge (Sheriff-substitute Hamilton), on 6th July, found the accused guilty of the offence charged, and ordained him to pay a penalty of £7, and, failing payment, to be imprisoned for six weeks.

M'Intyre appealed to the Court of Justiciary under the Summary Prosecutions Appeals Act, 1875, and a case was stated by the officiating Judge, the question of law being—"Whether, in the circumstances set forth, the Judge officiating in the Police Court of Edinburgh, on the 6th day of July 1876, was in error in holding that the appellant had not a subsisting certificate for the sale of exciseable liquors?"

Argued for the appellant;—The forfeiture of the appellant's certificate contained in the judgment of 4th May could only refer to the certificate then in force, and which had been contravened, *i.e.*, the certificate which expired on 15th May 1876, and could not apply to the certificate for the year beginning with 15th May 1876, which the appellant had obtained the right to receive, but which, on 4th May 1876, was not in existence, and did not come into existence till the 15th of that month. The appellant therefore had a valid certificate in force on 1st July 1876, and the police Judge was in error in holding the contrary.

Argued for the respondent;—What was forfeited by the judgment of 4th May was the whole right of the appellant under the licensing statutes to sell exciseable liquors, at least within his Greenside premises. The appellant's argument involved the assumption that on 4th May he had two such rights, whereas the right which he possessed was one

* The words of the complaint were:—"That Peter M'Intyre . . who holds a certificate for the sale of exciseable liquors at No. 3 Greenside Street, Edinburgh, has been guilty of an offence against the laws for the regulation of public-houses in Scotland, in so far as," &c.

† The words of the judgment were:—"And further adjudges his certificate to be void and null from this date."

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and indivisible, viz., a right to sell exciseable liquors within his premises at Greenside until Whitsunday 1877. 9 Geo. IV. c. 58, sec. 19, declared that a transferred certificate should only be in force until the date of the next annual Licensing Court. The words of the forfeiture could not therefore be satisfied by applying them exclusively to a certificate which had expired before the date either of the contravention or of the conviction.

LORD YOUNG.—This is an appeal against a conviction in the Police Court of Edinburgh on the 6th July, and we have to consider the appeal upon a case stated by the police Judge under the recent statute.

The validity of the conviction depends on whether on 1st July last, the date of the alleged offence, the appellant had a subsisting certificate to sell spirits within the hotel occupied by him in Greenside Street. If he had, the conviction, which proceeded on the footing that he had not, is of course bad. The question whether he had a certificate in force on 1st July depends on the effect of a conviction and sentence against him on 4th May preceding. That conviction appears to have been for selling exciseable liquor on a Sunday to persons not *bona fide* travellers. Part of the sentence was forfeiture of the appellant's certificate under sec. 21 of the Act of 1828. He had then a certificate current until 15th May following, *i.e.*, for eleven days, for although the cerificate he had was a transferred certificate, notwithstanding the language of sec. 19 of the Act of 1828, I am of opinion that the transferred certificate subsisted in force until 15th May. It might be forfeited; but if nothing came in the way it remained in force until 15th May, at which date for the first time a renewed certificate could come into operation. The statute contains a provision by which, in addition to any other penalty, the certificate granted to the offender may be forfeited. The convicting magistrate saw fit to forfeit the certificate the conditions of which had been offended against. The question is, whether the judgment of forfeiture is satisfied by applying it only to the certificate then in force and the conditions of which had been offended against. That is important, for on 11th April the magistrates had granted a certificate to the appellant to come into force on 15th May. The appellant was not in possession of the *corpus* of the certificate, because it was only to come into existence on 15th May, but of the right to get such a certificate. It is contended by the respondent that the forfeiture affected this right which the appellant obtained on 11th April to obtain a certificate to come into force on 15th May. Unless this view is sound, the conviction of 6th July cannot be supported. I am of opinion that the judgment of forfeiture applied solely to the certificate in operation at its date. Every such judgment must be construed with some limitation in regard to place. It is applicable only to the place in which the offence was committed. If the party had another certificate in respect of other premises, situated in another part of the town, the forfeiture for an offence committed in Greenside would have no application to that other certificate. But I am of opinion that there is a limitation of the effect of forfeiture, not only in place but in time. In the course of the argument for the respondent the analogy of a lease was suggested. I think the analogy a dangerous one. It might very well be urged that if a lease contained a clause of forfeiture in the event of certain specified violations of the lease, the forfeiture could only be of the existing lease, and would not extend to a new lease to come into operation upon the termination of the existing lease, although it contained similar provisions.

The case is really very simple. The appellant had a certificate in July last.

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He is convicted of selling exciseable liquor without a certificate. He asks why? and is told that his certificate was forfeited by the conviction of 4th May. Now, upon 4th May, he could do nothing under or against that certificate, because it only came into force on 15th May. I am of opinion, therefore, that upon law and plain sense that certificate was not forfeited, and ought to have been received as an answer to the charge.

LORD MURE concurred.

LORD DEAS.—As your Lordships are of one opinion, the presiding Judge has no vote, but I shall express in a few words the grounds on which I have arrived at the same result.

Upon 6th July the Sheriff-substitute convicted the appellant of having, on the 1st of that month, trafficked in exciseable liquors without a certificate. That conviction is not a conviction of breach of certificate, but for trafficking in exciseable liquors without having a certificate at all. The question whether the appellant had a certificate applicable to that period depends on whether a previous conviction and sentence by the police Judge upon 4th May forfeited not only the certificate then in force but also the certificate applicable to the period from 15th May 1876 to 15th May 1877. The Sheriff-substitute held that the right of the appellant to sell exciseable liquors was forfeited not merely with reference to the period up to 15th May 1876, but with reference to the new period up to 15th May 1877. A good deal might be said upon the policy of these statutes in favour of the view that it was the right to sell exciseable liquor which was forfeited, and not merely the current certificate. But I am of opinion that this is too severe a view of the effect of the statutes in what is really a criminal prosecution, and that the words of the sentence of 4th May apply only to the certificate then in operation, and not to the certificate which the appellant had been found entitled to get, but had not yet got. I am therefore of opinion that the Sheriff-substitute was in error in pronouncing the judgment under appeal.

Upon the question of expenses,—

LORD DEAS.—There is no absolute rule about awarding expenses in this Court, or as to modifying them when they are awarded. It is, however, usual to modify the expenses and save the expense of taxation. The amount of expenses does not depend on the nature of the error into which we may think the inferior Judge has fallen, and it must not be supposed that we go on the footing that there is anything palpably wrong in the Sheriff-substitute's judgment. It was a view which might reasonably be taken, although we differ from it. But in some cases it may be right to have two counsel, while in others one is sufficient. This is a case which it was right to have carefully argued on both sides, and it has been so. We shall, in the circumstances, allow ten guineas of expenses.

THIS judgment was pronounced:—"Answer the question in this case in the affirmative: Reverse the determination of the inferior Judge: Find the appellant entitled to expenses, which modify to ten guineas."

M'CASKIE & BROWN, S.S.C.—RICHARDSON & JOHNSTON, W.S.—Agents.

CASES

DECIDED IN

THE COURT OF SESSION, &c.

1875–76.

WINTER SESSION.

ANDREW GIRVAN, Appellant.—*Macdonald.*
JOHN CAMPBELL, Objector and Respondent.—*M'Laren.*

No. 1.

Nov. 1, 1875.
Girvan v. Campbell.

County Franchise—Valuation-Roll—17 *and* 18 *Vict. c.* 91, *sec.* 34.—Ailsa Craig was let for £30 a-year to two joint tenants, with a cottage thereon which was worth £7, 10s. a-year, together with the right to kill wild fowls, wild goats, and rabbits, under certain restrictions as to quantity and seasons. There was reserved to the landlord full right, without any qualification and without compensation, "to shoot, kill, and carry away fowls, goats, and rabbits" from the Craig. Ailsa Craig was totally incapable of agricultural occupation. It was entered in the valuation-roll as land, value £30 a-year, and the tenants were each entered as voters on the assessor's list as "joint tenant, land, Ailsa Rock." *Held* (*diss.* Lord Ardmillan) that the valuation-roll was conclusive; and objections,—that the accessory right not being heritable, its value must be deducted; and that the landlord's reserved right was such as to give him control over the value, and therefore over the qualification to vote, *repelled.*

Registration Appeal Court. B.

ANDREW GIRVAN was entered in the assessor's roll for South Ayrshire as Andrew Girvan, fisherman, Maidens, joint tenant, land, Ailsa Rock.

It was objected by John Campbell, Maybole, a voter for South Ayrshire, that Andrew Girvan was not entitled to be entered as a voter on the roll, in respect that the right or rights held or possessed by him were not "land," nor in the nature of heritable right, at least not to such an extent as to confer upon him, as joint tenant, a sufficient qualification.

Andrew Girvan produced in support of his right to be a voter on the roll the missives of set of Ailsa Craig for a term of years between the Marquis of Ailsa as proprietor, and himself and his brother William Girvan as joint tenants, dated 20th and 23d October 1873.

There was a cottage on Ailsa Craig of the value of £7, 10s. a-year formerly used for sea-bathing quarters, but which was to be possessed by the lessees exclusively as tenants; and the tenants accepted of this cottage as in a state of complete repair, and bound themselves to keep it and leave it in a like state. When the missives were entered into Ailsa Craig was stocked with goats, rabbits, and wild fowl. It was not adapted for the grazing of

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Nov. 1, 1875. Girvan v. Campbell.

sheep and cattle. Andrew and William Girvan never had stock of any kind of their own on Ailsa Craig. The goats upon it were the property of the Marquis of Ailsa. By the terms of the missives "the tenants are to have power to kill fowls, goats, and rabbits on the Craig, but so as not to reduce the existing stocks thereof, and no fowls, goats, or rabbits are to be killed excepting during the proper seasons for doing so, and they are not to allow other parties to do so. They are also to have the privilege of fishing in the sea around the Craig. They may also prepare and sell blocks for curling stones, but in doing so they are never to employ more than one man in addition to themselves."

It was for the exercise of these rights, along with the possession of the cottage, that the rent stipulated in the lease, viz., £30, was payable. This sum of £30 was entered in the valuation-roll as the annual value of Ailsa Craig. The rights of the said tenants were burdened in the missives with the following reservation, viz., full power to Lord Ailsa "and his friends to land upon the Craig, and to shoot, kill, and carry away fowls, goats, and rabbits thereon; and the tenants are to have no claim for compensation, on any ground whatever, for the animals so killed and carried away."

There was no evidence adduced of the separate values of the rights to kill fowls, goats, or rabbits, or of the privilege of fishing, or taking blocks of stone for making curling stones.

The Sheriff (N. C. Campbell) sustained the objection.

Andrew Girvan appealed, and argued;—The valuation-roll was conclusive on the question of value.* It was not competent to lead evidence to controvert it. Even if it was competent it was for the objector to lead such evidence. And as it was not alleged that this lease was not *bona fide*, all that he could possibly succeed in proving was that these tenants had agreed to give a higher rent than the subject was worth. That was not a ground upon which the claim could be rejected.

Argued for the respondent;—The question here was how far the rent of £30 was paid as the value or for the possession of the heritable subject, and how far as the value of the moveable rights and privileges that went along with it. It was true that the valuation-roll was conclusive of the value of "lands and heritages," but if it could be shewn that the subject of the lease was not all heritable, it was competent to separate it into its component parts, and if it was shewn that a substantial part was not heritable then it fell on the tenant to prove that there remained enough to confer the franchise. Here the Sheriff had rightly held that the accessory right of shooting wild fowls, goats, &c., was not heritable, though of substantial value, and that there was sufficient before him to shew that what remained was not of value to confer the franchise upon two joint tenants.

LORD ARDMILLAN.—I never saw a case like this before. The objector may perhaps have so stated his case as to put himself out of Court. But that this is a claim to the franchise of the most extraordinary character ever heard of I cannot doubt.

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* 17 and 18 Vict. c. 91, Valuation of Lands (Scotland) Act, 1854, sec. 34.—"In all questions and proceedings under any Act of Parliament relating to the franchise, or to the representation of the people in Parliament, it shall be sufficient to refer to an entry in the valuation-roll in force for the time, or last in force under this Act in any county or burgh, and such entry shall be received and taken in all such questions and proceedings as conclusive proof that the gross yearly rent or value of the lands or heritages specified therein is at the date of such reference, and has been from the commencement of the year to which such valuation-roll applies, of the amount therein set forth."

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The subject in respect of which the claim is made is a wild and rugged rock in the open sea. There can be no cultivation and no grazing; and of course the so called tenants have and can have no stock, the rock supporting no living creature except a few wild goats, a few rabbits, and a multitude of wild sea-fowl. There is a small house of the value of £7, 10s. a-year upon the rock, but no other dwelling. This subject was in the autumn of 1873, for the first time, let at this rent of £30 a-year, and the two joint tenants now come forward and claim to be placed on the roll of voters as tenants and occupants.

The question is, do these men occupy as tenants in the sense of the Act? It is not enough that they pay rent. That may be easily arranged. Nor is it enough that the subject let to them is in a certain sense heritable. The subject must be one capable of tenancy, susceptible of occupancy by tenants. Here it is incapable of being cultivated, incapable of being grazed, incapable of being possessed in any of the ordinary modes of possession. This rock is nominally let, but really, except the house, which alone cannot sustain the two claims, the thing let in lease is really the privilege of killing some goats and the wild sea-fowl and wild rabbits, admittedly *ferœ naturæ*, that are found upon the rock. The privilege of killing game does not sustain the franchise, though in certain circumstances it may enhance the value of another substantial subject of lease. But these wild sea-fowl are not game. Then the right—such as it is—to kill these sea-birds is given professedly to the tenants and then reserved to the landlord. While the tenants are to have "power to kill," the landlord reserves "full power to kill." The tenants are to have the privilege of killing under restriction and limitation, and only during certain seasons, and so as not to reduce the existing stock, while the landlord is to have the full and unrestricted power of killing without the tenants having any claim to compensation. Thus there is the form without the substance of a tenancy, since more is reserved than is communicated. I do not enter into the question whether or not the landlord is ever likely to exercise his reserved power to its extreme extent. He may, or may not, according as the tenant pleases or displeases him. But he has taken power to do so. He has introduced into the lease this reserved power of depleting and destroying at his pleasure the only subjects which give it value. By this, he has reserved to himself the power of controlling the franchise, of preserving or destroying it at will. Now, to make a tenant thus dependent upon the mere will or caprice of his landlord for the continuance of the franchise, is, in my opinion, fatal to a free franchise, and must make a lease of this nature altogether a bad qualification. To hold otherwise would, in my opinion, be contrary to the principles of representation and to the constitutional theory of the franchise.

But apart from this, the privilege of killing the wild sea-birds, which are not game and are not property, cannot sustain this claim.

LORD ORMIDALE.—I shall confine myself to the facts as stated in the case submitted to the Court, for by these facts alone are we entitled to determine the rights of parties.

I commence with this, that the subject founded on as a qualification stands in the valuation-roll as worth £30 a-year, and that the claimants as tenants pay that rent for it. Two votes depend upon this qualification, and the value is sufficient to sustain them both. I find, further, in the Valuation Act of 1854, section 34, that "in all questions and proceedings under any Act of Parliament

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relating to the franchise, or to the representation of the people in Parliament, it shall be sufficient to refer to an entry in the valuation-roll in force for the time, or last in force under this Act in any county or burgh, and such entry shall be received and taken in all such questions and proceedings as conclusive proof that the gross yearly rent or value of the lands or heritages specified therein is at the date of such reference and has been from the commencement of the year to which such valuation-roll applies, of the amount therein set forth." Nothing can be more distinct and conclusive than this as to the value of the subjects. It was quite possible, however, that though £30 a-year was the value of the subjects when the valuation-roll was made up, yet the tenant might have parted with a portion of them by the time the Sheriff came to deal with the assessor's list. If that had been the case a good objection to the qualification might on that ground have arisen; and if the objector succeeded in establishing it, the *onus* of proving that enough was left to support the claim might be shifted over upon the claimant. But it is not said here that the tenants have parted with any portion of their holding. No such objection has been taken. It is merely objected that the subjects are not of the requisite value, but to this objection the valuation-roll affords a conclusive answer. It has been suggested, however, that the landlord under his reserved power might render the tenants' holding worthless, and therefore that their alleged qualification is exposed to the objection of defeasibility. But (1) no such objection as that of defeasibility is to be found in the case. (2) It is not to be presumed that the landlord would attempt so to destroy the right he had, for a valuable consideration, given to the tenants; and (3) if he made any such attempt I cannot doubt that he could be interdicted from so acting *in fraudem* of the lease. But it is not said that the landlord has, hitherto at least, done anything to prejudice the tenants' right, and what we have to consider is, what the tenants were in possession of during the qualifying year. Independently of all that, it must, I think, be assumed that, when £30 a-year of rent was agreed to be given for the subject, the tenants had taken into account the landlord's reserved right, and made allowance for it.

In no view, therefore, can I sustain the objection of insufficient value, or the objection of defeasibility either, supposing it had been raised in the case, which I do not think it has. The result is that, in my opinion, the Sheriff has fallen into error, and that his judgment must be reversed.

LORD CRAIGHILL.—I also think that this appeal ought to be sustained.

The appellant is one of two joint tenants; but the subject of the tack is said by the respondent to be peculiar,—because it is a steep rock, is surrounded by the sea, and possesses neither agricultural capacities, nor even pasture grounds on which a few cattle or sheep could be supported. Be it so. There must nevertheless be some attractions—something on account of which Ailsa Craig is considered worth the taking upon tack—worth that which the tenants have become bound to pay, and the mere peculiarity of the place is unimportant in the question whether one of the joint tenants, by reason of the tenancy, possesses the necessary qualification for a vote.

There seem to me to be two points, and only two, which could or might be taken in objecting here to the sufficiency of the qualification. The first is, that the subject of the lease is not heritage within the sense of the enfranchising statutes; and the other is that, so far as heritable, it is not of the requisite value. On the former of these points little if anything requires to be said. In the first

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place, the Sheriff assumes that there is heritage let to the tenants; and his reason for rejecting the appellant's claim is, that the rent or yearly value of what is really heritable is insufficient. In the second place, even if the Sheriff had not held that Ailsa Craig was land or heritage within the meaning of the Acts, I should have experienced no difficulty in coming to the opposite, which I think the true conclusion.

The value of this heritable subject is therefore all that has to be considered. Now, why is the usual test, the written lease, or what in such a case as the present is practically the same thing, the valuation-roll, not to be taken as conclusive upon this point? The reality of the lease is not disputed; and the stipulated rent is the value entered in the valuation-roll. Both landlord and tenant are assessed upon that rent.

The reasons urged for making this case an exception, are (1) That the rent is paid not for Ailsa Craig, which is heritable, but for Ailsa Craig and for the privilege of killing goats, rabbits, and birds upon the rock. This privilege is not heritable, as the respondent contends and the Sheriff appears to assume. But seemingly it has been forgotten that though the privilege of sporting when unconnected with a subject in its own nature heritable is not a qualification, whatever the rent or return which it yields, yet if it be joined to lands or heritages properly so called, the value of both is the test of the qualification. It is urged (2) that the privilege of sporting given by this lease is illusory, and must be thrown out of account, because full power is reserved to the landlord, and to friends of the landlord having his authority, to kill all, the right to kill which has in form of words been conferred on the tenants. Two answers occur to me, either of which is conclusive. The one is, that the landlord could not, without a violation of the lease, destroy the subject which he had let; and the other, that on the opposite assumption this result must have been contemplated by the tenant, who for what remained agreed to pay and is bound to pay the stipulated rent, which consequently must, on this view of the matter, be taken to be the value of Ailsa Craig.

The lease appears to me to be plain, and also for the period of its duration to confer certainty of tenure. Nothing which is let is at the caprice of the landlord, and therefore all apprehension relative to the independence of the voter, should the claim of the appellant be sustained, may be dismissed.

On the whole, I come, without difficulty, to the conclusion that the appeal must be sustained, and the appellant be placed upon the roll.

THE COURT reversed the judgment of the Sheriff.

J. & F. ANDERSON, W.S.—MILLAR, ALLARDICE, ROBSON, & INNES, W.S.—Agents.

No. 2.

Nov. 1, 1875.
Learmont v. Young.

JOHN LEARMONT, Appellant.—*Macdonald.*
THOMAS YOUNG, Objector and Respondent.—*A. J. Young.*

County Franchise—Successive Ownership—Reform Act, 1868, 31 *and* 32 *Vict.* c. 48, *sec.* 13.—*Held* that the successive ownership of different premises, and merely civil possession during the requisite period, did not afford a qualification for a vote in a county.

Registration Appeal Court. B.

JOHN LEARMONT, C.E., Edinburgh, was entered on the assessor's list as proprietor of dwelling-house, garden, &c., Girdwood Street, Peebles, and, in succession, of dwelling-house, stable, and coach-house, Tweed Green, Peebles.

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Learmont had been proprietor of the subjects in Girdwood Street, Peebles, and in receipt of the rents thereof for several years preceding the 15th June 1875, when he sold them. The rent was £29 per annum, and the feu-duty £3, 15s. 2d. He became proprietor of the subjects in Tweed Green, Peebles, at Whitsunday 1875, and was entitled to the rents of the same, which amounted to £11 per annum, free of any deduction, from that term. He had not been in the actual personal occupation of either of the subjects during any part of the twelve calendar months next previous to 31st July 1875.

Thomas Young objected to Learmont's name being continued on the roll, on the ground that the ownership and mere civil possession of different subjects in succession during the statutory period could not, whatever their value, give a qualification to be enrolled under either the Reform Act of 1832 or the Representation of the People (Scotland) Act, 1868, and that section 13 of the latter Act, recognising successive occupancy, was only applicable where the occupancy was personal.

The Sheriff (G. Napier) sustained the objection.

Learmont appealed, and argued;—There was no principle and no conceivable reason why successive occupancy should confer the franchise and successive ownership should not. There could be no doubt that it was the intention of the Legislature that they should be equally sufficient to give a qualification. The word "occupied" in section 13 of the Act of 1868* must be interpreted with reference to the previous clause of the statute. Where personal occupancy was necessary it must be interpreted as "occupied personally," and where personal occupancy was not necessary then as "occupied civilly." Now, there was a provision in the statute whereby an owner occupying civilly the same premises during six months acquired the franchise, and it would be inconsistent with the terms of the section to hold that the occupation of different premises must be, not civil, but natural. True, by an oversight the Legislature had extended the time during which the owner must own or possess civilly different premises to twelve months instead of six; but that was no reason for depriving him of the benefit of the section altogether, unless he were in the actual personal possession as well as ownership.

Argued for the objector;—The position both of owner and occupier prior to the Act of 1868 must be considered. Under the old law neither successive ownership nor successive occupancy was recognised as giving a qualification.[1] The Legislature had now specially enacted that successive occupancy should give a good qualification,[2] and had said nothing about successive ownership. In doing so the intention was to exclude successive ownership without occupancy.

Lord Ormidale.—I am of opinion that the judgment of the Sheriff is right. I must say, however, that it is with regret I have come to this conclusion, because the result is to restrict and not enlarge the right of franchise, while, at the same time, there is reason for thinking, as was argued by the appellant, that the Legislature did not intend any such restriction, but, on the contrary, intended to make successive ownership as much a qualification as successive occu-

* 31 and 32 Vict. c. 48, sec. 13.—"Different premises occupied in immediate succession by any person as owner or tenant during the twelve calendar months next previous to the last day of July in any year shall have the same effect in qualifiying such person to vote for a burgh or county respectively as a continued occupancy of the same premises in the manner herein provided," &c.

[1] Young v. Lindsay, Dec. 2, 1865, 4 Macph. 125, 38 Scot. Jur. 76.

[2] 31 and 32 Vict. c. 48, sec. 13, quoted *supra*.

pancy. I should, therefore, if I could, have been inclined to support the claim; but, carefully attending to the terms of the 13th clause of the Act of 1868, I am unable to arrive at a conclusion in accordance with my inclination without materially altering the clause, by introducing into it a variety of words. That I do not feel myself at liberty to do.

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LORD ARDMILLAN and LORD CRAIGHILL concurred.

THE COURT affirmed the Sheriff's judgment.

JOHN GILLESPIE, W.S.—W. ARCHIBALD, S.S.C.—Agents.

ALEXANDER HANNAH, Objector and Appellant.—*R. V. Campbell.*
THOMAS DODDS, Respondent.—*M'Laren.*

No. 3.
Nov. 1, 1875.
Hannah v. Dodds.

Burgh Franchise—Reform Act, 1868, *secs.* 3 *and* 13.—*Held* that occupancy, as tenant, of one house in a burgh, combined with occupancy, in immediate succession, as owner, of another house in the same burgh, gave a qualification for the burgh franchise when the combined occupancy extended over the requisite period.

Registration Appeal Court. B.

THOMAS DODDS was entered in the roll of voters as "inhabitant occupier as owner of dwelling-house, Main Street," Whithorn.

Dodds had been for several years previous to the term of Whitsunday 1875 tenant of a dwelling-house in Main Street, Whithorn, and during those years was enrolled as "inhabitant occupier as tenant of dwelling-house, Main Street," Whithorn. At Whitsunday 1875 he became owner of a different house, also in Main Street, Whithorn, which he occupied from that date as owner.

Alexander Hannah objected to Dodds being continued on the roll of voters, on the ground that it was not competent to combine occupancy as tenant with occupancy in immediate succession as owner to give a qualification in burghs.

The Sheriff (M. Napier) repelled the objection.

The objector appealed, and argued;—The use of the words "different" must be contrasted with the use of the word "same" in the 13th section of the Reform Act of 1868.* Continued occupancy of the same premises as tenant gave a qualification, and so successive occupancy of different premises as tenant was to give a qualification. Similarly, continued occupancy of the same premises as owner gave a qualification, and so successive occupancy of different premises as owner was to give a qualification. But occupancy of different premises as tenant and as owner successively could not give a vote, because it was not provided that occupancy of the same premises as tenant and owner successively should give a vote. This had already been held with regard to the county franchise.[1]

Argued for the respondent;—The bases of the county and burgh franchise were essentially different. What it was not competent to combine in the one case it was competent to combine in the other. The case of Scott Moncrieff v. Dalgleish had, therefore, no bearing on the present.

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* 31 and 32 Vict. c. 48, sec. 13.—"Different premises occupied in immediate succession by any person as owner or tenant during the twelve calendar months next previous to the last day of July in any year shall have the same effect in qualifying such person to vote for a burgh or county respectively as a continued occupancy of the same premises in the manner herein provided."

[1] Scott Moncrieff v. Dalgleish, Dec. 19, 1868, 7 Macph. 315, 41 Scot. Jur. 186.

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LORD ARDMILLAN.—The basis of the qualification of a burgh voter, as defined in section 3 of the Representation of the People (Scotland) Act, 1868, is occupancy.* Whether that occupancy be as owner or tenant matters not.

Now, in counties there are two bases of the qualification of a voter. The one is ownership without any necessity for occupancy. The other is tenancy accompanied by personal occupancy. Moreover, the ownership need only have continued for six months. The tenancy and its accompanying occupancy must have continued for twelve months prior to the 31st July in each year.

It is plain, therefore, that the statute could not have contemplated the combination of ownership with occupancy as tenant in succession, or of occupancy as tenant with ownership in succession, to give a qualification for a vote in a county. The case of Scott Moncrieff v. Dalgleish occurred in the county of Selkirk, and I see no reason to doubt that it was rightly decided, though briefly reported.

But the case of the burgh qualification must be distinguished from that of the county qualification. Occupancy, and occupancy alone, being the basis of the burgh qualification, I see no incompatibility in combining occupancy as tenant with occupancy as owner. Had the respondent, at Whitsunday 1875, purchased the house of which he was then tenant, instead of another, and continued to occupy it as owner instead of tenant, I think there can be no doubt that he would have continued qualified to vote as occupier just as he was before. It would be inequitable and irrational to hold that he destroyed his qualification by buying his house. If that be the case, the next step in the reasoning is easy. Instead of purchasing the house he was occupying as tenant, he purchases another, and there he continues his occupancy uninterrupted. He is an inhabitant occupier in the burgh for the requisite twelve months, and that is enough to satisfy the statute. But occupancy is indispensable, and the section in regard to continued occupancy, though of different subjects, relates only to the case of such occupancy.

I am, therefore, for supporting the Sheriff's judgment.

LORD ORMIDALE and LORD CRAIGHILL concurred.

THE COURT affirmed the judgment of the Sheriff.

MAITLAND & LYON, W.S.—MILLAR, ALLARDICE, ROBSON, & INNES, W.S.—Agents.

No. 4.
Nov. 1, 1875.
Mackenzie v. King.

JAMES MACKENZIE, Objector and Appellant.—*Lancaster.*
WALTER KING, Respondent.—*R. V. Campbell.*

Franchise—Payment of Poor-rate—Notice by Collector of non-payment—31 *and* 32 *Vict. c.* 48, *secs.* 6 *and* 18.—A voter's name was struck off the roll for non-payment of poor-rate, in terms of sec. 6 of the Reform Act, 1868. No notice had been given him in the form of schedule C, referred to in sec. 18 of the Act, nor had any "demand-note" been served upon him in terms of that section, except that he had received on 5th February the usual notice of assessment to the effect he had been assessed in a certain sum, and that it was pay-

* 31 and 32 Vict. c. 48, sec. 3.—"Every man shall . . . . be entitled to be registered as a voter . . . . for a burgh who . . . . is qualified as follows—that is to say,—

"2. Is and has been, for a period of not less than twelve calendar months next preceding the last day of July, an inhabitant occupier as owner or tenant of any dwelling-house within the burgh: Provided," &c.

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able on 16th February. *Held* that the notice of assessment was sufficient to satisfy the requirement of the 18th section of the statute, and that the name had been rightly struck off the roll.

WALTER KING claimed that his name be retained on the roll of voters for the county of Dumbarton as joint tenant of the farms of Little Duncryne, &c.

Walter King had been a voter on the roll for year 1874-75 as joint tenant along with James King, but the names of both were struck off by the assessor as having become disqualified by failure to pay, on or before 20th June 1875, the poor-rate that had become payable by them and each of them in respect of their farms of Little Duncryne, &c., up to the preceding 15th day of May.

A notice of assessment for the poor on a rental of £68, amounting, at 1½d. per £, to 8s. 6d. in respect of these subjects, was, on 5th February 1875, given by the collector to Walter King, as tenant along with James King, by being left at his usual place of abode. This notice bore "The above is payable to me at my house at Bridgend, Gartocharn, on Tuesday, 16th February 1875."

The poor-rate thus assessed remained unpaid on the 15th day of May 1875, and it was admitted that subsequent to 15th May, and on or before 20th June 1875, no notice was given, in terms of schedule C to the Act 31 and 32 Vict. c. 48, annexed, under the 18th section thereof, and that the said poor-rate was still unpaid at 20th June 1875.

It was also admitted that the omission on the part of the collector to give such notice, in terms of the schedule C, was not wilful, or with intent to keep the claimant off the list or register of voters for the said county; and that, apart from the alleged failure to pay poor-rate, King was entitled to have his name retained on the register.

James Mackenzie objected to the claim, on the ground that the claimant had failed to pay poor-rate, as required by the statute.

The Sheriff (Lee) repelled the objection, and admitted the claim.

The objector appealed, and argued;—The question was how far the provision in sec. 18 of the Act of 1868, as to notice being given,* was to be read along with the disqualification for non-payment contained in section 6.† The disqualification was absolute. The provision as to notice was

* 31 and 32 Vict. c. 48, sec. 18.—"Where any poor-rate due from an occupier of premises, to which a right of voting is for the first time attached by this Act, remains unpaid on the 15th day of May in any year, the collector of poor-rates for the parish in which such premises are situated shall, on or before the 25th day of July in the present, or the 1st day of June in any subsequent year, unless such rate has previously been paid, or has been duly demanded by a demand-note served in like manner as the notice in this section referred to, give or cause to be given, a notice in the form of schedule (C) to this Act to every such occupier. . . . . Any collector of poor-rate who shall wilfully withhold such notice with intent to keep such occupier off the list or register of voters for the burgh or county, as the case may be, shall be deemed guilty of a crime and offence."

† 31 and 32 Vict. c. 48, sec. 6.—"Every man shall be entitled to be registered as a voter, &c. who . . . . 2. Is and has been, during the twelve calendar months immediately preceding the last day of July, in the actual personal occupancy as tenant of lands and heritages within the county of the annual value of fourteen pounds or upwards, as appearing on the valuation-roll of such county: Provided that no man shall under this section be entitled to be registered who . . . . shall have failed to pay on or before the 1st day of August in the present, or the 20th day of June in any subsequent year, all poor-rate (if any) that have become payable by him in respect of said lands and heritages up to the preceding 15th day of May."

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not so. It was only where the premises were of the kind "to which a right of voting is for the first time attached by this Act" that notice required to be given. Now, on the face of the valuation-roll these premises would have given a qualification for a vote prior to the Act of 1868, for they were of more than £50 value. It was true that it was only under the Act of 1868 that they could sustain the votes of two or more joint tenants, but the collector of the poor-rate was not bound to make inquiry into how many tenants were claiming votes for each subject from which he collected rates. He was not, therefore, under the 18th section of the Act of 1868, obliged to give any notice. But, even if he was so obliged, he had fulfilled his duty in leaving the notice of 5th February 1875, and there was nothing to counteract the disqualification arising from the 6th section.

Argued for the respondent;—The term "demand-note" used in the 18th section was borrowed from the English poor-law system. As an excuse for not giving the notice in the form of schedule C such a demand-note must be served. But the notice actually given on 5th February 1875 was not in any sense a demand-note. It was a mere notice of assessment in a sum which would become due, and that was a very different thing from a demand for payment of a sum which had become due, and from the notice prescribed in schedule C. Besides, under 8 and 9 Vict. c. 83, sec. 39, the collector is bound to give to every person a notice of assessment, such as that given on 5th February. Unless, then, the demand-note of the 18th section of the Act of 1868 was something different from the notice of assessment, that section could never have any effect, for every one received a notice of assessment.

LORD ARDMILLAN.—Notice, usual and sufficient, was given on 5th February, that this rate was due on 16th February. Four months and more elapsed between that last day and the 20th June, when the appellant became disqualified for non-payment of the rate. During all this time the rate remained unpaid, and we do not know whether it has been yet paid.

The notice of 5th February 1875 was given in terms of the Poor-Law Amendment Act, 1845, sections 39 and 90, and was in the usual form. It gave sufficient intimation that the rate was payable on a specified day, and past-due after that day. The question is, Is the use of the English term "demand-note" to introduce any change into our practice, so as to make a new and separate notice necessary. I cannot think so. The collector might have proceeded to obtain a distress warrant for non-payment, and recover the rate in arrear, without any further notice.

I am of opinion, therefore, that the objection is good.

LORD ORMIDALE and LORD CRAIGHILL concurred.

THE COURT reversed the Sheriff's judgment.

J. & R. D. ROSS, W.S.—T. & R. B. RANKEN, W.S.—Agents.

No. 5.
Oct. 15, 1875.
Turbyne v. Kirk-Session of Leuchars.

CHRISTINA HUSBAND OR TURBYNE AND OTHERS, Pursuers.—*D.-F. Clark*—*J. P. B. Robertson.*

KIRK-SESSION OF LEUCHARS, Defenders.—*Guthrie Smith*—*Henderson.*

Trust—Charity—Relevancy.—A testator left £500 to the kirk-session of a parish, the interest of which he directed to be applied to the relief of such poor persons, natives of the parish, as the kirk-session should consider to be proper objects of such aid, but who had never received relief from the poor-funds,

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"declaring that the minister and elders constituting the kirk-session" "shall be perpetual patrons of the said sum, and shall have the sole power of naming the said individuals." *Held* that the kirk-session was entitled to depute the duty of selecting the objects of the charity to the minister.

THE late Alexander Kettle Young, who died on the 30th of August 1841, by his disposition and settlement bequeathed a sum of £500 sterling to the kirk-session of the parish of Leuchars. The following is the clause of the disposition making the bequest, and giving directions as to its application:—"To the kirk-session of the parish of Leuchars, county of Fife, the sum of five hundred pounds, to be lent out on heritable or moveable security, and the interest to be applied towards the relief of such persons, natives of the parish, and particularly of the village of Leuchars, as the said kirk-session shall consider to be proper objects of such aid, but who have never received any relief from the poor-funds, to be paid at such times and in such small sums as shall be considered to be most useful to the said poor persons; declaring that the minister and elders constituting the kirk-session of the parish of Leuchars for the time being shall be perpetual patrons of the said sum, and shall have the sole power of naming the said individuals." The sum of £500, under deduction of legacy-duty and expenses, was paid over to the kirk-session of the parish of Leuchars in 1842.

Mrs Turbyne and others raised the present action against the kirk-session of the parish of Leuchars. They stated that they were natives of the parish of Leuchars, in very poor circumstances, that they had never received relief from the poor-funds, and that in consequence of the illegal actings of the defenders, or some of them, they had been debarred from sharing in the relief intended to be afforded by the testator to persons in their position.

(Cond. 2.) "For many years back, or at all events, the pursuers believe, since the induction of the present minister of the parish, which took place on or about 22d July 1866, no proper application has been made of the interest arising on said £500, as directed by Mr Young's settlement. In particular, they believe and aver that during the whole, or at all events a large portion of the period from July 1866 to the present date no nomination has been in use to be made by the said kirk-session of such persons as they considered entitled to receive relief from said charitable bequest, nor has the interest accruing from the funds thereof been paid to any such persons so nominated, or even, so far as the pursuers know, has said interest been applied to any charitable purpose whatever, at least it has not been so applied in terms of Mr Young's settlement. During the whole of said period there have been numerous persons, natives of the parish of Leuchars, who have never received relief from the poor-funds, but who, from their poverty, were proper objects of relief from the said charitable bequest." (Cond. 3.) "The pursuers have called on the defenders to exhibit accounts of the application and management of said charitable bequest during the period since 22d July 1866 to the present date, but the defenders refuse, or at least delay to do so. The defenders, further, have never given to the pursuers or any other residenters in the parish of Leuchars, although they have been called on repeatedly so to do, the slightest information regarding the investment of the said fund, the management thereof, or the application of the interest accruing thereon."

The kirk-session explained that the revenue had been distributed by the minister with the sanction of the elders. "When the present minister (Mr Johnstone) came to the parish in 1866 he followed the practice of his predecessor with regard to the management of this fund, which was simply to

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distribute it in consultation with his elders, or at least with their knowledge and sanction, among such necessitous and deserving persons of the class mentioned in the will as were likely to benefit from a little timely help, but who were naturally disinclined to accept public or parochial charity. To persons of this description, whose cases had come to his notice in the course of his visiting through the parish, or had attracted the attention of the elders, or were otherwise brought to his knowledge, assistance was given in the form of clothes, meal, coals, and sometimes small sums of money, for longer or shorter periods. It was not the practice before the defender, Mr Johnstone's time, and has not since been deemed necessary, to call special meetings of the kirk-session for the purpose of making express nominations to the fund; indeed, as the cases were often of considerable urgency, it would have been impracticable to do so without seriously interfering with the good which was done by means of the charity. No receipts were taken for the sums spent in the above manner, and it has never been suggested that lists should be prepared and published of the persons who received relief from the fund. No purpose would have been served by the publication of these lists, and many persons would have declined to have received the assistance tendered if such had been the condition on which it must be accepted. The defender, Mr Johnstone, however, preserved lists and notes of his own, from which an account at any time could have been prepared. It is admitted that there have been numerous persons, natives of the parish, who were deserving of relief from the fund had it been larger; but the sum being limited, the defenders were obliged to make a selection of the cases, and they have done so faithfully and to the best of their ability, and it is believed judiciously and with good results."

The conclusions of the summons were (1) for declarator that the kirk-session were bound at their usual meetings, or at meetings called for the purpose, to nominate certain persons as objects of the charity; (2) "that the defenders, the kirk-session foresaid, have not during the last nine years, or a great part of that period, been administering the said charitable bequest in accordance with the will, intention, and purposes of the said Alexander Kettle Young; and (3) the defenders should be ordained to invest the said sum of £500 on good heritable or moveable security, and from time to time henceforward to nominate at their usual meetings, or at meetings called for the purpose, such persons, natives of the parish of Leuchars, and particularly of the village of Leuchars, as they shall consider to be proper objects of aid from said charitable bequest, but who have never received any relief from the poor-funds, to be recipients of aid from the said charitable bequest, and each year henceforward to distribute the interest accruing from year to year on said £500 among said persons nominated by them, and that at such times and in such small sums as should be considered most useful to said persons; and to administer said charitable bequest regularly in all time coming, and to make and preserve yearly accounts of their said administration." There were further conclusions for the appointing of a judicial factor, and for accounting.

The pursuers pleaded;—(1) In terms of the said disposition and settlement of the said Alexander Kettle Young the pursuers are entitled to decree in terms of the first and third conclusions of the summons. (2) The administration and management by the defenders of the charitable bequest mentioned in the condescendence having been at variance with the wish and intention of the said Alexander Kettle Young said management and administration were and are illegal, and *ultra vires* of the de-

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fenders, and the pursuers are entitled to decree in terms of the second conclusion of the summons.

The defenders pleaded;—(1) The averments of the pursuers are irrelevant and insufficient to support the conclusions of the summons. (2) The defenders are entitled by the terms of the bequest to distribute the said charity among poor persons of the class mentioned at such times and in such small sums as shall be considered most useful, without any express nomination to the fund at meetings of session.

The Lord Ordinary pronounced this interlocutor:—"Sustains the defences, and assoilzies the defenders from the conclusions of the summons, and decerns: Finds the pursuers liable in expenses, and remits," &c.*

The pursuers reclaimed.

Argued for the pursuers;—It was *ultra vires* of the kirk-session to devolve their duty of selecting and naming the persons who were to be recipients of the testator's charity upon the minister. What the testator had intended in selecting the minister and kirk-session as the dispensers of his bounty was that each case to be relieved should be carefully considered by a responsible body of men, and the persons entitled to participate in the bequest were justified in demanding that this protection against favouritism or improper use of the fund should be exercised. The minister and kirk-session having in this manner, and also in failing to keep an account of monies disbursed, neglected their duty, the action was a relevant one, and its conclusions should be sustained.

Argued for the defenders;—The object of the testator was to prevent those poor persons who, though not actually paupers, were in pressing need of relief, from coming upon the parish, and so losing their self-respect. Such being the case, the testator's intention would be utterly defeated if public inquiry were to be made into the merits of each case, the recipients of a fund so distributed being in no better case than the paupers who were relieved by the parish. It was at once the most proper and simple mode of distributing this fund for the kirk-session to remit to the minister, whose opportunities of knowing the circumstances of the poor in his parish were much greater than theirs, to act as the dispenser of this fund, subject to such suggestions and assistance as they might offer. The Court were always slow to interfere with the discre-

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* "NOTE.—The pursuers state no case to warrant the interference of the Court. Having regard to the character and amount of the charity in question, I think the kirk-session acted reasonably and within their power when they left the distribution to the discretion of the minister. Having confidence, no doubt well founded, in his integrity and judgment, to fulfil the intention of the charitable giver, I think they could not have taken a wiser course. The minister no doubt gave such an account of his proceedings from time to time as satisfied the session, and any more formal accounting would, with reference to such a fund and the purpose for which it was given, have been out of place. Accounts open to public inspection are certainly not required, and an accounting in this Court, at the instance of the pursuers or others like them, would put the little fund in a fair way of being extinguished altogether, by a rapid distribution of it in a manner not contemplated by the charitable donor. There is, in truth, nothing for it but to trust the kirk-session, as the giver did, implicitly; and unless the members shall concur in deliberate misapplication, which is not reasonably to be apprehended, there is no real danger. The practical local checks against any serious abuse are quite sufficient, and I can give no countenance to a resort to this Court with such a case as the pursuers present. I see no reason to doubt that the defenders have been acting properly according to the purpose and intention of the charity."

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tion of such a body as were here selected by the testator to administer his bequest.[1]

LORD PRESIDENT.—There is no doubt what is the object of this charity. It is the relief of poor persons not on the roll of the parochial board, and who have never been on the poor's-roll. Out of that class the kirk-session are to relieve those whom they consider proper objects of the charity. There is no doubt that the kirk-session are to select out of that class the persons who are to receive the charity. The only question is whether the kirk-session can devolve on the minister the duty of selection, and are entitled to trust to his selection. I agree with the Lord Ordinary that they may do so.

It is not desirable that the kirk-session should go formally to work, and make a minute on every occasion of their granting a sum of money. Nor is it desirable that every member of the kirk-session should concur in every shilling or half-crown which is given to a poor person. It is quite competent to depute the duty. If this had been a larger parish, and the fund had been larger, it would have been competent to devolve the duty of distributing the charity on a committee of the kirk-session. It seems to me that the minister is just a committee. His knowledge of the poor makes him the most suitable person to distribute the funds, and it would be very much to be regretted if any interference should be made. This is a small fund, which is to be divided in small portions, and if any formal proceedings, such as are contemplated by the pursuers, were necessary, I think it is very doubtful whether any kirk-session would be willing to undertake the duty at all.

The charity is devoted to a very useful and important object—to keep poor persons from coming upon the poor's-roll. It is a charity in aid of the church-door collections, which, to a certain extent, are devoted to the same purpose, and I should be sorry if we were to come to a result which would interfere with the present arrangement. I therefore agree with the Lord Ordinary.

LORD DEAS.—This is a very useful kind of charity, and creditable to the discrimination of the testator. There is nothing more important than to keep persons who are in danger of sinking into poverty from being placed on the poor's-roll. A certain feeling of degradation naturally results from the receipt of parochial relief which is not favourable to subsequent independent exertion and industry. That is an evil which inevitably accompanies the otherwise beneficial operation of a poor-law, and which does not result in the same degree from charity privately administered. If this fund were distributed in the way the pursuers propose the beneficial results would be to a great extent defeated. If the kirk-session had always to meet and discuss the claims for relief and record them in their minutes the publicity would go far to defeat the object of the testator. We are not told what the testator's position in life was, but I have no doubt he understood all these considerations when he made the bequest.

The minister is generally a person of respectability and of religious principles. He has opportunities of ascertaining the character of the recipients. If the testator has empowered the kirk-session to distribute the charity it is surely competent for them to depute the duty to the minister so far as they have confidence in him, and to rely on what he verbally reports to them. If they have

[1] Liddle v. Kirk-session of Bathgate, July 11, 1854, 16 D. 1075, 26 Scot. Jur. 584; Petrie v. Meek, March 4, 1859, 21 D. 614, 31 Scot. Jur. 334.

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at any time the slightest idea that he is doing wrong they have power to inquire and to interfere.

I have no doubt that the Lord Ordinary is right, and I concur in the observations which he makes in his note. The pursuers have stated nothing relevant, and in place of sustaining the defences generally I think it would be better to sustain the defenders' first plea in law and dismiss the action.

LORD ARDMILLAN.—I concur. I read the word "naming" used in this deed as meaning selecting, the object being plainly to give the privilege of selection. As the kirk-session are to administer this bequest, and I wish it were larger, then, I think, they could not do so more wisely than by handing it over to the minister, who is moderator of the session, and who knows more of the habits and the means of the deserving poor of the parish who are not paupers than any one else. If the minister distributes the fund at the request of the kirk-session, who accept his distribution as satisfactory, that is the same as if they had done it themselves.

LORD MURE concurred.

THE COURT pronounced this interlocutor:—"Recall the interlocutor: Find that the averments of the pursuers are not relevant to support the conclusions of the summons, or any of them: Therefore sustain the first plea in law for the defenders: Dismiss the action, and decern: Find the pursuers liable in expenses, and remit," &c.

LINDSAY, PATERSON, & Co., W.S.—MITCHELL & BAXTER, W.S.—Agents.

No. 6.

JAMES FORREST, Pursuer.—*Brand—Rhind.*
ALEXANDER DUNLOP, Defender—*Mitchell.*

Oct. 15, 1875.
Forrest v. Dunlop.

Process—Court of Session Act, 1868, *sec.* 26—*Decree by default—Res judicata.*—A decree of absolvitor upon the pursuer's failure to deliver printed proofs of the record in terms of sec. 26 of the Court of Session Act, 1868, is a decree *in foro*, and, so long as it subsists, will exclude a new action upon the same grounds.

2D DIVISION.
Ld. Curriehill.
I.

ON 30th November 1874 Forrest raised an action of damages against Dunlop for slander, which was called before Lord Young, Ordinary. The defender entered appearance and lodged defences; and on 8th January Lord Young, in respect of the failure of the pursuer to deliver two printer's proofs of the record, in terms of the Court of Session Act, 1868,* and no appearance being then made for the pursuer, assoilzied the defender from the conclusions of the action, and found the defender entitled to expenses.

The pursuer did not reclaim, but before the reclaiming days had expired raised the present action before Lord Curriehill, Ordinary, precisely in terms of the former action.

The defender, founding on the decree of absolvitor in the former action, which had been extracted and a charge for the taxed amount of expenses given thereon, pleaded *res judicata.*

The Lord Ordinary pronounced the following interlocutor:—"Sustains

* Sec. 26 provides that if the pursuer shall fail within eight days from the lodging of the defences (where no revisal has been allowed), to deliver to the defender's agent, two printer's proofs of the pleadings which are to form the record, "the defender may enrol the cause, and move for decree of absolvitor by default, which decree the Lord Ordinary shall grant, unless the pursuer shew good cause to the contrary."

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the defender's plea of *res judicata*, assoilzies the defender from the action, and finds the pursuer liable in expenses," &c.*

The pursuer reclaimed.

Argued for him;—There could be no *res judicata* unless the Court applied its mind to the case.[1]

LORD JUSTICE-CLERK.—The question is too clear for doubt. A decree in absence is not a nonentity. It will receive effect as long as it stands, though it may be brought under review by reduction or suspension. But a decree by default is a decree *in foro*. It may be taken out of the way by reclaiming note, and in the event of the reclaiming days being allowed to expire through inadvertence, a remedy is provided by the 16th section of the Act 48 Geo. III. c. 151.† It is also open to the party to bring a reduction of the decree on the ground that it was obtained through inadvertence, in which case the Court, although it will require a strong statement of facts to support such an application, has the power to award substantial justice. But that is not the question here. It is whether, after decree of absolvitor has been pronounced and extracted, it can be ignored and a new action brought as a matter of course. I am clearly of opinion that it cannot, and that the interlocutor of the Lord Ordinary should be adhered to.

LORD NEAVES, LORD ORMIDALE, and LORD GIFFORD concurred.

THIS interlocutor was pronounced:—" In respect of the subsisting decree in the former action at the instance of the pursuer against the defender refuse the reclaiming note and adhere to the interlocutor reclaimed against, find the pursuer liable in additional expenses to the defender," &c.

ABRAHAM NIVISON, S.S.C.—MILLAR, ALLARDICE, ROBSON, & INNES, W.S.—Agents.

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* " NOTE. . . . . .—I am of opinion that this plea (of *res judicata*) is well founded. I think that the pursuer must be held as confessed in the former action, and that he cannot now insist in the claim of damages from which the defender was assoilzied in that action. The pursuer not only did not appear to shew cause why that decree of absolvitor should not be pronounced, but he did not avail himself of the remedy, which was open to him, of applying to the Inner-House by a reclaiming note to be reponed. To allow the pursuer now to insist in a new action, in the same terms as the former action, would not only be to ignore the provisions of the Judicature Act, by which a pursuer may abandon an action, reserving right to bring a new action, but would be a violation of the policy and of the letter of the Court of Session Act, 1868. A decree by default is a decree *in foro*, and the party against whom such a decree is pronounced can be reponed only by adopting the well-known and authorised procedure of an application to the Inner-House by a reclaiming note within twenty-one days, or possibly before extract. I know of no case in which a decree by default has ever been allowed to be set aside by the institution of a new action. The defender must therefore be assoilzied, with expenses."

[1] Jenkins v. Robertson, April 5, 1867, 5 Macph. H. L. 27, 39 Scot. Jur. 384, L. R., 1 Sc. Ap. 117. The following cases were also referred to:—Sheriff v. Brodie, May 24, 1836, 14 S. 825, 8 Scot. Jur. 365; Mackenzie v. Smith, June 26, 1861, 23 D. 1201, 33 Scot. Jur. 605.

† " Provided always, and be it enacted, that if the reclaiming or representing days against an interlocutor of a Lord Ordinary shall, from mistake or inadvertency, have expired, it shall be competent, with the leave of the Lord Ordinary, to submit the said interlocutor, by petition, to the review of the Division to which the said Lord Ordinary belongs; but declaring always that in the event of such petition being presented the petitioner shall be subjected in the payment of the expenses previously incurred in the process by the other party."

JOSEPH ROBERTSON, Petitioner.—*Mackintosh.* No. 7.

Joint Stock Company—Liquidator—Statute 25 *and* 26 *Vict. c.* 89 (*Companies Act*, 1862), *sec.* 138.—*Held* that the liquidator of a Scotch joint stock company, appointed under the Companies Acts of 1862 and 1867, who had gone to reside in England in the course of the liquidation, was entitled to obtain decree under secs. 121 and 138 of the Companies Act, 1862, against contributories who had failed to make payment of calls.

Oct. 20, 1875. Robertson.

JOSEPH ROBERTSON, the resident manager of the Northern Counties Fire Office at Inverness, was appointed liquidator for winding up the company voluntarily under the Companies Acts of 1862 and 1867 (25 and 26 Vict. c. 89, and 30 and 31 Vict. c. 131). In the course of the liquidation he went to reside at Newcastle, and while there presented the present petition under secs. 121 and 138 of the Companies Act of 1862 against a list of shareholders who had failed to make payment of calls.

1st DIVISION. B.

The petition was not opposed, but the Court expressed some doubt whether the liquidator, having gone to reside in England, they ought to give decree.

Counsel was heard for the petitioner.[1]

At advising,—

LORD PRESIDENT.—I do not think there is any doubt about this. The petitioner is liquidator of the Northern Counties Fire Office, which is a Scotch company. For some time after he was appointed liquidator he continued to be resident in Inverness, where the domicile of the company was. He is now living in Newcastle, in England. It is a question whether we are entitled to grant this decree in the same way as if the liquidator was still resident in Scotland. But, on reflection, I do not think there is any objection. If this had been an English company, with an Englishman as liquidator, we should not have hesitated in giving decree against Scotch contributories. The contributories mentioned in this list will have the same power of stating objections to payment of calls as in any other case. They can state their objections in a suspension.

LORD DEAS, LORD ARDMILLAN, and LORD MURE concurred.

THE COURT pronounced this interlocutor:—"Decern against the several contributories named in the list certified by the petitioner and annexed to the petition, being No. 10 of process, for payment to the petitioner at the office of the National Bank of Scotland, Inverness, of the sums therein certified to be due by each of the said contributories respectively, with interest on the said sums from 1st September 1874, the date certified in the said list when the same became due, at the rate of five per centum per annum until payment, and ordain the said contributories respectively to make the said payment within six days of the service of this decree, and grant warrant for immediate extract hereof."

GIBSON-GRAIG, DALZIEL, & BRODIES, W.S.—Agents.

[1] Lumsden, Dec. 14, 1858, 21 D. 110, 31 Scot. Jur. 73; Lord Macdonald v. His Next of Kin, June 11, 1864, 2 Macph. 1194, 36 Scot. Jur. 600.

No. 8.

Oct. 22, 1875.
Wilson v.
Mackie.

WILLIAM WILSON, Pursuer and Respondent.—*Scott.*
ARCHIBALD MACKIE Junr., Defender and Appellant.—*Thoms—Trayner.*
ARCHIBALD MACKIE Senr., Defender.

Arrestment—Malice and want of probable cause.—Opinions (*per* Lord President, Lord Ardmillan, and Lord Mure), that where arrestments have been used against the private funds of an executor upon the dependence of an action against him as executor for payment of an executry debt, the executor is entitled to damages without proving malice or want of probable cause, in respect that the arrestments are entirely without warrant.

1st DIVISION. Sheriff of Lanarkshire. M.

THIS was an action at the instance of William Wilson, baker, Glasgow, against "the firm of Archibald Mackie," provision merchant, Glasgow, and Archibald Mackie and Archibald Mackie junior, as partners and as individuals, for £150 of damages caused to the pursuer by "the wrongous, illegal, and malicious use of arrestments by the defenders, or one or other of them." Appearance was entered for the individual defenders, but Archibald Mackie senior subsequently allowed decree by default to go out against him.

The arrestments had been used on the dependence of an action at the instance of the firm of "Archibald Mackie" against William Wilson, "executor decerned and confirmed to the late John Wilson," for payment of a debt due by the executry estate.

The schedule of arrestment complained of bore,—"I, Alexander Macintyre, Sheriff officer, by virtue of a libelled summons from the Sheriff Court books of Lanarkshire, containing warrant to arrest, dated at Glasgow, the 4th day of December 1872 years, raised at the instance of Archibald Mackie, provision merchant, 82 Main Street, Anderston, Glasgow, pursuer, against William Wilson, baker, Thistle Street, Glasgow, executor decerned and confirmed to the late John Wilson, baker in Glasgow—In Her Majesty's name, &c., lawfully fence and arrest in the hands of you, William Hay, miller, Glasgow, the sum of £300 sterling, more or less, due and addebted by you to the said William Wilson; together also with all goods and gear, debts, sums of money, or any other effects whatever, lying in your hands, custody, and keeping, pertaining or in any manner of way belonging to the said William Wilson, or to any person or persons for his use and behoof, all to remain under sure fence and arrestment at the instance of the said pursuer aye and until payment be made or security be found," &c.

The pursuer averred that the arrestments had been directed against the personal funds of the pursuer, and had been used maliciously for the purpose of injuring his credit. It appeared from a proof that it was Archibald Mackie senior who gave instructions to the officer to execute the arrestment, and it also appeared that he had made use of threatening language against the pursuer. No malice was proved against Archibald Mackie junior.

The Sheriff-substitute (Guthrie), after a proof, pronounced this interlocutor:—"Finds that the individual defender, Archibald Mackie junior, maliciously and wrongously caused the arrestments libelled to be used against the funds of the pursuer: Finds him liable in damages therefor jointly and severally with the other individual defender, Archibald Mackie, against whom decree by default has already passed, for the whole sum sued for: Assesses the said damages at £25: Finds the defender Archibald Mackie junior liable in expenses: Allows an account," &c.*

* "NOTE.—In the conjoined actions between the same parties the Sheriff-substitute has found that a partnership exists between the Mackies to the effect at least of making them responsible to the present pursuer in respect of his claim

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The Sheriff, on appeal, adhered, except as to the amount of damages, which he reduced to £10.*

The defender Archibald Mackie junior appealed to the Court of Session.

Argued for the appellant;—The schedules of arrestment were to be construed as affecting the executry funds alone, and if so, it was necessary for the pursuer to prove malice on the part of the appellant personally. Even if it had been proved that he was in partnership with his father, one partner was not responsible for the malice of another.[1]

Argued for the respondent;—Malice was not necessary. The former action gave no ground for the use of diligence against the pursuer's personal funds, and therefore there was no ground whatever for the arrestment.[2]

LORD PRESIDENT.—This action is at the instance of William Wilson for damages for the wrongous use of arrestments by the defenders upon the dependence of a previous action at their instance against the present pursuer in his capacity of executor of the deceased John Wilson. Arrestments may be used wrongously in two senses. When the claim in the action on which the arrestments proceed is unfounded, it is still the right of the pursuer to use such arrestments, unless he does it maliciously and without probable cause. But if the arrestment be used without any warrant at all,—if there be no warrant in the summons, nor in the letters of arrestment,—that is wrongous in a different sense; and it is not necessary to aver and prove malice and want of probable cause. Now, this is the nature of the present case. The action was against William Wilson, as executor of John Wilson, and was for an executry debt, and Mr Wilson was not personally liable for the sum sued for beyond the funds of the executry estate. Now, there was a warrant in

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in that action. But he is not sure that the principles of agency on which he proceeded there are applicable to a claim of damages for a malicious and illegal act, which is not properly within the agency of a partner acting for his firm. Possibly the Sheriff-substitute may take too narrow a view of a firm's liability for the way in which its members use arrestments in the course of their business. But he thinks that, in the present action, which is directed against both the Mackies as individuals as well as partners, and concludes for decree against them jointly and severally, the justice of the case may be arrived at by decrees against them as individuals, leaving the firm out of the question.

"There is no direct proof of malice on the part of the younger Mackie. But there is clear proof of malice on the part of the father; and considering that the younger Mackie was the avowed pursuer of the action on the dependence of which the arrestments were used, as well as the proved relations between the parties, and the nature of the arrestments, which were entirely disconform to their warrant, and were therefore recalled by this Court without caution, the Sheriff-substitute thinks that he is bound to impute that legal malice to the son also, now the only defender.

* "NOTE.—The only question submitted to the consideration of the Sheriff on the appeal was the amount of damages, the defenders' agent frankly admitting (what could hardly be disputed) that damages had been incurred.

"As to their amount the Sheriff has considerable difficulty. On the one hand, merely nominal damages are not enough; for it is evident that the locking up of the funds of a man in business must cause him annoyance and trouble, and tends to impair his credit. On the other hand, the original pursuer was unable to specify any damage which he had incurred, or to say that any customers had left him in consequence of the arrestments in question. In these circumstances it is thought that £25 is too large a sum to meet damage of a not very tangible kind, and that £10 is a fairer sum."

[1] Brodie v. Young, Feb. 19, 1851, 13 D. 737, 23 Scot. Jur. 319.

[2] Meikle v. Sneddon, March 5, 1862, 24 D. 720, 34 Scot. Jur. 357.

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the summons, which entitled the pursuer (present defender) to arrest funds due to the executry estate, and to Mr Wilson as executor, but which gave him no right to arrest the personal funds of William Wilson. Yet this is what he did. We find that this was an arrestment entirely without warrant. There is thus therefore no necessity to aver malice or want of probable cause. If there had been any I should have had the greatest difficulty in concurring with the Sheriff-substitute. I cannot find any evidence of malice against Mackie junior. But the Sheriff-substitute seems to think that he is liable for the malice of the father. But malice is a personal feeling. I think we should recall the interlocutor of the Sheriffs; find that the arrestments were used wrongously; and I am not inclined to assess the damages at a higher sum than has been found by the Sheriff.

LORD DEAS.—Assuming that damages are to be given the amount awarded is fair and reasonable.

I am not disposed to give an opinion whether or not it was essential to libel malice. The action libels malice, and the pleas in law proceed upon malice. There is no plea to the effect that malice is not necessary, and the question was not argued at the bar. All I say, therefore, is that on this point I reserve my opinion. I rather think the arrestment was intended to cover the executry funds only, and that it was by an inaccuracy of language merely that it was made to comprehend the funds of the pursuer as an individual. Before holding malice to be required in such a case I should desire to examine the authorities, which we have not had an opportunity of doing.

LORD ARDMILLAN.—If in the action of damages it had been necessary to prove malice and want of probable cause I could not accept the doctrine that the malice of the father can attach to the son, so as to make the son liable. There is no such thing as vicarious malice. Malice is a purely personal quality.

But was it necessary to aver malice? I think there is a great distinction between using diligence nimiously, or wrongously, in the sense of injuriously, or where it turns out that no debt is due, and using an arrestment which is *ab origine* null, being without warrant. The former may afford ground for an action of damages, but malice there requires to be proved. But in the present case there was no warrant to support the arrestment used. The only warrant was to arrest the funds of another *persona* in law. There was therefore no legal warrant, and in the case of arrestment without warrant malice does not require to be proved. The damages awarded by the Sheriff (£10) are quite sufficiently high.

LORD MURE.—The question whether it is necessary to libel malice and want of probable cause in this action is one attended with difficulty. I am of opinion that the circumstances of this case fall under the rule of law as laid down by the Court in the case of Meikle v. Sneddon, 24 D. 720, and that malice and want of probable cause is therefore not necessary.

THE COURT pronounced this interlocutor:—"Recall the interlocutors of the Sheriff-substitute and the Sheriff, dated respectively 10th December 1874 and 11th March 1875: Find that the firm of Archibald Mackie, provision merchant, 82 Main Street, Anderston, Glasgow, and the individual defender (appellant), Archibald Mackie junior, one of the partners thereof, caused the arrestments libelled to be used against the personal funds of the pursuer (respondent),

William Wilson, executor of the deceased John Wilson: Find that the said arrestments were so used wrongously and without legal warrant: Find the said firm of Archibald Mackie, and Archibald Mackie junior, one of the partners thereof, liable in damages therefor jointly and severally with the other individual defender, Archibald Mackie, the other partner of said firm, against whom decree by default has already been pronounced in the inferior Courts for the whole sum sued for: Assess the said damages at £10 sterling, and decern therefor, with interest as libelled, against the said firm of Archibald Mackie, and the said Archibald Mackie junior, one of the partners thereof: Find the said firm of Archibald Mackie and the said Archibald Mackie junior liable in expenses both in the inferior Court and this Court," &c.

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GEORGE BEGG, S.S.C.—LINDSAY MACKERSY, W.S.—Agents.

ANDREW ROBERTSON, Pursuer and Appellant.—*Trayner—Brown.*
JOHN COCKBURN, Defender and Respondent.—*Mackintosh—J. P. B. Robertson.*

No. 9.

Oct. 22, 1875. Robertson v. Cockburn.

Lease—Jurisdiction—Sheriff.—An action to compel a person to implement a lease, by entering into possession and paying the rent, may competently proceed in the Sheriff Court, although the Sheriff may have to decide upon the constitution of the lease, in consequence of the defender's denial of its existence.

Process—Summons—Contract—Lease.—A summons concluding generally against a tenant for implement of a contract of lease *held* insufficient, but *allowed* to be amended by the insertion of the words "by entering into possession of the premises and paying the rent when due."

Process—Appeal—Sheriff—Jurisdiction—Expenses.—In an appeal from a Sheriff Court, remit made to the Sheriff to proceed with the case, with power to decide the question of expenses in the Court of Session when the case should be decided on its merits.

THE present action was raised by Andrew Robertson against John Cockburn in the Sheriff Court at Edinburgh.

2D DIVISION. Sheriff of Mid-Lothian. I.

The conclusions of the summons were as follows, but without the words in italics, which were allowed to be added by the Court of Session:—"Therefore the defender ought to be decerned and ordained forthwith to implement and fulfil the contract or agreement entered into between him and the pursuer on or about the 5th day of October 1874 for a lease of the shop No. 64 Grove Street, Edinburgh, for five years, at the rent of £45 for the first three and £50 for the remaining two years, conform to draft of such lease prepared by the agents of the said pursuer and revised by the said defender, *and that by entering into possession of the premises and paying the rent when due,* or otherwise, and in the event of the defender failing to implement and fulfil the said contract as above concluded for, the defender ought and should be decerned to pay to the pursuer the sum of £400 as damages sustained by the pursuer, or which he may yet sustain in consequence of the defender's said failure to implement and fulfil the said contract or agreement."

The record was closed upon the summons and the following minute of defence:—"Mr M'Dougall, for defender, denied that any lease between the pursuer and defender was ever entered into for premises in Grove Street, and explained that the defender was in negotiation for a lease of the subjects in Grove Street, but that no agreement was come to nor any lease signed. He further pleaded *locus pœnitentiæ*, in respect that no written agreement or lease was ever signed, though the alleged lease is for a term of years."

No. 9.

Oct. 22, 1875. Robertson v. Cockburn.

The Sheriff-substitute (Hallard) pronounced this interlocutor :—" Finds that this action is in substance one to have it found and declared that the defender is bound to accept from the pursuer a lease for five years, at the rent of £45 for the first three and £50 for the remaining two years : Finds that it is *ultra vires* of this Court to pronounce a judgment to the above effect : Therefore dismisses the action ; finds the defender entitled to expenses," &c.*

The Sheriff (Davidson) adhered.†

The pursuer appealed to the Court of Session.

Argued for the appellant ;—(1) The first ground on which the Sheriff-substitute had dismissed the action was clearly wrong. A declaratory conclusion was the assertion of a bare right, to be afterwards followed up. This was simply a petitory action *ad factum præstandum*, with an alternative conclusion for damages. The necessity of declaring a fact in order to reach the decree did not make it a declaratory action. (2) Mere reference to a heritable subject did not make the action incompetent in the Sheriff Court. There was no competition between the pursuer and the defender in regard to the property of the subjects in question. No decision could be quoted to the effect that it was not within the Sheriff's jurisdiction to determine the constitution or validity of a lease. The *dicta* relied on by the defender were merely *obiter*. The books on Sheriff Court practice might be appealed to, if not as authorities on the law, at least in proof of the practice. Indeed it was well known that in actions of removing, for instance, Sheriffs constantly entertained questions in regard to the validity of leases. The defender's contention might have some weight if the validity of the lease depended on the title of the granter, though even in such cases it was competent for the Sheriff, in order to explicate his proper jurisdiction, to decide incidentally a question of heritable right, provided there was no proper competition of heritable titles. But in this case the defender did not deny the pursuer's title to the subjects. The

* " NOTE.—The Sheriff-substitute has read the authorities to which he has been referred by the pursuer's agent. These bring out pretty clearly that a declaratory conclusion and decree are necessary to give the pursuer the remedy he seeks. This Court is not competent to give that remedy. Moreover, the proposed deed is intended to give a leasehold title to an heritable subject ; and the conclusion for damages is subordinate to the leading conclusion, which, as already said, is in substance and effect a declaratory one.—See Robertson v. Lindsay, Dec. 4, 1873" (*ante*, vol. i. p. 323).

† " NOTE.—The case of Gordon in 1802 (M. 12,245) to which the respondent has referred, and also another case of recent date, Cox and others v. Kerr, Oct. 25, 1873 (*ante*, vol. i. p. 60), which followed the case of Gordon, were not, at least apparently, quite the same as this. In both these cases there were disputes as to the terms of the dispositions, which in each case the petitioner asked that the respondent should be ordained to deliver to him. Thus, questions of heritable right were clearly involved in these cases.

" But here—supposing the alleged agreement for a contract of lease were to be proved by the petitioner—the exact terms and conditions of the lease to which the petitioner is entitled would or might be subject of discussion, and equally raise such incompetent questions. The petitioner of course means that if he proved his agreement for a lease the Sheriff should read the written lease to be executed in respect of the agreement, and decide all questions that might arise thereanent. Therefore, though with hesitation, the Sheriff concurs in holding this action incompetent.

" The respondent did not plead incompetency. The Court was, however, *ex proprio motu*, entitled to consider that ; and it is not thought there should be any modification of expenses, inasmuch as the progress of the case has been at once arrested, and no additional expenses caused by the respondent's act."

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question between them, which would equally have arisen had the action been simply for payment of the first half year's rent, was whether the parties had entered into a certain contract, personal in its nature, though in certain cases and to certain effects made real by statute. Cases in regard to feu-rights, which were heritable in their nature, did not support the defender's case.[1]

Argued for the defender;—This was not an action to enforce an admitted lease; it was an action to constitute a lease. The validity of all contracts respecting heritage, where challenged, could be tried in the supreme Court alone.[2] If it was competent for the Sheriff to try the validity of a lease for five years, it would be equally competent for him to try the validity of a lease for ninety-nine years, or longer. Further, if this action were competent in the Sheriff Court, it would be equally competent in the Sheriff Court to sue the landlord for implement of a lease the constitution of which he denied.

In the course of the argument the pursuer proposed, with leave of the Court, to amend the summons by adding the words in italics.

At advising,—

LORD JUSTICE-CLERK.—This case raises a point of very general importance—how far a Sheriff Court can decide on the constitution and validity of a lease. I am not altogether surprised that as the summons originally stood the Sheriff-substitute could find in it nothing but an action of declarator. Except as regards the alternative conclusion for damages, there is nothing petitory about the summons. A conclusion for implement of a contract is a conclusion for nothing, unless it states in what way the contract is to be implemented. The difficulty, however, has been removed by the addition to the summons of the words "and that by entering into possession of the premises and paying the rent when due."

The question is, whether the Sheriff can competently judge whether the defender is bound to enter into possession and pay the rent, although, to enable him to judge of this, he may have to decide whether the pursuer has proved the existence of a lease. I think that it is clear, beyond doubt, that the Sheriff has jurisdiction to determine whether a tenant is bound to take possession, or to relinquish possession, or to pay the rent, or perform any other obligation of the lease; and he cannot determine such questions without looking at the document of lease, if there is a document. I wish to reserve my opinion on some of the matters suggested in argument. I do not think that the relation of landlord and tenant is at all in the same position as a competition of titles to heritable property. This case does not present anything in the shape of a competition of heritable rights. The pursuer asserts, and the defender denies, that a

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[1] Hall v. Lady Grant, May 19, 1831, 9 S. 612, 3 Scot. Jur. 433; Murdoch v. Wylie, March 8, 1832, 10 S. 445, 4 Scot. Jur. 377; Corbet v. Douglas and Jarvie, March 5, 1808, Hume, p. 346; Robertson v. Paton, May 23, 1815, Hume, p. 658; M'Glashan's Sheriff Court Practice (4th edit., by Barclay), secs. 74, 76; Dove Wilson's Sheriff Court Practice, pp. 12, 13; (see also Sellar v. Aiton, Jan. 26, 1875, *ante*, vol. ii. p. 381.)

[2] E. of Moray v. Pearson, June 14, 1842, 4 D. 1411, 14 Scot. Jur. 493—(see the note appended to the interlocutor of Lord Cuninghame, Ordinary, 4 D. 1413, which was adhered to by the Second Division, pp. 1414-15); Earl of Aberdeen v. Laird, Feb. 7, 1822, 1 S. 294; Robertson v. Lindsay, Dec. 20, 1873, *ante*, vol. i. p. 323—(see opinion of the Lord President, p. 325, and of Lord Deas, p. 328).

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contract of lease has been entered into. I cannot doubt that the Sheriff can competently try such a question.

Lord Neaves.—I am of the same opinion. The original summons was bad, not for want of jurisdiction, but for want of specification. I cannot discover any authority in the law of Scotland for holding that where a pursuer, alleging a right of property in heritable subjects, which is not disputed, seeks to enforce a lease, that is a competition of real rights. A competition necessarily involves two conflicting rights. The rights of landlord and tenant are not properly conflicting. Only one heritable title is alleged by the parties. The defender's case is that he has no claim to any right whatever in the lands, not even to a lease from the obligations in which he seems desirous to escape. The Sheriff's jurisdiction is excluded, if the case discloses a competition of proper heritable titles. But it does not follow that the Sheriff may not examine the validity of a title produced, where no conflicting title is maintained. For instance, in an action of removing, where the pursuer is not the granter of the lease, the Sheriff may competently look at the landlord's disposition or sasine to see whether his title to pursue is *prima facie* valid.

In this case, then, the objection to the Sheriff's jurisdiction is groundless. The true objection to the summons was its not pointing out in a clear and practical manner what the pursuer sought. If decree had been given in terms of the conclusions of the summons no executorial could have followed. But this objection has been obviated by the amendment.

I give no opinion on the question whether a competition of leasehold rights is competent in the Sheriff Court. To some extent, and upon certain leases, the statute 1449 has conferred the character of real rights, but only in favour of a tenant in possession. A lease is certainly not a real right in the person of a man who has never been in possession and who disclaims the lease. The case is totally different from that of feu-rights, which are real in their nature.

Lord Ormidale.—This case has, from its commencement in the Sheriff Court, been very oddly dealt with. The defender, when he minuted his defence, stated no objection to jurisdiction. Neither did he object that the action, as laid, was irrelevant and insufficient to support its conclusions, although this appears to me to have been a very obvious objection to the summons. To conclude, in general terms, that a defender should implement a lease without specifying how—by paying the stipulated rents and otherwise fulfilling the conditions of the lease—was clearly a defective mode of libelling the action. No one could venture to enforce a decree, if he obtained it, in terms so vague and indefinite. The defect, however, has been supplied by the amendment which has now been made on the summons. And I must express my regret that it had not been so amended at the outset of the litigation in the Sheriff Court. According to the Sheriff Court Act of 1853 it was the duty of the Sheriff-substitute to meet the parties and hear them "in explanation of the grounds of action, and of the nature of the defence to be stated thereto." I am therefore surprised that when this was done, as I presume it was, the summons was not at once amended, as it has now been, and in that way a great deal of time, litigation, and expense saved to the parties.

In regard to the plea of want of jurisdiction taken up and given effect to by the learned Sheriff-substitute, whose interlocutor on the subject was with diffi-

culty adhered to by the Sheriff-principal, not only was it not stated by the defender, but it appears to me to be ill-founded in itself. No. 9.

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It is out of the question to say that, because a contract relates to heritable property, the Sheriff has no jurisdiction to consider and sustain an action having reference to it. This was scarcely maintained by the defender, although his argument went very nearly that length. It is enough, however, to remark on the point that actions of a possessory and petitory character, although relating to heritable property, are perfectly competent, and of frequent, if not constant, occurrence in the Sheriff Court. I could not, therefore, have concurred in the views of the learned Sheriffs as stated by them, even if the summons had not been amended. But at any rate, as the case now stands, it is clearly one which cannot be dismissed on the ground of want of jurisdiction on the part of the Sheriff to try its merits. What these may ultimately appear to be cannot be predicted at present. It is quite possible that the pursuer may fail to instruct by competent evidence that there is any such lease as that on which he libels; and for that or other reasons it may turn out that he has no maintainable case.

LORD GIFFORD.—I concur. The Sheriff has always jurisdiction to enforce the stipulations of a lease, whether by decerning for payment of rent, or by ordering the execution of improvements, draining or otherwise, contracted for in the lease, or by enforcing any other obligation incumbent on either party. In all such actions there is no doubt whatever of the Sheriff's jurisdiction, and it does not deprive him of jurisdiction that the objection is taken that there is no valid lease. It is a different question whether it may be expedient for the Sheriff to sist process until any general question regarding the lease is settled, either in a reduction, if an *ex facie* lease is to be set aside, or in a declarator in the supreme Court, if this shall be necessary. But this does not affect the question of jurisdiction. The Sheriff's jurisdiction is untouched, although it may be that he must wait till questions of right be otherwise determined. Viewing this action, as now amended, as simply an action for rent, it is certainly competent in the Sheriff Court, and it is not rendered incompetent by any question raised upon the defences.

THIS interlocutor was pronounced:—"Sustain the appeal: Recall all the interlocutors in the cause: Allow the amendment to be added to the summons: Find that the action as thus amended is competent in the Sheriff Court: Reserve all questions of expenses, and remit the cause to the Sheriff to proceed with the cause, with power to decide the question of expenses in this Court, when the case shall be decided on its merits, and decern."

RICHARDSON & JOHNSTON, W.S.—ALEXR. M'DOUGALL, L.A.—Agents.

JAMES BLAIR, Pursuer.—*Sol.-Gen. Watson—Balfour.*
ROBERT BALFOUR WARDLAW RAMSAY, Defender.—*Asher—J. P. B. Robertson.*
THE ALLOA COAL COMPANY, Defenders.—*D.-F. Clark—Guthrie Smith.*

No. 10.

Oct. 22, 1875.* Blair v. Ramsay, &c.

Minerals—Property—Superior and Vassal—Servitude.—B acquired in feu from A three contiguous parcels of lands. In the titles to the different parcels A reserved respectively:—

(1) "The coals and coal-heughs to be won and disposed upon at our pleasure."

* Debated in July 1875.

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(2) "The whole coal, stone quarries, and all other metals and minerals, with power to search for, work, and carry away the same."

(3) "The coal, with full power to dig for, work, win, and carry away the same."

A was proprietor of the land surrounding B's, and leased the whole coal-field thereunder, including the coals under B's lands, to a coal company who drove a mine, with its entrance in A's lands, cross-cutting coal and other strata in B's lands, to A's lands beyond, and thereby conveyed the minerals wrought under these last-mentioned lands to the surface.

Held that, while A's right in the reserved minerals was one of *plenum dominium*, his right to bore through strata under B's lands not reserved was of the nature of a servitude or privilege, which could only be used for the purpose of working the reserved minerals and bringing them to the surface; and accordingly that A and his lessees were not entitled to use the mine under B's lands for conveying minerals wrought under A's lands, except in so far as the mine passed through coal wastes under B's lands, or other reserved minerals.

2D DIVISION. Ld. Mackenzie.

MR BLAIR was the proprietor of a small estate in the county of Clackmannan of which Mr Wardlaw Ramsay was the superior.

Mr Blair's lands consisted of three contiguous parcels acquired by him at different times.

The first parcel, described as the lands of Langour, was feued out in 1825, the superior reserving "the coals and coal-heughs of the said haill lands to be won and disposed upon by me and my foresaids at our pleasure."

The second parcel, which lay between the other two, was feued out in 1827 under a contract of excambion, which contained the following clause:—"Reserving always to the said Robert Wardlaw Ramsay, and his heirs and successors, the whole coal, stone quarries, and all other metals and minerals within the said three acres of the lands of Westquarter hereby disponed, with power to search for, work, and carry away the same, they always paying to the said James Blair and his foresaids all damages which may be done to the said lands by the said workings, as these damages shall be ascertained by two arbiters to be mutually chosen."

The third parcel was feued out in 1857 under a contract of excambion containing this reservation:—"But excepting always the coal within the said several subjects above disponed to the said James Blair, which coal is hereby expressly reserved to the said Robert Balfour Wardlaw Ramsay, with full power to him to dig for, work, win, and carry away the same on paying the surface damages which the ground may thereby sustain, as the same shall be ascertained by two persons to be mutually chosen by the said parties, with power to name an oversman in case of difference."

Mr Blair's lands were situated about the middle of a large estate belonging to Mr Wardlaw Ramsay, the coal-field of which, extending to 830 acres, including 19 acres under Mr Blair's lands, was leased to the Alloa Coal Company.

Under the lease three valuable seams of coal were worked, known as the cherry coal, the splint coal, and the main coal, the splint coal lying about five fathoms below the cherry coal, and the main coal about thirteen fathoms below the splint coal. Other seams existed, but so thin as not to be of marketable value.

Partly to work out the splint coal under Mr Blair's lands, but chiefly for the purpose of working out the coal under Mr Wardlaw Ramsay's lands to the south and east, the Alloa Coal Company found it convenient to drive a mine through Mr Blair's lands. The mine, which was constructed in 1870–1872, left the surface in Mr Ramsay's lands, and ran in a south-easterly direction, first under Mr Ramsay's lands for 158

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yards, then under Mr Blair's lands a distance of about 330 yards, at a depth from the surface varying from 16 yards to 34 yards, and entered Mr Ramsay's lands on the other side.

The strata under Mr Blair's lands rose rapidly from north-west to south-east, and the mine cross-cut them, its course lying partly in the cherry coal waste and splint coal waste, and partly in other strata, consisting chiefly of shale and sandstone of no marketable value.

Mr Blair objected to the Alloa Coal Company driving the mine in question through his lands for the purpose of removing minerals under Mr Wardlaw Ramsay's lands, except upon payment of a way-leave. This was refused, and Mr Blair accordingly raised the present action against Mr Wardlaw Ramsay and the Alloa Coal Company.

The conclusions of the summons were (1) for declarator that the defenders had no right "to make or drive any mines or other roads or passages, whether below or above ground, in, through, or over any part" of the pursuer's lands, "for the purpose of obtaining access to coal or other minerals in any lands outside the bounds of the pursuer's said lands belonging, or the coal and other minerals in which belong to the defender, Robert Balfour Wardlaw Ramsay, or for carrying along, through, or over such mines, roads, or passages any coal or other minerals from such lands, and in particular that none of the defenders were entitled or had or have right to make or drive a mine now existing in the pursuer's said lands, and having its daylight entrance at or near to the south side of the turnpike road between Alloa and Tillicoultry near to the village of Devonside for any of the purposes foresaid;" (2) for declarator that the defenders had no right to "carry or convey coal or other minerals wrought or won in lands belonging, or the minerals in which belong to, the defender, Robert Balfour Wardlaw Ramsay, outside the bounds of the pursuer's foresaid lands, either along the said mine, or along any other mine, road, or passage, either now existing or which may be hereafter made, in, through, or over any part of the pursuer's said lands, whether below or above ground;" and for interdict against the defenders "making or using any mines, roads, or passages, whether below or above ground, in or through the pursuer's foresaid lands, or any part thereof, for the purpose of carrying or conveying any coal or other minerals wrought or won from lands belonging, or the coal or other minerals in which belong to the defender, Robert Balfour Wardlaw Ramsay, outside the bounds of the pursuer's said lands; and, in particular, from carrying or conveying any such coals or other minerals along or by the mine now existing in the pursuer's said lands above specified." There were also conclusions for damages, or otherwise for a way-leave to be fixed by the Court.

Defences were lodged for both defenders, in which they maintained that they had a right to use the mine in the way complained of.

The Lord Ordinary, of consent of parties, and before answer, remitted to Mr Alexander Simpson, mining engineer, Glasgow, to report with reference to the mine in question, and the purposes for which it was made and used.

Mr Simpson returned a report, from which the facts above-stated appeared.

The Lord Ordinary pronounced this interlocutor:—"Finds, decerns, and declares that neither the defender, Robert Balfour Wardlaw Ramsay, nor the other defenders, or any of them, has, have, or had any right or title to carry or convey coal or other minerals wrought or won in lands belonging, or the minerals in which belong, to the defender, Robert Balfour Wardlaw Ramsay, outside the boundaries of the pursuer's lands, along the mine now driven through the pursuer's lands libelled on, or along any

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other mine, road, or passage which may hereafter be made or driven through or over any other parts of the pursuer's said lands, whether below or above ground, except where said mine passes through the coal wastes in said lands, or through the lands acquired by the pursuer under the contract of excambion, dated 25th August 1827; and interdicts, prohibits, and discharges the whole defenders from making or using any mines, roads, or passages, whether below or above ground, in or through the pursuer's foresaid lands, or any part thereof, excepting as aforesaid, for the purpose of carrying or conveying any coal or other minerals wrought or won from lands belonging, or the coal or other minerals in which belong, to the defender, Robert Balfour Wardlaw Ramsay, outside the bounds of the pursuer's said lands; and, in particular, from carrying or conveying any such coals or other minerals along or by the mine now existing in the pursuer's said lands above specified, and decerns: Reserves all questions of expenses, and appoints the cause to be put to the roll with a view to further procedure."*

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* "NOTE.—The Lord Ordinary does not see his way to give decree in favour of the pursuer in terms of the first declaratory conclusion. It does not appear from Mr Alexander Simpson's report that the mine driven through the pursuer's lands was not made for working the cherry coal in these lands. It is used for working the splint coal, and it may be used for working the main coal situated within the pursuer's lands. The defender, Mr Wardlaw Ramsay, and the other defenders as his tenants in the coal under the pursuer's lands, were, the Lord Ordinary thinks, entitled to drive that mine for the purpose of winning and away carrying the coal in the pursuer's lands, which is the reserved property of Mr Wardlaw Ramsay.

"It was no doubt decided in the case of the Duke of Hamilton v. Graham, 28th July 1871, 9 Macph., p. 98, that a superior, as absolute proprietor of the coal and limestone, is entitled to form in them roads for the underground carriage of minerals between mines in other properties. But in the present case Mr Wardlaw Ramsay, the superior, is not absolute proprietor of the strata through which the mine driven through the pursuer's lands runs. That mine is not formed in the coal which is reserved by him. The mine is nearly level, while the coal and other strata rapidly ascend from the entrance of the mine. The strata are therefore cut across by the mine, and the cherry and splint coal seams are alone cut across during its transit through the pursuer's lands.

"The coal in question is reserved under three separate titles, the first being dated in 1825, the second in 1827, and the third in 1857. In the title of 1825 there is a reservation to Mr Wardlaw Ramsay of the coals and coal-heughs. In the contract of excambion of 1827 there were reserved to Mr Wardlaw Ramsay the whole coal, stone quarries, and all other metals and other minerals, and in the disposition of 1857 the coal was alone reserved.

"Under the term metals and minerals all strata seem to be comprehended, which are now destitute of, or incapable of supporting animal or vegetable life. If this be a correct definition, Mr Wardlaw Ramsay and his coal tenants had right to drive the foresaid mine through the three acres of ground acquired by the contract of excambion of 25th August 1827, with a view to win the coal of other lands beyond those belonging to the pursuer, because the whole strata were his absolute property.

"Under the decision in the Duke of Hamilton's case the superior as owner of the coal was found entitled to use the coal waste for the underground carriage of minerals from other lands where it was not proved, as is the case here, that the whole reserved coal had been worked out and exhausted.

"With the foresaid exceptions, the mine in question, where it traverses the pursuer's property, is cut through strata which undoubtedly belong to him. That mine may be used for the conveyance of coals to the surface, the produce of the three parcels of land belonging to him, but no coal from other lands can be conveyed along those parts of that mine.

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The Alloa Coal Company reclaimed.

Argued for the reclaimers;—It was now established by the case of Duke of Hamilton v. Graham that the right of the superior to reserved minerals was not of the nature of a right to remove a loose stone on the surface which right was exhausted with the removal of the stone. The superior's right to reserved minerals was a right of property in the mineral strata, which remained after the minerals were removed, and he could therefore use the space which was occupied by the minerals for any lawful purpose.[1] A right of property in coal could not be construed so strictly as to limit the right to seams which happened to be marketable. There were always coal strata not considered fit for the market, but which were the property of the proprietor of the coal, and which he was entitled to use for any purpose he pleased. In short, he was the proprietor of the whole coal measures. The reservation must be interpreted according to the circumstances in which it was made.[2] When the pursuer's lands were feued off, the minerals under Mr Ramsay's lands had been worked as a continuous coal-field; and it was reasonable to hold that the parties intended that they should continue to be so worked. Otherwise the result would be that, if the proprietor of a large estate feued it out in small parcels, reserving the minerals in each, he could not work the minerals in any one feu except by sinking a pit in that feu. *Separatim*, so far as the lands acquired in 1827 were concerned, the superior's *plenum dominium* in everything below the surface was clear.[3]

Argued for the pursuer;—The superior could not claim a right of property in the strata not specially reserved. The question, then, was whether he had any right of the nature of servitude which entitled him to make a mine through strata not reserved, for any purpose except that of removing the reserved minerals. The decision in Duke of Hamilton v. Graham proceeded on the ground that there was no trespass by the Duke on Mr Graham's property. The coal under Mr Graham's lands was the property of the Duke, and he was accordingly found entitled to use the coal wastes for any purpose he pleased. A right of servitude, on the contrary, could only be exercised for the specific purposes for which it was constituted.[4]

At advising,—

LORD ORMIDALE.—This case raises some questions of nicety and importance, and in order to arrive at a satisfactory conclusion regarding them it is necessary to ascertain what is the true nature and effect of the rights reserved in the three several titles under and in virtue of which the pursuer's lands are held by him.

The titles referred to are dated respectively in 1825, 1827, and 1857; and, although the clause of reservation is not expressed in all of them in precisely the

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"Such being the view which the Lord Ordinary takes of the decision in the case of the Duke of Hamilton, both in the House of Lords and in the Court below (7 Macph. 976), he has pronounced decree under the second declaratory conclusion in favour of the pursuer, subject to the limitations above referred to."

[1] Duke of Hamilton v. Graham, July 28, 1871, 9 Macph. H. L. 98, 43 Scot. Jur. 491, L. R. 2 Scot. App. 166; Proud v. Bates, May 1865, 34 L. J. (N. S.) Ch. 406; Davidson v. Duke of Hamilton, May 15, 1822, 1 S. 411.

[2] Eadon v. Jeffcock, June 11, 1872, L. R. 7 Exch. 379.

[3] Hext v. Gill, July 1872, L. R. 7 Ch. App. 699.

[4] Turner v. Ballandene, March 29, 1834, 7 W. and S. 163; Bowser v. M'Lean, November 1860, 30 L. J. (N. S.) Ch. 273; Dand v. Kingscote, 1840, 6 M. and W. 174.

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same words, it does not appear to me that there is any such difference as to affect materially the conclusion that should be come to.

In 1825 the pursuer acquired from a predecessor of the defender, Mr Wardlaw Ramsay, the lands of Langour, but in the titles under and in virtue of which the lands so acquired are now held by the pursuer, there is an express reservation of "the coals and coal-heughs of the said haill lands, to be won and disposed upon by me and my foresaids at our pleasure." It neither was, nor could be, disputed, having regard to the rule of law, as generally stated by Mr Bell in his Principles (sec. 987), and to the decision of the House of Lords in the case of the Duke of Hamilton v. Graham (Law Reports, Scotch Appeals, vol. 2, p. 166), as well as to some of the English cases referred to at the discussion, that the coals and coal-heughs thus reserved continued to belong, as a proprietary right, to the defender, Mr Ramsay's, predecessor, and his heirs and successors, in a sense, as full and unlimited as did the lands of Langour themselves before the conveyance of them by him to the pursuer; and neither was it, nor could it well have been disputed, that along with the reserved coals and coal-heughs there was likewise reserved the right to work and bring them to the surface for the purpose of being disposed of, anything defective or obscure in this respect in the terms of the reservation itself being supplied by implication, inasmuch as an absolute right to the coal, infers, independently of express stipulation, a right to work and make it available.

But, on the other hand, I think that this reserved right to work and carry away the coal was not of the nature of a proprietary right, but rather of the nature of a privilege, servitude, or easement.

And it also appears to me to be clear that this privilege, servitude, or easement must be held to be limited to the coal and other reserved minerals of the lands conveyed, and does not apply to the rest of the coal-field held in lease by the defenders, the Alloa Coal Company, from the proprietor, the other defender, Mr Wardlaw Ramsay. This, I think, is the only interpretation the terms of the reservation admit of; and that it is the true legal interpretation is sufficiently established by the cases of Turner v. Ballandene or M'Whannell, 29th March 1834 (7 Wilson and Shaw's Appeals, p. 163), and Bowser v. M'Lean, 30 Law Journal, Chan. p. 273). The case of Davidson v. the Duke of Hamilton (15th May 1822, 1 Shaw, 411), cited by the defenders as an authority to the contrary, turned upon what was held to be the effect of the special terms of the reservation in that case, and is so remarked upon and distinguished by the Lord Chancellor in Turner v. Ballandene.

In regard to that portion of his lands consisting of three acres of Westquarter acquired by the pursuer in 1827 under the contract of excambion referred to in the second article of the condescendence, the same considerations are, I think, equally applicable, although the terms of the reservation are in some respects different. By that contract there was expressly reserved to the defender, Mr Ramsay's predecessor, his heirs and successors, "the whole coal, stone quarries, and all other metals and minerals within the said three acres of the lands of Westquarter hereby disponed, with power to search for, work, and carry away the same, they always paying the said James Blair and his foresaids all damages which may be done to the said lands by the said workings, as these damages shall be ascertained by two arbiters to be mutually chosen." It is true that the reservation here is more comprehensive than in the deed of 1825, inasmuch as in place of it being limited to "coal and coal-heughs," it refers, in

addition, to "stone quarries and all other metals and minerals;" but I do not see how this can affect the judgment, for it must be taken as an ascertained fact in the case that "the strata through which the mine passes, other than the coal, consists chiefly of shale and sandstone, and is of no marketable value." Such is the report of Mr Simpson, the engineer to whom it was remitted by the Lord Ordinary, of consent of all parties, to examine into and report upon all the facts necessary for the determination of the disputed questions; and not only was the remit to Mr Simpson made of consent of all parties, but his report has been received without objection, and assumed by all parties to be correct and conclusive as to the facts embraced by it. The result is that, although the clause of reservation in the deed of 1827 is differently expressed, and more comprehensive than that in the deed of 1825, both may, for the purposes of the judgment, be held, I think, to be to the same effect—viz., a reservation of the coal, and nothing else, it turning out that there is nothing else in the pursuer's lands which can in any reasonable sense be held to fall within the reservation. At the same time, it may be right, as afterwards suggested by me, to frame the judgment so as to meet the possible event of reserved substances other than coal being present in the pursuer's lands. Be this, however, as it may, no distinction at least can be taken between the deed of 1827 and that of 1825 as regards the legal nature and effect of the rights reserved. In the former, while a full right of property in the coals and coal-heughs is reserved, with a right also,—not of the nature of property, but of privilege, servitude, or easement,—of working and bringing the coals to the surface, so in the latter, while a full right of property in the coal, stone quarries, and all other metals and minerals is reserved, there is added the right not of property, but of privilege, servitude, or easement of working and bringing them to the surface.

In regard to the remaining, or third portion of lands acquired by the pursuer, the same conclusions must be come to, with perhaps even less hesitation than in the two former instances, seeing that here the reservation is limited simply and exclusively to coal, with full power to "dig for, work, win, and carry away the same on paying the surface damages which the ground may thereby sustain."

It only requires further to be noticed that, according to Mr Simpson's report, and especially the plans thereiñ referred to, not only the strata intervening between the seams of coal in the pursuer's lands are entirely worthless, but that they occupy a space greatly larger than the seams of coal themselves, the consequence being that it is impossible for the defenders to take up by the mine or level already formed, or by any other mine or level that can be formed in the pursuer's lands, coal or other substances from the grounds outside the boundaries of the pursuer's lands, without passing through ground or strata which in no view can be held to belong to them except for the special purpose only of working and bringing to the surface the coal or other reserved minerals situated within the limits of the pursuer's lands.

Such being the nature and effect of the rights of the defender, Mr Ramsay, reserved in the titles granted to the pursuer of the lands in question, it does not appear to me that the matters to be determined are attended with serious difficulty.

I am therefore of opinion—

(1) That the right to coal-heughs, stone quarries, and other metals and minerals reserved in the titles of the pursuer, is one of property as full and

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unlimited as is the right otherwise of the pursuer himself to the lands acquired by him.

(2) That the coal or other wastes created by the removal or exhaustion of the substances, the property of which was reserved to the defender, Mr Ramsay, his heirs and successors, belong in the same way in *plenum dominium* to them; and,

(3) That in regard to the power of carrying to the surface the reserved coal and others no proprietary right is reserved, but merely a right of the nature of a privilege, servitude, or easement, and that this right is applicable only to the coal and other substances, the full property of which is reserved in the pursuer's titles, and does not extend to the rest of the coal-field.

In this state of matters, and with reference to the opinion I have just expressed, it appears to me that the Lord Ordinary's interlocutor is well founded, and ought to adhered to, with a slight variation on that part of it which excepts from the interdict the "coal wastes," to the effect of including in the exception, in addition to "coal wastes," wastes that may be created by the removal of any of the other reserved substances. I think it right that this variation should be made on the Lord Ordinary's interlocutor to meet the possible, although, I think, improbable, contingency of it yet turning out that such reserved substances are found to be in the pursuer's lands.

Lord Neaves and Lord Gifford concurred.

Lord Justice-Clerk.—I concur. I doubt whether it would be worth while to vary the Lord Ordinary's interlocutor. I think we should simply adhere.

The Court pronounced this interlocutor:—"Having heard counsel on the reclaiming note for the Alloa Coal Company against Lord Mackenzie's interlocutor of 14th April 1875, refuse said note, and adhere to the interlocutor complained of, with expenses since the date of the Lord Ordinary's interlocutor: Remit to the Auditor to tax said expenses, and to report: And remit the cause to the Lord Ordinary, with power to decern for the expenses now found due."

Gibson-Craig, Dalziel, & Brodies, W.S.—Maclachlan & Rodger, W.S.—Alex. Morison, S.S.C.—Agents.

No. 11.
Oct. 25, 1875.
Minister v. Heritors of Kilmalcolm.

Rev. Alexander Leck, Minister of the Parish of Kilmalcolm, Pursuer.—*Balfour.*

The Heritors of the Parish of Kilmalcolm, Defenders.—*Sol.-Gen. Watson—Asher.*

Teinds—Stipend—Augmentation—Value of Feu-Duties.—In an application by a minister for augmentation of stipend, *held* that the revenue derived from portions of the glebe feued under the Glebe Lands (Scotland) Act, 1866, was not to be taken into account in determining whether or not an augmentation should be granted.

Teind Court.
Teind Clerk.

This was an action of augmentation of stipend brought by the minister of the parish of Kilmalcolm. The last augmentation was granted in 1854, and raised the stipend to 17 chalders. The minister asked a farther increase of 5 chalders.

The glebe extended to 11½ acres. In 1867 the minister applied to the Court of Teinds for authority to feu the glebe under the Glebe Lands

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(Scotland) Act, 1866. This application was granted after the statutory procedure. In virtue of the power to feu thus granted two feus were given out extending together to 2¾ acres, and giving a net return to the minister of £45, 6s. 8d., after deduction of interest on preliminary expenses. The remainder of the glebe remained unfeued.

It was objected for the heritors that the amount of feu-duties received from the glebe must be taken into consideration in determining whether an augmentation ought to be granted or not, and that in that view the augmentation asked was excessive.

Argued for the minister;—Prior to the date of the Act of 1866 it was decided that the value of the glebe was only to be taken into account in questions of augmentation where that value was materially in excess of the usual value, but not otherwise. This could only be so where there was something exceptional in the history of the glebe. Such was the fact in the Blair Atholl case,[1] where the parish was composed of four united parishes, and the minister had retained all four glebes, and had, besides, excambed one of them with the principal heritor for a piece of much more valuable ground. Even in that case there was a very strong minority of the Court of opinion that the value of the glebe should not be taken into account. The Glebe Lands Act of 1866 was not intended to relieve the heritors, but to benefit the minister. One thing of which the minister had to satisfy the Court before he could obtain authority to feu was as to "the grounds on which the petitioner submits that benefit will arise to the minister and his successors in office by authority to feu or lease being granted."[2] It could be of no benefit to his successors, if, as soon as the glebe, or any part of it, was feued, it became a ground for refusing an augmentation which was otherwise justly due. This view had been taken in the case of glebes feued under private Acts prior to the general Act of 1866. As, for instance, in the case of the Barony Parish of Glasgow, where, in 1867, an augmentation of 12 chalders was granted, though the minister derived £395 a-year from feus. So also in the case of St Cuthbert's Parish, Edinburgh, where, in 1862, an augmentation of 4 chalders was granted to each minister, though the first minister derived £256 and the second minister £246 a-year from feus.

Argued for the heritors;—The heritors consented to an augmentation of 2 chalders, and, if there were no element of special value in the benefice to be taken into account, would consent to more. But the principle being settled,[3] that wherever the glebe was one of exceptional value, that value was to be taken into consideration in questions of augmentation, there was no reason for excepting this case from the general rule, and laying out of sight the exceptional value of the glebe because it was in part derived from feu-duties. This glebe was not, perhaps, of special extent, but it had the special quality of feuing capacity which neighbouring parishes had not. In the hands of the heritors the glebe would now have been of the same feuing value as it was to the minister, and there were no grounds for saying that they should not get the benefit of that feuing value as they would have of exceptional agricultural value. The policy of the Court was to place ministers in the same neighbourhood as much as possible on a footing of equality. This feuing value of his glebe was just what distinguished the position of the minister in the present case from that of his neighbours, and therefore that value must be taken into account in determining whether he was entitled to an augmentation or not.

[1] Stewart v. Lord Glenlyon, May 20, 1835, 13 S. 787, 7 Scot. Jur. 365.
[2] 29 and 30 Vict. c. 71, sec. 9.
[3] Minister of Old Deer v. Heritors, Nov. 23, 1808, F.C.; Stevenson v. Duke of Buccleuch, Nov. 21, 1827, Shaw's Teind Ca. 137.

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LORD PRESIDENT.—The present stipend of this charge is seventeen chalders. The minister asks an augmentation of five chalders. The heritors oppose this as an excessive demand, and on one ground in particular, namely, that the glebe is of special value.

If the value of the glebe arose from purely agricultural produce there is not much doubt that supposing that value to be at all markedly in excess of the ordinary agricultural value of glebes in Scotland we should be bound by the Blair Atholl case and a variety of others to take that value into consideration in determining whether or not we should grant an augmentation.

But the peculiarity of this case is, that any excess in the value of the glebe is caused by a portion of it having been feued out in virtue of the Glebe Lands (Scotland) Act, 1866. Under that statute, in the year after it was passed, this minister presented a petition to the Court for authority to feu his glebe, and what he had to establish to the satisfaction of the Court—and what I must assume he did establish, as he succeeded in his application—was, *inter alia*, that there were no reasonable objections arising from considerations on behalf of adjoining heritors, or on behalf of the benefice, and that benefit would accrue not to himself only but to his successors in the benefice.

The glebe consists of 11½ acres, and of these the minister has succeeded in feuing out 2¾ acres, which give him a net return of about £45 a-year. The proposal of the heritors is that we should count this as part of his ordinary stipend, and take it into account in determining whether or not he should be granted an augmentation.

This raises a question of considerable general importance, namely, whether the matter is to be determined by the principle accepted in the Blair Atholl case, or whether it does not rather fall under the principle applied to the cases in which private mortifications have been made for the benefit of the minister of a parish. In such cases of private mortifications it has been the universal practice to leave the amount out of consideration in questions of augmentation of stipend, on the ground that the opposite course would directly defeat the donor's end, and benefit not the benefice and the incumbent for the time being, but the heritors.

The statute under which alone the authority of the Court could be obtained to feu this glebe was undoubtedly a statute passed to benefit the existing minister and his successors in the charge. And it appears to me that if we were to adopt the view advanced for the heritors the practical result would be, not to benefit the minister and his successors, but to benefit the heritors where they have rights to their teinds, and the titular where they have not. In short, the effect would be to give relief to the heritors and titular in proportion as the glebe is feued out. That was certainly not the purpose of the statute. The intention of the statute would, by such a course, be as completely defeated as that of the founder of a mortification would be by our taking the annual produce of his mortification into consideration in a question of augmentation. There is no answer that I can see to this argument for the minister, and I am therefore for not taking into consideration the value of the feus.

LORD DEAS, LORD ARDMILLAN, LORD MURE, and LORD CRAIGHILL concurred.

THE COURT granted an augmentation of four chalders.

J. B. M'INTOSH, S.S.C.—M'EWEN & CARMENT, W.S.—Agents.

No. 12.

Oct. 26, 1875.
Jack v. Begg, &c.
Begg, &c. v. Jack.

ANDREW JACK, Pursuer.—*Campbell Smith—Rhind.*
REV. DR JAMES BEGG AND OTHERS, Defenders.—*Sol.-Gen. Watson—Jameson.*
REV. DR JAMES BEGG AND OTHERS, Pursuers.—*Sol.-Gen. Watson—Jameson.*
ANDREW JACK, Defender.—*Campbell Smith—Rhind.*

Property—Gable—The customary rule according to which the owner of one of several adjoining lots of ground feued or sold for building a continuous street is entitled to erect his gable to the extent of one-half its thickness upon the adjoining lot without consent of the proprietor, and to be reimbursed half the cost of the gable by that proprietor when he comes to use the gable, proceeds on implied contract inferred from a feuing plan or other circumstances, and where there are no facts from which an implied contract can be inferred (as in rural or villa subjects), no such rule exists, and the builder of a tenement must build it entirely upon his own ground.

Property—Mutual Gable.—A proprietor of a piece of ground in the suburbs of Edinburgh, without consent of the conterminous proprietor, and pending unsuccessful negotiations as to the terms on which consent should be given, took down an old mutual garden wall between the subjects, and erected on the site a gable of four stories. *Held*, in an action of declarator and removal against him at the instance of the conterminous proprietor, that the defender's operations were illegal, but that the Court had the power to impose equitable conditions on which the gable should be allowed to stand, and that in the circumstances the use of the gable by the pursuer, when he came to build on his own ground, without payment, would be a sufficient indemnification for the use which had been taken without agreement of his ground.

Reparation—Interdict.—Held that a person could not claim damages for being prevented by interdict from proceeding with a building which it was ultimately found that he had no right to erect, although the interdict was recalled as not being the proper remedy in the circumstances.

(SEE process of Interdict between the same parties, reported *ante*, vol. i. p. 366.)

2D DIVISION. Ld. Craighill. I.

The circumstances which led to these actions were as follows:—Dr Begg and others, as trustees for the deacons' court of Newington Free Church, were proprietors of a piece of ground in Causewayside, Edinburgh, available for building. Mr Jack was the proprietor of the immediately adjoining ground to the north. Down to 1873 the properties were separated by a mutual garden wall, about 8 feet high, erected about a century before, when the district was in a rural condition.

In February 1873 Mr Jack began to erect a building of three or four stories on his ground, the south gable of which extended along the line of the old wall, part of which he removed to make way for the gable. Soon after he commenced operations he was warned by the Newington Free Church deacons' court that he was encroaching on their property. They did not, however, insist on his immediately desisting, and about two months was spent by the parties in trying to arrange terms on which the deacons' court might give their consent to Mr Jack's operations. Meanwhile Mr Jack proceeded with the erection of the gable. The negotiations failed, and on 10th May 1873, when the gable was nearly finished, Dr Begg and others, as trustees for the deacons' court, presented a petition to the Sheriff to ordain Jack to restore the wall to its former height, and for interim interdict against proceeding with the building. The Sheriff-substitute granted interim interdict as craved, and on 26th November 1873, after a proof, he ordained Jack to take down the gable, and reduce the same to the height of the original wall. Jack appealed to the Court of Session, who, on 10th January 1874, recalled the interdict,

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and dismissed the petition, on the ground that the application for interdict was too late.[1] The building, which had been stopped since the interim interdict granted on 10th May 1873, was then resumed.

On 15th April 1874 Jack raised an action of damages against the trustees for the deacons' court, concluding for £360, the loss sustained by him, as he alleged, in consequence of the defenders having "wrongfully, maliciously, and without probable cause," obtained and kept up the interdict against him.

In defence the trustees pleaded (1) that the action was not relevant.

On 2d June 1874 they raised an action against Jack, concluding—(*First*), for declarator that the pursuers were proprietors of all and whole the subjects situated in Causewayside, Edinburgh, &c., as described in their titles; (*second*), for declarator "that the wall which formerly separated the subjects above described from the property lying immediately to the north thereof, presently belonging to the defender, was mutual property, and that the defender had no right to deal with the same as his exclusive property, and that he was not entitled to remove the same, or to make other erections on the site thereof, without the consent of the pursuers;" (*third*), to have the defender decerned and ordained "to restore the said wall, so far as the same has been removed by him, to its original height and condition;" or otherwise, (*fourth*), "to remove the gable wall built by him on the site of the said old wall, so far as it is of greater height than said old wall, and to the south of what was the centre line of the said old wall;" or (*fifth*), "in the event of the defender not being decerned and ordained to restore said wall to its original condition, in terms of one or other of the two immediately preceding conclusions hereof, to make payment to the pursuers of the sum of £500 in name of damages."

In the action at the instance of the church trustees against Mr Jack the Lord Ordinary allowed a proof, and subsequently pronounced the following interlocutors:—

"18th December 1874.—Finds (1) that the pursuers are proved by their titles to be proprietors of the subjects in Causewayside described in the first conclusion of the summons, and therefore decerns and declares in terms of that conclusion: Finds (2) that the wall which formerly separated said subjects from the property lying immediately to the north thereof, presently belonging to the defender, was mutual property, and being such, that the defender was not entitled to deal with the same as his exclusive property, and in particular, to remove the said wall, or to make other erections on the site thereof, without the express or implied consent of the pursuers, and to this extent and effect decerns and declares in terms of the second conclusion of the summons: *Quoad ultra* finds, as matters of fact—1. that in February 1873 the defender began to clear out the foundations of the tenement which has since been erected by him, and the south gable of which stretches across the site of the boundary wall referred to in the second conclusions of the summons; 2, that the intention of the defender, when he began his operations, was to erect the said gable upon ground which was his own property, including therein the northern half of the site of the said wall; 3, that after operations were begun the defender became desirous to change his plan, so as to include in the site of the foundation of the said gable the whole site of the said wall; and accordingly he, on 24th February 1873, addressed to the pursuers the letter which is No. 54 of process, wherein, on condition that he was 'allowed to occupy the piece of ground whereon is built the present boundary wall, and that he was relieved of all responsibility of

[1] Begg, &c. v. Jack, January 10, 1874, *ante*, vol. i. p. 366.

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protecting, shoring up, and repairing any damage to the schoolhouse there, which may be required on account of operations,' he offered 'to build a mutual wall four stories high, with all necessary vents and wall presses, according to plan which will be submitted, and to make no charge for same to said deacons' court;' 4, that the offer thus made was not accepted by the pursuers as given, the pursuers requiring that in addition to the things conceded by the defender, he, as expressed in the letter of their agent, Mr John Auld, W.S., dated 26th February 1873, No. 13 of process, should 'take on himself all responsibility of protecting or shoring the schoolhouse or other buildings, and repairing all damage that may be done by his operations, and paying the whole expense of writings, &c., necessary to carry the arrangement out, and make it effectual;' 5, that this counter proposal was not accepted by the defender, but a part of the said wall, though shored up by the defender, having on 2d March 1873 fallen down partly in consequence of natural decay, and partly in consequence of the attempt to underfoot the northern half of said wall on which the defender had for some days previously been engaged, the defender removed the remains of the said wall the whole length of his intended gable, and upon the site of that portion thereof, extending in breadth to twenty inches or thereby, and on other ground seven inches broad, forming part of his property contiguous to the wall, he proceeded to erect, and erected, the said gable as it now stands; 6, that from the time when the defender began to build upon the pursuers' half of the site of the said wall, and in particular from the time when the gable had been raised higher than what had been the height of the said wall, the pursuers warned the defender that he was encroaching upon their property, and that if he so persevered without coming to terms with them measures would be taken for the vindication of their rights; 7, that the terms upon which the pursuers' consent to the erection of the said gable would be given never were arranged between the parties, the pursuers on the one hand insisting for more than had been offered by the defender in said letter of 24th February 1873, No. 54 of process, and the defender, on the other hand, not only refusing to concede these terms, but withdrawing the offer originally made that the gable when erected should become mutual property, without contribution by the pursuers on account of the cost; 8, that notwithstanding the variance of views by which an agreement was prevented, both the pursuers and the defender desired and expected that in the end an agreement would be concluded, the defender carrying forward the erection of said gable, and the pursuers refraining from the adoption of measures by which its erection should be stopped in consequence of the feeling so entertained till the gable was all but completed; and, 9, that ultimately, and on or about the 10th of May 1873, the defender was interdicted on a warrant granted by the Sheriff of Midlothian, at the instance of the pursuers, from proceeding further with the erection of said gable; but this interdict, on an appeal, was recalled, in the Court of Session, on or about the 10th of January 1874, and immediately thereafter operations were resumed, and the wall was completed, as it now stands, without further operation: Finds in point of law, the facts of the case being as above set forth (1) that the pursuers are not entitled to insist that the said gable shall be taken down, if reasonably indemnified for the use that has been taken of their ground; (2) that the defender is bound to make reasonable indemnification to the pursuers for the ground belonging to them, upon which in part his said gable has been erected; and (3) that the defender having originally offered to build the said gable as a mutual gable without charging any portion of the cost against the pursuers, the adoption of this as the condition on which the

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said gable is to be left as erected will not be unfair to him, and will be full satisfaction or indemnification to the pursuers for the use which has been taken without agreement with them of a portion of their ground for its erection, and appoints the cause to be enrolled that parties may be heard as to the application of these last findings to the remaining conclusions of the summons, reserving meantime all questions of expenses."*

* "NOTE.—The first and second conclusions of this action had ceased, before the proof was closed, to be matters of controversy. The other conclusions, however, were keenly contested; and the Lord Ordinary has adopted, and has expressed in his findings, results which were presented neither by the pursuers nor by the defender. On the one hand, the pursuers, in their argument upon the proof, sought that decree in terms of the first and second conclusions of the summons should at once be pronounced, and that the action *quoad ultra* should be left undisposed of for the present, that it might by-and-by be conjoined with an action of damage for interdict alleged to have been wrongously obtained by the pursuers when the erection of the gable referred to was all but completed. This course the Lord Ordinary has not adopted, because in his opinion the conclusions of the present action ought to be exhausted, if that can reasonably be accomplished, without reference to these proceedings in another suit. On the other hand, the defender urged that though his conduct in using the pursuers' ground in the erection of his gable was not strictly legal, the gable must be allowed to stand, and become his property, should the value of the ground belonging to the pursuers, on which in part it has been erected, be paid to the pursuers, this value, according to the estimate of one of the pursuers' witnesses, who is the only witness by whom evidence on the subject is given, being only £15. This view of the course to be followed the Lord Ordiuary has also set aside. If anything is plain in this case, it seems to be that the defender, by using the ground belonging to the pursuers in the way he did, cannot make it his own, or compel the pursuers to sell it to him. They are entitled to retain what is theirs, and the only question of practical importance which has to be decided is, what, in the circumstances, are the terms on which the property should remain with them, and the gable which was erected by the defender partly upon that property be permitted to remain? The Lord Ordinary says this, because, if the facts are as have been found, the pursuers, as he thinks, are precluded from insisting that the gable shall be taken down, and a facsimile of the old boundary wall erected, provided that all which they can reasonably ask for the use which has been taken of the ground shall be rendered. The pursuers saw the gable in the course of erection, and though they gave warnings, yet these appear to have been given rather for the purpose of bringing the defender to their terms than to prevent its erection. They, in truth, were not anxious that the gable should not be built; and, accordingly, it was only when the building was all but finished that the interdict which has given occasion to the counter action was sought.

"The terms to which the pursuers are entitled, and which may be imposed on the defender, have been to the Lord Ordinary the cause of some anxiety; but he in the end has come to think, in the first place, that the result at which he has arrived has legal warrant in the facts of the case; and that, in the second place, what has been given as amends is full indemnification to the pursuers, and not unreasonable satisfaction to be rendered by the defender. As to the first of these points, if the Lord Ordinary is right in holding that though this ground is the property of the pursuers, and was built on without agreement with them, they in the circumstances are not entitled to insist that the gable shall be removed, it follows almost as a necessary consequence that it must be in the power of the Court to fix the terms on which it shall be permitted to stand. Regarding the second point, a few words of explanation are all that are required. The value of the gable has not been proved; but it is perfectly certain that the acquisition without payment of a mutual right in that gable is worth all the inconvenience, and the loss and damage of every kind, which the pursuers have suffered or can suffer through its erection. The only doubt which

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"24th March 1875.—The Lord Ordinary having heard parties' procurators as to the application of the findings set forth in the interlocutor of 18th December 1874, to the third, fourth, and fifth conclusions of the summons, being the conclusions which are still undisposed of, and having considered the debate and whole process,—*Primo*, In respect of the findings relative to matters of fact contained in the said interlocutor, and in particular of the sixth, seventh, and eighth of these findings, refuses the pursuers' motion, for decree in terms either of the third conclusion or alternatively of the fourth conclusion of the summons, and assoilzies the defender from both of these conclusions, and decerns: *Secundo*, On the pursuers' motion, decerns against the defender for payment to the pursuers of the sum of £15 sterling, as damages to the pursuers in the premises, in terms of the fifth conclusions of the summons: *Tertio*, Finds no expenses due to or by either the pursuers or the defender, and decerns."*

In the action at the instance of Mr Jack against the church trustees, the former proposed the following issue:—"Whether the defenders, by means of an interdict wrongfully obtained on or about 10th May 1873, prevented the pursuer from proceeding with the building of the gable of a house on ground situated in or near the east side of Causewayside, Edinburgh, to the loss, injury, and damage of the pursuer?"

The Lord Ordinary on 24th March 1875, pronounced the following

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the Lord Ordinary felt is whether the indemnification given is not a greater burden than should be imposed on the defender. But when it is considered that the defender originally offered what has now been found due, and that he, by persevering in the course upon which he entered, despite repeated warnings from the pursuers, has obtained all the advantages which he could have secured if the offer he made at the outset had been accepted, or had not been withdrawn, most will be disposed to conclude that the terms are not unreasonable, being such as are naturally suggested as well as recommended by the real facts of the case, as these have been established in the proof."

* "NOTE.—The Lord Ordinary hoped, from what was said at the bar on more than one occasion, that there would have been an agreement by which further litigation in this as well as in the action of damages at the instance of the present defender against the present pursuers would have been prevented. But though there have been some concessions made upon both sides, several of the points and claims in dispute remain subjects of contention, and in consequence it has become necessary that an ultimate judgment should be given by the Lord Ordinary in both suits.

"The first and second conclusions of the summons in the present action having been disposed of by the interlocutor of 18th December 1874, the third, fourth, and fifth conclusions were those alone which at the recent debate were open for consideration before the Lord Ordinary. The pursuers moved for decree in terms either of the third conclusion, or alternatively of the fourth conclusion; and also for decree for the sum decerned for in the foregoing interlocutor, in terms of the fifth conclusion. The Lord Ordinary thinks that his findings in the interlocutor of 18th December precluded him from granting the first part of this motion, but there was no obstacle to the granting of the second part, especially as this was consented to by the defender, and accordingly damages to the extent of £15 have been awarded to the pursuers. This sum, it may be explained, represents the injury done to conterminous buildings on the pursuers' ground by operations connected with the erection of the gable wall in dispute, carried out by the defender in such a way as to render the defender liable in reparation.

"Expenses have been found due to neither party, because, in the opinion of the Lord Ordinary, success and failure have as nearly as possible been equally divided."

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interlocutor:—"Finds that there is no issuable matter on record: Therefore sustains the first of the defender's pleas in law" (irrelevancy), "dismisses the action, and decerns: Finds the pursuer liable in expenses," &c.*

Mr Jack reclaimed against the interlocutors in both actions.

The two actions were debated and advised together in the Inner-House.

Argued for Mr Jack (in the action of declarator);—By a well established custom a proprietor in a town was entitled to erect his gable to the extent of one half upon the property of his neighbour, that neighbour getting the benefit of the gable when he came to build, upon paying half the cost of erection. The first builder was not bound to give notice to his neighbour or to obtain his consent. Nor did the existence of an old mutual wall affect the question. Either proprietor was entitled to heighten the mutual wall without the other's consent, otherwise the result would be that the first builder in a line of street would settle for all time coming the utmost height to which the houses could be built.[1] (2) Even if the defender had not an abstract legal right to erect the gable as he had done, it was erected with the knowledge and acquiescence of the pursuers, and their present demands were unreasonable.

(In the action of damages)—The recall of the interdict by the Court was sufficient to found an action of damages for wrongful interdict.[2] In such an action it was not necessary for the pursuer to aver or prove malice.[3] If the Court were of opinion that malice must enter the issue a general averment of malice in the record was sufficient.[4]

Argued for the Rev. Dr Begg and others (who were not called upon to reply upon the question of Mr Jack's legal right to erect the gable);—Mr Jack was claiming damages for being prevented from doing what was now found to be an illegal act. Even apart from this, in cases relating to real property, an action would not lie against a party who had obtained an interdict *causa cognita* which was ultimately found to be groundless, unless it was averred that he had obtained the interdict by misrepresenta-

* "NOTE.—In the present action, damages are sued for as reparation for loss said to have been sustained by the pursuer through the granting of an interdict by the Sheriff of Mid-Lothian on the application of the defenders. The pursuer contends that he is bound neither to aver nor to prove malice; while the defenders, on the other hand, maintain, in the first place, that if an issue shall be granted, malice must be inserted; and, in the second place, that even were the pursuer willing to take an issue so expressed, no issue could be adjusted, inasmuch as malice has not been relevantly averred on the record. The Lord Ordinary has adopted, and, by the preceding interlocutor, has given effect to this last view of the case.

"It is quite true that the defenders, in applying for and in keeping up the interdict complained of, are alleged on record (Cond. Art. 4) to have acted 'wrongously, maliciously, and without probable cause.' But the Lord Ordinary thinks that the bare use of such epithets is not enough. There must also, in his opinion, be something which affords at least a colourable reason for their application. Here, however, what is required has not been afforded, the averments of the pursuer presenting nothing which can be regarded even as a pretext for characterising either the obtaining or the maintaining of the interdict granted by the Sheriff as a malicious proceeding. The plea of irrelevancy, therefore, has been sustained, and the action, as a consequence, dismissed."

[1] Lamont v. Cumming, June 11, 1875, *ante*, vol. ii. p. 784; see also Sanderson v. Geddes, July 17, 1874, *ante*, vol. i. p. 1198.

[2] Miller v. Hunter, March 23, 1865, 3 Macph. 740, 37 Scot. Jur. 381.

[3] Abel's Exrs. v. Edmonds, July 10, 1863, 1 Macph. 1061, 35 Scot. Jur. 627; Snare v. Duff, Dec. 10, 1850, 13 D. 286, 23 Scot. Jur. 119; Gilmour v. Anderson and Gilchrist, June 20, 1857, 29 Scot. Jur. 411.

[4] Baillie v. Hume and Adamson, Dec. 8, 1853, 16 D. 161, 26 Scot. Jur. 73.

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tion of facts.[1] Cases like Miller v. Hunter, which arose upon contracts, had no application. In that case the landlord had, by an interdict, prevented the tenant from taking the use of the ground which he had contracted to give him by the lease, and therefore he was found liable in damages. The distinction between the two classes of cases was clearly pointed out in the opinion of the Lord Justice-Clerk (Inglis).

At advising,—

LORD GIFFORD.—In these two cases, the one an action of declarator at the instance of the Rev. Dr Begg and others against Mr Jack, and the other an action of damages for wrongous interdicting at the instance of Mr Jack, I concur in the results at which the Lord Ordinary has arrived; and in the action of declarator, in substance, I agree with the Lord Ordinary in the grounds upon which he has proceeded. The circumstances of the cases are very special, and it appears to me that the mode in which the Lord Ordinary has disposed of them is not only reasonable and equitable, but in entire accordance with the strict rules of law.

Although last in date, the leading action is the action of declarator, for it directly raises the questions between the parties as to their respective legal rights the determination of which is essential before any question of wrongous interdicting can be entered upon, and, in truth, the decision of the questions raised in the declarator will virtually decide the questions of law raised in the action of damages. For example, if it were held that the defender Jack even yet is bound to take down his gable, he could never be held entitled to damages for having been interdicted for a time in building it.

It is clear from the titles, and is no longer disputed by the defender Jack, that the old wall between his property and that of the pursuers, and upon the site of which the defender has now erected the gable of his tenement, was a mutual or party wall between him and the pursuers, and could only be dealt with as such. The defender admitted that the pursuers were entitled to decree in terms of their first declaratory conclusion and in terms of the first branch of their second declaratory conclusion.

But the defender maintained, and this contention lies at the foundation of the whole case, that he was entitled at his own hand, without the warrant and authority of any Court, and without the consent and against the remonstrances of the pursuers, to convert the mutual division wall which formed a mutual fence between the lands of the parties into a mutual gable four stories high, that is, that he was entitled by himself and against the will of the pursuers to build the gable of his new tenement to the extent of one-half upon the property of his neighbour.

Now, I am unable to assent to the proposition thus broadly and generally laid down. It is quite true that where adjoining lots of ground are feued or sold for the purpose of building a continuous street, the owner of any one of the lots in building his tenement constructs its gables one half upon the adjoining lots so as to be mutual gables, and then when these gables are taken advantage of or used by the neighbouring proprietors, they become bound to pay to the first builder half the value of the mutual gables so used by them. It is also true

[1] Moir v. Hunter, Nov. 16, 1832, 11 S. 32, 5 Scot. Jur. 103; Mudie v. Miln, June 12, 1828, 6 S. 967; Reid v. Bruce, July 11, 1855, 17 D. 1100, 27 Scot. Jur. 556.

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that very often, or in general, the builder of the first tenement builds the mutual gable partly upon his neighbour's ground without the express consent of that neighbour, or as it is expressed by the Lord President in Lamont v. Cumming, 11th June 1875,[1] "behind the back of the adjoining proprietor," who takes for granted that the mutual gable will be all right, and the want of express consent will not preclude the builder of the mutual gable from claiming half its value from his neighbour who comes to use it. But all this proceeds upon a tacit or implied contract inferred either from a feuing plan according to which the line of street is to be built, or from the special circumstances of each case. Where there is no room for such implied contract and implied consent the rule does not hold, and the builder of a tenement must build it, gable and all, entirely upon his own ground, unless he gets the consent of his neighbour.

It was hardly contended that in proper rural subjects where the lands of the parties are divided by mutual fences, whether walls or hedges, the proprietor of one of the subjects can at any point he pleases, and without his neighbour's consent, remove the mutual fence or wall, and insist upon erecting a gable one half upon his neighbour's property. I think he has no such right, and that he cannot, without mutual consent, convert a mere garden or field division wall into a mutual gable. For example, in villa feuing, where each villa stands entirely in its own grounds, and the lots are divided by mere mutual garden walls, I do not think that the proprietor of one villa lot is entitled, without his neighbour's consent, to remove the garden division wall and erect a gable one half upon his neighbour's ground, and that at any spot he pleases, without any regard to the plans or wishes of his neighbour. This would be carrying the rights of mutual proprietors farther than has ever been done. In like manner, where even in a street a church has been built entirely within its own ground, I do not think that adjoining proprietors, apart from contract, express or implied, can insist upon building the gables of their houses one half upon ground belonging to the church, although the church and its proprietors can never take any benefit from such gables as mutual gables. Such a right may arise from contract, or even from implication, but it certainly does not exist at common law.

Now, in the present case, and looking to the titles of the parties, and to the whole circumstances as appearing from the proof, I am of opinion that the defender, Mr Jack, was not entitled, without the consent of the pursuers, and against their remonstrances, to build his gable one half upon the property of the pursuers. The mere existence of a mutual division wall gave no such right, and the express stipulation in the title seems inconsistent therewith. The title describes the walls, including the walls in question, to be "party walls between the deceased John Henderson of Leaston, his avenue and garden of his other house, and to be in all time thereafter upheld, beeted, and repaired, on his representatives, and his, the said William Miller, and his foresaids, their joint charges and expenses." This seems to be an obligation to maintain the wall as a mutual avenue or garden-wall, and to exclude the right of either proprietor changing it into a gable wall, as the present defender has claimed right to do. There is nothing in the position or character of the respective properties from which the right to erect a mutual gable on the site of this wall can be inferred.

In the next place, I think it is clear that the pursuers never consented, either expressly or by implication, to the gable in question being erected partly upon

[1] *Ante*, vol. ii., p. 787.

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their ground. On the contrary, I think that the correspondence and evidence shews that the pursuers all along objected and warned the defender that he was proceeding at his own risk, while at the same time they were negotiating terms of agreement or arrangement. No agreement, however, was ever come to, the parties having differed as to the responsibility for any damage which might be occasioned to the schoolroom. It was on the failure of these negotiations for arrangement that the pursuers on 10th May 1873 obtained interdict against the defender, stopping him from proceeding farther with the erection of the gable, but this interdict was not obtained until the gable was very nearly completed. It is plain, however, that the pursuers, although they delayed their application for judicial interdict till towards the end, never consented to the erection, but extrajudicially objected, and reserved all their rights.

The question of interdict was brought by appeal to this Court, when the First Division, on 10th January 1874, recalled the interdict and dismissed the pursuers' petition. But they did so, not upon a consideration of the rights of the parties, or upon the ground that the defender had a right to erect his gable one half upon the pursuers' ground—this question was never entered upon at all—but solely upon the ground that the interdict was too late. They held that in the circumstances interdict was "an inappropriate remedy." The Court were of opinion that a summary petition for interdict ought to be presented timeously, and before the erection complained of is finished; and if this is not done, from whatever cause, the parties must vindicate their right in another form, and not in a summary application of a mere possessory nature. But the Court gave no decision of any kind upon the present defender's right to erect the gable in question, or upon the farther question what are the interests of parties in the gable when erected. These questions are now raised, and competently raised, by the present action of declarator.

If I am right in the opinion I have expressed, that the defender Jack had no right to build the gable in question so as to encroach upon the property of the pursuers, and if the defender erected it at his own risk, and notwithstanding the opposition and warning of the pursuers, the logical result is that the Court might order it to be taken down and set back, and there are cases when this course, severe although it be, may be necessary to do justice between the parties; but in all such cases there is an equitable power vested in the Court in virtue of which, when the exact restoration of things to their former condition is either impossible or would be attended with unreasonable loss and expense, quite disproportionate to the advantage which it would give to the successful party, the Court can award an equivalent,—in other words, they can say upon what equitable conditions the building shall be allowed to remain where it is, although it has been placed there without legal right. This equitable power has often been exercised by the Court when slight encroachments have been made by a builder upon his neighbour's property, it being unreasonable in such cases to insist on the demolition of the whole building. An example of this occurred in the case cited in argument, Sanderson v. Geddes, 1 Rettie, 1198, but there are many other and stronger instances.

Now, in the present case, I am of opinion with the Lord Ordinary that the pursuers "are not entitled to insist that the gable shall be taken down if reasonably indemnified for the use that has been taken of their ground," and this brings me to the question,—What, in the whole circumstances, will be reasonable indemnification? What are the equitable conditions on which the defender's

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gable should be allowed to stand as it is, although he has unwarrantably encroached on the pursuers' ground?

Now, here I am of opinion that the finding of the Lord Ordinary is reasonable and proper in the circumstances. He finds that if the pursuers ever come to use the mutual gable in question they shall be entitled to do so without making any payment to the defender. The value of the half of the mutual gable I understand to be from £60 to £80.

I reach this result on several grounds. First, it was the defender's own original proposal. He offered to give the pursuers the use of the gable gratis if they would waive all questions as to the ground on which it was built, and although this proposal was not accepted by the pursuers, who asked an additional guarantee, and the negotiations for an agreement went on—still as the gable was allowed to go up, and is now to stand, I think it is quite fair to keep the defender to what he himself originally offered. The additional guarantee asked by the pursuers, and which alone prevented the agreement from being completed, turned out to be of no practical moment. Second, I think the condition is fair and reasonable in itself, and such as, apart altogether from the defender's own proposal, might have rightly and equitably been suggested and imposed by the Court. But, third, the same result is reached in another way, and on a legal ground. When a man builds upon the property of his neighbour, especially when he does so not by mistake, but with his eyes open, and in the face of warning, the rule applies *inædificatum solo cedit*—the building becomes the property of the owner of the land. No doubt, in general this owner is bound to make compensation to the builder *in quantum lucratus*, but this is a mere equitable rule applicable to a *bona fide* builder, and always subject to the control of the Court. Such compensation may be denied altogether to one who *in mala fide*, or in spite of warning, attempts to appropriate his neighbour's ground. In the present case, the gable to the extent of nearly a half has been built on the pursuers' land. It has been so built knowingly, and against remonstrance. It confers no present benefit on the pursuers. They are not now *lucrati* in any sense, and looking to the whole history of the proceedings I think it no more than equitable to declare that the pursuers, if they ever require to do so, may use the mutual gable, which stands half on their own land, without compensation. I think we can do this under the present summons and under the conclusion for removal and damages. Even without a conclusion for damages I think we could impose the condition now proposed, because it is the equitable condition in respect of which we abstain from ordering the gable to be set back.

This exhausts the leading case, and I have only to add that I think the Lord Ordinary has exercised a sound discretion in finding no expenses due to either party in this action.

The action of damages at the instance of Mr Jack must be considered and disposed of on its own grounds, although its merits to a large extent depend on the decision of the questions in the action of declarator. Here also, I think, the conclusion to which the Lord Ordinary has come is well founded, although I do not agree in the grounds upon which he has proceeded.

In the view which I take of the case it is not necessary to consider the form of issue, or to enter on any of the questions discussed at the bar as to whether in actions of damages for wrongous interdicting the pursuer is bound to prove malice or want of probable cause. All these questions seem to me to be super-

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seded, for I am of opinion that when the real nature and substance of this action is looked to there is no relevant or legal ground for damage at all. I may say, in passing, however, that if in cases of contract or implied contract, and in cases of property, a party is deprived of his legal rights by a wrongous interdict, he will in general be entitled to damages without proving either malice or want of probable cause.

In the present case damages are demanded because the pursuer in this action, Mr Jack, was prevented by the interdict from proceeding with the erection of the gable from 10th May 1873 to 10th January 1874. He maintains that the interdict was wrongful, and he says that this is proved by its having been recalled by this Court, and as the stoppage of the work caused him loss he claims compensation from the defenders.

Now, if the Court in recalling the interdict had decided that in point of law the pursuer Jack was entitled to build the gable as he was doing, one half or nearly one half, on the defenders' ground, and if in respect of this legal right they had recalled the interdict as wrongful, I do not doubt that this would have been conclusive between the parties, and that the pursuer would have been entitled to an issue of damages. But this is not at all the nature of the case. The Court did not find that Jack had right to erect the gable to the extent of one half, or to any extent, on the defenders' ground, and that was not the reason why the interdict was recalled. On the contrary, if your Lordships concur with the Lord Ordinary and affirm his judgment in the other action, as I think we should now do, then the Court is now to hold that Mr Jack had no right to build the gable as he did, and although the defenders were too late in their application for interdict, and were ultimately found not entitled to summary interdict, yet they were right in the main substance of their contention, and the pursuer's proceedings were wrongful throughout. The interdict was only recalled on a point of form. It was not the proper remedy,—it was inapplicable to the circumstances of the case. But in the declarator, which was the proper form and the proper remedy, Mr Jack has entirely failed, and been found in the wrong from the beginning. Mr Jack cannot possibly claim damages for being interdicted from doing that which it is now found he had no right to do at all, even although on a mere point of form or on a rule of process the interdict was recalled. To give him damages in such a case would be to reward him for wrongdoing, for he was the wrongdoer all the time although the other party made a mistake in their selection of a remedy. Suppose that the Court had ordered the gable to be removed, as it might have done, as an illegal erection, the pursuer could never have got damages because the defenders made an abortive attempt for a time to prevent its going up. The case is not really different, although the Court, instead of ordering the gable down, have imposed equitable conditions on which they have allowed it to stand.

Now, on this short ground, and not on the different, and I think somewhat narrow ground taken by the Lord Ordinary (in whose view as to the necessity of giving details as to malice, and explaining in what it consisted, I cannot concur), I think the action should be dismissed, and in this case I think the defenders are entitled to their expenses.

LORD NEAVES concurred.

LORD ORMIDALE.—While I do not feel myself called upon to differ from what I understand to be the opinion of the rest of the Court, I think it right to say

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that I have felt considerable difficulty as to a part of the proposed judgment. The pursuers of the action of declarator conclude for pecuniary damages, and pecuniary damages alone. Proof is allowed, and in the evidence £15 is brought out as the amount of damages for injury to the rest of the pursuers' property, and although there is not much evidence on the point, £15 seems also to be the amount of damages sustained by the pursuers by the encroachment on their property and on the division wall. Whether the pursuers are entitled, in place of pecuniary reparation for the encroachment on their property and mutual division-wall, which is the only mode of reparation they ask, and in regard to which alone the defender was called upon to address himself, to have it found that they are to have the benefit of the gable erected by the defender without contributing anything towards its expense, is not a question on which the pursuers ask for judgment in the record, or in regard to which there is any evidence whatever. This being so, I have some doubt whether it is competent for the Court to ignore the mode of redress which the pursuers have exclusively libelled, and to give them a different sort of remedy, viz., a finding to the effect that when they come to use the gable they will be entitled to do so without any payment whatever. And I rather think the Lord Ordinary must have felt the same difficulty as that now noticed by me, for he has not in his final and only operative judgment repeated the finding as to the use of the gable. But the equity of the case, as explained by Lord Gifford, is obviously so clearly with the pursuers, that I do not feel called on to differ from the rest of the Court in the judgment which they think to be right and competent in the circumstances. The defender Jack was clearly wrong in destroying the old division wall, and building a gable on the site without the consent of the pursuers, and without judicial authority. Apparently he thought he had a right to do so, but that he had not is made very clear by the unanimous decision of the Court in Dow and Gordon v. Harvey.[1]

Lord Justice-Clerk.—I entirely concur in the whole of Lord Gifford's opinion. The difficulty suggested by Lord Ormidale does not much impress me. Our finding that the pursuers of the action of declarator will be entitled to the use of the gable when they come to build, without payment, is not a mere arbitrary or equitable assessment of damages. We find, in the first place, that the pursuers are not entitled to insist on the gable being taken down, that being too harsh a remedy. On the other hand, the right to repayment by the conterminous proprietor of half the cost of the gable can only arise, as Lord Gifford has explained, when the gable has been erected by implied contract. We find that the defender (Mr Jack) is not entitled to such repayment, and at the same time we find that the use of the gable by the pursuers when they come to build is sufficient indemnification for the use which the defender has taken of their ground.

Jameson, for pursuers, asked for an operative finding in terms of the third finding in law of the Lord Ordinary's interlocutor of 18th December 1874.

Lord Justice-Clerk.—I think you may safely leave the matter upon the interlocutors of the Lord Ordinary, both of which will stand.

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[1] Nov. 9, 1869, 8 Macph. 118, 42 Scot. Jur. 60.

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IN the action at the instance of Mr Jack, the Court adhered, finding the defenders (Dr Begg and others) entitled to additional expenses.

IN the action at the instance of Dr Begg and others, the Court adhered, finding no expenses due.

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J. B. W. LEE, S.S.C.—AULD & MACDONALD, W.S.—Agents.

No. 13.

HELEN THOMSON OR MABON, Pursuer and Petitioner.—*Campbell Smith.*
ROBERT CAIRNS, Defender and Respondent.—*Rhind.*

Oct. 29, 1875.
Mabon v. Cairns.

Process—Proof—Sheriff—Act of Sederunt 10th July 1839, *sec.* 83.—After a proof in an action of filiation had been closed, and judgment given for the defender by a Sheriff-substitute, the pursuer appealed to the Sheriff, and also lodged in process a petition for the examination of the pursuer's sister, which examination was allowed by the Sheriff. *Held* that the additional witness ought not, in the circumstances, to have been examined.

1ST DIVISION.
Sheriff of Roxburgh, &c.
M.

AN action of filiation and aliment was raised in the Sheriff Court of Jedburgh by Helen Thomson or Mabon against Robert Cairns.

In a proof before the Sheriff-substitute (Russell), the pursuer, Helen Mabon, deponed that the defender had had connection with her on three different occasions. On two of these occasions she deponed that her son, aged eleven, had seen them together, and that on a third occasion her sister was present in the field where the act was committed. The son was called as a witness, and deponed to having seen his mother and the defender together in somewhat suspicious circumstances on two occasions, but the sister was not called as a witness, and no explanation of her absence was given. After the case had been taken to avizandum, the pursuer presented a petition praying for the examination of her sister as an additional witness. The Sheriff-substitute (Russell) pronounced an interlocutor finding that the pursuer had failed to prove her case.

The pursuer appealed to the Sheriff (Pattison), who pronounced this interlocutor:—"Allows the pursuer to adduce the witness Elizabeth Welsh, mentioned in the said petition, as a witness for the pursuer in reference to the matter also therein mentioned; and remits to the Sheriff-substitute to name an early diet for taking this evidence, and appoints the same, when taken, along with the process, to be transmitted to the Sheriff." *

The evidence of the additional witness having been taken the Sheriff pronounced this interlocutor:—"Finds it instructed by the proof that the defender is the father of the pursuer's illegitimate child mentioned in the libel: Finds that he is therefore liable in the inlying expenses and aliment sued for: Therefore decerns against him in terms of the conclusions of the libel: Finds him liable to the pursuer in the expenses of process: Allows an account thereof," &c.

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* "NOTE.—The Sheriff has, but with much hesitation, pronounced the above interlocutor. The tendency of all Courts is not to exclude evidence unless a very stringent rule of Court forbids its admission. As the petition No. 5 was presented before the judgment on the proof was pronounced, it does not fall literally within the clause of the Act of Sederunt referred to by the defender. At the same time the Sheriff is sensible of the danger of anything which has a tendency to encourage carelessness or inattention in the leading of a proof. But as the request in this instance is only for the examination of one witness, limited to certain matters of fact, and as there seems to have been some miscarriage whereby she was not adduced at the proper time, occasioned by the state of the pursuer's health, he thinks that it is safer for the ends of justice to admit the evidence."

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The defender appealed, and argued that the Sheriff should not have allowed the additional witness to be examined ;[1] and that the pursuer had failed to prove her case.

At advising,—

LORD PRESIDENT.—In this case the proof was completed on 1st February, and on the 18th of the same month the Sheriff-substitute pronounced an interlocutor finding that it was not proved that the defender was the father of the child libelled. As the case then stood it was not altogether free from difficulty. I do not sympathise with the view stated by the Sheriff-substitute in his note—"There is something singularly painful in the thought that a son of such tender years should be brought as a witness to his mother's shame." I cannot see that because the witness is the illegitimate child of his mother that his evidence should be rejected. Nor do I think that the evidence of a child of that age is less reliable than of a person of more mature years. His being brought to speak to his mother's shame does not affect the question. Although the case was therefore a narrow one on the evidence I am disposed to agree with the Sheriff-substitute. Against his judgment an appeal was taken to the Sheriff, when the case assumed a different aspect. There was a petition presented to the Sheriff for the examination of an additional witness, and the Sheriff entertained it favourably.

The circumstances under which that witness was examined were very peculiar. The witness was a sister of the pursuer, and was called upon to speak to one of the occasions on which the parties were said to have had intercourse together. She was an important witness, and it was impossible that the pursuer or her agent should not have been aware, before the proof, that her evidence was material. They must also have known what she was able to prove, and yet they did not examine her, and closed their proof without her evidence. The admission of such a witness appears to me a very serious proceeding. It may be doubtful whether it falls under the Act of Sederunt of 1839, which requires very weighty reasons for such a course.

On the other hand, if the question does not fall under the Act of Sederunt, then this course must have been taken by the Sheriff in the course of his ordinary discretion. When the pursuer, being examined as a witness for herself, speaks of a person as being present on one of the occasions on which it is alleged intercourse took place, and that person is not called, the impression is irresistible that the person was not disposed to undertake to confirm the pursuer, more especially when the person referred to is so near a relative of the pursuer. But when at an after part of the proceedings the pursuer proposes to examine her sister after all, that does not remove the presumption that at the time she ought to have been called she was not willing to support the pursuer's statement on oath, but only raises an additional presumption that in the interval she has by some means or other been at last prevailed on to do so. Such evidence, I think, is altogether worthless, and I therefore lay it aside, and take up the case as it stood before the Sheriff-substitute. I am for reversing the Sheriff's interlocutor, and returning to that of the Sheriff-substitute.

LORD DEAS.—I am of the same opinion with your Lordship. I think the

[1] A. S. 10th July 1838, sec. 83 ; Drain v. Scott, Nov. 25, 1864, 3 Macph. 114, 37 Scot. Jur. 64.

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Sheriff-substitute was right as the case stood before him. The pursuer's mother evidently gave honest testimony, but she did not confirm the pursuer's story. The only witness who could be said to confirm the pursuer was her son, who was ten years of age. Now, I agree with the observation of your Lordship, that a boy of ten years of age may be a very good witness, and that there is nothing in the remark that he was brought to speak to his mother's shame. But we must consider that his tender years gave the pursuer a facility of suggesting to him circumstances which she thought favourable, and which renders his testimony less satisfactory than that of an older person would have been. It is that which leads me to think his corroboration insufficient.

I also agree with your Lordship that the Sheriff ought not to have allowed the additional witness to be examined. I do not say that there was anything in the Act of Sederunt to make it incompetent. But, in the circumstances, there were strong grounds for holding that the truth could not be expected from her. If she was an important and reliable witness at all she was the most important witness for the pursuer in the case, and this could not but be known both to the pursuer and her agent. It was plain enough, therefore, that whatever she might say, her evidence could not be relied on.

For the same reason I think, supposing her evidence to be admissible, it is entitled to no weight. The case is thus less rather than more favourable for the pursuer than it was when before the Sheriff-substitute, who, I think, rightly disposed of it as it then stood.

LORD ARDMILLAN.—In this action of filiation the Sheriff-substitute has decided for the defender, and assoilzied. The Sheriff-principal has decided for the pursuer, and decerned for aliment. The question was, however, not presented to the Sheriff-principal under the same circumstances and on the same proof as to the Sheriff-substitute, since an additional witness, Elizabeth Welsh, half-sister of the pursuer, was examined after the Sheriff-substitute had pronounced his decision.

I have, not without some difficulty, arrived at the conclusion that the judgment of the Sheriff-substitute, on the proof before him, was well founded. I have hesitated a little on this point, because the pursuer's evidence is distinct, if true, and is not absolutely without corroboration. But I do not feel justified in differing from the opinion which has now been given by your Lordship; and the opinion of the Sheriff-substitute, who saw and examined the witnesses, is also important, and entitled to some weight. The boy, James Laidlaw, was only eleven years of age when examined, and must have been little more than ten at the time of the occasion to which he speaks. He is the son of the pursuer, and his testimony—not given on oath, and not bearing directly on the question involved—seems scarcely sufficient to afford the necessary corroboration to the pursuer, a single witness of worse than doubtful character.

But it is said that the evidence of Elizabeth Welsh, taken on the 19th of April—the Sheriff-substitute's judgment having been on the 18th of February—1875, affords additional and sufficient confirmation of the pursuer. I am of opinion that under the circumstances, and having regard to the previous examination of witnesses, the judgment of the Sheriff-principal of 8th April 1875, allowing the pursuer to adduce the witness Elizabeth Welsh, was not well founded. I think it was wrong, under the circumstances, to admit that additional witness. It is not correct to speak of it as merely a question of compe-

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tency. To some extent it is a question of judicial discretion. I do not say that the Sheriff could not have competently allowed the witness to be examined, if, in the circumstances, justice required her examination. But it was not so. No "weighty reason," such as was required by the Act of Sederunt, explaining why the witness had not been previously adduced, was stated to the Sheriff, or has now been stated to this Court. Both the pursuer and the defender were examined as witnesses for the pursuer, and both of them then mentioned the fact that the pursuer's sister was present at the carting in of the rakings in the field. The fact of the witness' presence was therefore known, and certainly any evidence she could give as to what occurred when she was present in that field must have been known to be more or less important. If it was important, she should have been adduced. No excuse was made for not calling her. Mrs Welsh, mother of the pursuer and of the witness, was examined, and no circumstance explaining the witness' absence, or accounting for the failure to adduce her, was stated. The pursuer's procurator must have known the nature of this witness' testimony But he did not think fit to examine her, and he closed his proof without adducing her, and some time afterwards he proposes to adduce this sister of the pursuer, who had not been examined before the Sheriff-substitute.

Without expressing my opinion on the credibility of this witness' testimony, if the adducing her as a witness had been sustained, I have no alternative but to leave her testimony out of consideration.

So viewing the case, I think that we should adhere to the decree of absolvitor pronounced by the Sheriff-substitute.

LORD MURE concurred.

THE COURT pronounced this interlocutor:—"Recall the interlocutor of the Sheriff of 8th April 1875: Refuse the prayer of the petition for the pursuer, No. 5 of process, and appoint the evidence of the witness, Elizabeth Welsh, to be withdrawn from process: Further, recall the Sheriff's interlocutor of 15th May 1875: Find it not proved that the defender (appellant) is the father of the child mentioned in the summons: Therefore assoilzie the defender" &c.

M'CAUL & ARMSTRONG, S.S.C.—THOMAS LAWSON, S.S.C.—Agents.

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NATHANIEL JAMES SPENS, Pursuer.—*Sol.-Gen. Watson—Keir.*
JOHN ALEXANDER SPENS AND OTHERS (Monypenny's Trustees).—*Lee—Moody Stuart.*
MISS J. H. E. SPENS AND ANOTHER, Defenders.—*Lee—Moody Stuart.*

Trust—Succession—Vesting—Beneficial Fee.—In a trust-settlement the trustees were directed to lay out the residue of the truster's estate (which amounted to £60,000) in the purchase of lands, and when the whole residue, or within £300 thereof, was so invested, to deliver a disposition of the lands to the truster's brother (who predeceased her) in liferent, and his son and the heirs whatsoever of his body in fee, whom failing, certain other persons,—the trustees being declared to be "the sole and exclusive judges of the lands which and the period when these should be purchased, free from the control of any of the heirs who may be interested therein." The trustees having invested all the residue except £20,000 in the purchase of lands, the truster's nephew raised an action against the trustees for declarator that he was entitled to payment of the £20,000 as his absolute property. *Held* (*rev.* judgment of Lord Shand)

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(1) that the pursuer's rights as a beneficiary vested in him *a morte testatoris;* and (2) that, as the directions to the trustees to purchase lands were framed for the purpose of settling them on the pursuer as an unlimited fiar, and were not such as to confer a right on third parties, the pursuer was entitled to require payment of the £20,000 in cash.

By trust-disposition and settlement dated 11th February 1869 the late Mrs Hannah Spens or Monypenny, widow of the late William Tankerville Monypenny of Pitmilly, disponed her whole means and estate, with certain exceptions, to John Alexander Spens, Lawrence Dalgleish, W.S., Nathaniel James Spens, and to the deceased Nathaniel Spens of Craigsanquhar, in trust. The exceptions from the deed were expressed as follows:—"Excepting and reserving herefrom the whole of those portions of the lands and estate of Ardit and others in the shire of Fife, ... of which a separate disposition and settlement has been executed by me of equal date herewith in favour of the said Nathaniel Spens, my brother, in liferent, and the said Nathaniel James Spens, his son, and the heirs whomsoever of his body in fee, whom failing, as therein mentioned; as also excepting and reserving herefrom the dwelling-house No. 7 Moray Place, . . . and of which a separate disposition and settlement has also been executed by me of equal date herewith in favour of Misses Jessie Hannah Elizabeth Spens and Mary Margaret Roberta Spens, daughters of the said Nathaniel Spens, equally between them, and the heirs of their bodies, whom failing, as therein mentioned; as also excepting and reserving herefrom that portion of ground forming part of the lands of Trinity, . . . and of which a separate disposition and settlement has also been executed by me of equal date herewith in favour of William Thomas Thornton, Esq. and Miss Anne Halkett Craigie, in liferent, whom failing, the said Nathaniel Spens in liferent, and the said Nathaniel James Spens and his heirs and assignees in fee."

The truster gave power to the trustees to sell the estate, heritable and moveable, to let leases not exceeding nineteen years, to lend the money on security, to assume new trustees, to appoint factors, &c.

The purposes of the trust were (1) payment of the truster's debts; (2) to deliver the furniture of the house in Moray Place to her nieces, the silver plate to her nephew, Nathaniel James Spens; (3) payment of an annuity of £100 to William Thomas Thornton, and an annuity of £500 to Mrs Spens, her sister-in-law; (4 and 5) payment of various legacies. "In the sixth place, in order that the said trustees or trustee may, and I hereby direct them or him, as soon after my death as may be convenient, to make up a state exhibiting the amount of the residue and remainder of the means and estate hereby conveyed, after answering the foregoing purposes of this trust. In the seventh place, in order that the said trustees or trustee may, and I hereby direct them or him, as soon after my death as may be convenient, and as they may think proper, to invest the said whole residue and remainder of my means and estate in the purchase of lands in the county of Fife, and adjacent to or near the estate of Craigsanquhar, belonging to the said Nathaniel Spens, or the said portions of the estate of Ardit, if in their opinion a suitable purchase can be effected in the said locality, or, if not, then in some other part of the said county, or, if not, then in some other county in Scotland; declaring that the said purchase may be made by my trustees of such lands at such prices, and from time to time, as they may consider to be most eligible, according to the state of the trust-funds and the opportunities which may occur of making suitable and convenient purchases, and that they shall be the sole and exclusive judges of the lands which, and the period when, these should be

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purchased, free from the control of any of the heirs who may be interested therein. In the eighth place, in order that the said trustees or trustee may, and I hereby direct them or him, on the said residue or remainder of my means and estate or sums being wholly or within £300 thereof invested in the purchase of lands as aforesaid, to execute a valid disposition thereof in favour of the said Nathaniel Spens, my brother, in liferent, for his liferent use only, and to the said Nathaniel James Spens, and the heirs whomsoever of his body in fee, whom failing, the said Miss Jessie Hannah Elizabeth Spens, and the heirs whomsoever of her body, whom failing, the said Miss Mary Margaret Roberta Spens, and the heirs whomsoever of her body, the eldest heir-female excluding heirs-portioners, and succeeding always without division throughout the whole course of succession, whom failing, to my own nearest heirs and assignees whomsoever, under the real burden of" the annuities mentioned above. "In the ninth place, in order that the said trustees or trustee may, and I hereby direct them or him, to pay over the annual interest and produce of the said residue and remainder of my means and estate previous to its being invested in the purchase of lands as aforesaid, and the rents of the said lands, after they are so purchased, which shall accrue or become payable between the first term of Whitsunday or Martinmas which shall happen six months after my death, and the date of entry under the said disposition to be granted by them or him as aforesaid, to the heir who would have been entitled to the rents of the lands to be purchased as aforesaid, if they had been so purchased and the disposition thereto been executed; that is, to the said Nathaniel Spens during his life, and after his death to the said Nathaniel James Spens, and the heirs whatsoever of his body, whom failing as aforesaid. In the tenth place, in order that the said trustees or trustee may, and I hereby direct them or him, on the said disposition being executed and titles completed thereon in the person of the immediate disponee, to deliver the same, along with the titles, to him, on his granting an absolute and valid discharge in favour of the said trustees or trustee," &c.

The truster died in May 1873. Her brother, Nathaniel Spens, had predeceased her. In carrying out the purposes of the trust the trustees had purchased the lands of Cruivie at the price of £28,500, and of Cuplahills at the price of £11,000. In addition to the sums so expended there remained a balance in the hands of the trustees of £20,000. The trustees stated that certain annuities bequeathed in the codicils would fall to be secured by them over the said lands or otherwise before conveying them to the beneficiary, Nathaniel James Spens.

Nathaniel James Spens (who was not married) raised this action concluding for declarator that the trustees were bound to "make payment to the pursuer upon his simple receipt and for his own absolute use of the whole balance in their hands of the residue of the means and estate of the truster not invested in land in terms of the seventh purpose of the said trust-disposition, and that the pursuer is entitled to the said balance as his own absolute property;" and that the trustees should be ordained to make payment to the pursuer of £20,000, or such other sum as might be found to be the amount of the balance, with five per cent interest, from the date of decree.

He called as defenders Mrs Monypenny's trustees, his sisters, and his mother.

Separate defences were lodged for the trustees and for Miss Jessie H. E. Spens and Miss Mary Margaret Roberta Spens.

The pursuer pleaded;—The directions contained in the said trust-disposition and settlement being that the residue of the trust-funds should

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moveable, with certain specified exceptions, to trustees, whom she directed, as soon after her death as convenient, to make up a state exhibiting the amount of residue remaining after certain specific purposes had been provided for, in order that the trustees might, and she thereby directed them, as soon after her death as convenient and as they might think proper, to invest that residue in the purchase of lands in the county of Fife, adjacent to the estate of Craigsanquhar, belonging to her brother Nathaniel Spens, the pursuer's father, or to the portions of her own estate of Ardit, which, by a separate deed of the same date with her deed of settlement, she conveyed to her said brother in liferent and to the pursuer and the heirs of his body in fee; and, if a suitable purchase could not be made in such locality, then in some other part of the county of Fife, and failing thereof, in some other part of Scotland; and when the fund was thus exhausted, or within £300 of being so, to execute a disposition thereof in favour of her said brother in liferent for his liferent use only, and his son, the pursuer, and the heirs whomsoever of his body in fee, whom failing to his sister Jessie Hannah Elizabeth and the heirs whomsoever of her body, whom failing to his sister Mary Margaret Roberta and the heirs whomsoever of her body, the eldest heir-female always succeeding without division, whom failing, to the granter's own heirs and assignees whomsoever.

The testatrix died in May 1873. Her brother predeceased her, having died in November 1869. The trustees have paid all the legacies, and secured all the annuities bequeathed by the deed to the satisfaction of the annuitants. The

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tional institutes as well as substitutes; and if the pursuer should predecease the granting of the conveyance, the estate must be conveyed to a descendant of the pursuer in the event of his leaving lawful issue, and failing such descendants, then to the pursuer's sisters respectively, whom failing, to their respective issue, as the destination provides. For these reasons I am of opinion that the pursuer has not that sole interest in the fee of the residue of the trust-estate, or in the lands purchased or to be purchased with that residue, which alone could give him right to the decree he asks. He has a present limited interest in the annual return from the residue, but his right to the residue itself appears to me to depend on his survivance of the date when the conveyance, in the ordinary execution of the trust, shall come to be executed.

"Even if the whole residue had been exhausted in the purchase of lands I am not prepared to say that the pursuer would be entitled to a conveyance to himself and his heirs and assignees in fee-simple. It appears to me that the heirs named after the pursuer in the destination to be inserted in the conveyance have an interest and are entitled to require the trustees to insert a destination in their favour in the deed, leaving it to the pursuer, if he think fit, after the lands have been conveyed in that way, to execute a deed defeating that destination; but it is unnecessary and would be premature to decide that question now.

"The only authority to which the pursuer's counsel referred in support of his claim was the Cluny case, Gordon, 4 Macph. 501. That case appears to me to differ entirely in all essential respects from the present. Even there a considerable minority of the Judges were against granting the decree bringing the trust to an end and declaring that Mr Gordon had right to the residue on his own receipt, but the majority of the Court proceeded on the ground that as there was no direction to insert a destination in the conveyance of the lands to be purchased, which would have given rights to a particular line of heirs or a series of persons named in succession to Mr Gordon, and as it was clear he had the present and sole right of fee in the residue of the trust-estate, he was entitled to dispense with the purchase of lands and receive the residue in money. In this respect, which was vital to the decision, the case of Gordon appears to me to differ entirely, and the difference makes all the difference in the result."

No. 14. The pursuer reclaimed.[1] At advising,—

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LORD DEAS.—The late Mrs Monypenny, by her trust-deed and settlement, dated 11th February 1869, conveyed her whole means and estate, heritable and

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the residue of the trust-estate. He pleads that the truster's directions being that the residue of her estate 'should be invested in the purchase of lands, to be conveyed with a simple destination to the pursuer as institute, and the substitutes specified, the pursuer, as absolute fiar of the residue, is entitled to decree in terms of the conclusions of the summons.' If the pursuer be not the absolute fiar he is not entitled to succeed in the action.

"I am of opinion that the pursuer is not absolute fiar, and is not in the position of having the sole interest in the residue of the estate. His immediate and present interest and right, in terms of the ninth purpose of the trust-deed, is, so long as he survives, to receive the interest of the residue and the rents of such lands as have been purchased out of the residue, but he has no present right to the annual proceeds of the residue beyond his own life, or to the lands already purchased or to be purchased. His right to these lands, as it appears to me, will arise only in the event of his surviving until the trustees shall have fulfilled the directions of the truster by the purchase of lands exhausting the residue, and by granting a conveyance in terms of the destination in the truster's deed of settlement. If a right of fee in the lands be now vested in the pursuer, it follows that he could now dispose of that right, with the effect of defeating the directions of the truster and the rights of the other parties mentioned in the destination prescribed by the truster. This, I think, having regard to the plain terms of the deed, which provide otherwise, he cannot do. It is not in his power, or in that of any one of the other heirs mentioned in the destination, to accelerate the period when the conveyance of the lands shall be executed, for the trustees are declared to have the sole discretion as to the time when the lands shall be purchased, and, so long at least as they act *in bona fide*, no one of the persons interested under the destination has any right to interfere with them. A consideration of the various provisions of the trust-deed shews that the truster contemplated that a considerable time might elapse before the trustees could satisfactorily carry out her directions to purchase the lands, for the deed gives the trustees power to grant leases for nineteen years, to invest the residue in heritable security as well as government stock and debentures, a power to resign and assume new trustees, and a provision for an annual audit of accounts. I see no good reason for holding that the pursuer, as the first of the persons in whose favour a conveyance of the lands is to be executed when the trust has been fulfilled by the exhaustion of the residue in the purchase of lands, has right at his own will to accelerate the date of granting the conveyance, or to dispense with it altogether, and demand the residue of the estate in money. There are other persons having an interest who are entitled to say this shall not be done.

"The persons named in the destination after the pursuer, including his own descendants, are expressly favoured by the truster under her trust-deed. It is true that there is no direction to settle the estates by a deed containing the fetters of a strict entail, and consequently, after the pursuer obtains a conveyance, if he should survive the time when it comes to be granted, he will then be in a position by a new deed to evacuate the destination, and to dispose of the lands as he thinks fit. But in the meantime the parties interested under the destination after the pursuer, including his own possible descendants, are condi-

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[1] Gordon v. Gordon's Trustees, March 2, 1866, 4 Macph. 501, 38 Scot. Jur. 232; Dickson's Tutors v. Scott, Nov. 2, 1853, 16 D. 1, 26 Scot. Jur. 16; Thorburn v. Thorburn's Trustees, Feb. 16, 1836, 14 S. 485, 8 Scot. Jur. 239; Wilkie v. Wilkie, Jan. 27, 1837, 15 S. 430, 9 Scot. Jur. 236; Howat's Trustees v. Howat, Dec. 17, 1869, 8 Macph. 337; Grieve's Trustees v. Bethune, June 9, 1830, 8 S. 896, 2 Scot. Jur. 449; Pretty v. Newbigging, March 2, 1854, 16 D. 667, 26 Scot. Jur. 338.

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moveable, with certain specified exceptions, to trustees, whom she directed, as soon after her death as convenient, to make up a state exhibiting the amount of residue remaining after certain specific purposes had been provided for, in order that the trustees might, and she thereby directed them, as soon after her death as convenient and as they might think proper, to invest that residue in the purchase of lands in the county of Fife, adjacent to the estate of Craigsanquhar, belonging to her brother Nathaniel Spens, the pursuer's father, or to the portions of her own estate of Ardit, which, by a separate deed of the same date with her deed of settlement, she conveyed to her said brother in liferent and to the pursuer and the heirs of his body in fee; and, if a suitable purchase could not be made in such locality, then in some other part of the county of Fife, and failing thereof, in some other part of Scotland; and when the fund was thus exhausted, or within £300 of being so, to execute a disposition thereof in favour of her said brother in liferent for his liferent use only, and his son, the pursuer, and the heirs whomsoever of his body in fee, whom failing to his sister Jessie Hannah Elizabeth and the heirs whomsoever of her body, whom failing to his sister Mary Margaret Roberta and the heirs whomsoever of her body, the eldest heir-female always succeeding without division, whom failing, to the granter's own heirs and assignees whomsoever.

The testatrix died in May 1873. Her brother predeceased her, having died in November 1869. The trustees have paid all the legacies, and secured all the annuities bequeathed by the deed to the satisfaction of the annuitants. The

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tional institutes as well as substitutes; and if the pursuer should predecease the granting of the conveyance, the estate must be conveyed to a descendant of the pursuer in the event of his leaving lawful issue, and failing such descendants, then to the pursuer's sisters respectively, whom failing, to their respective issue, as the destination provides. For these reasons I am of opinion that the pursuer has not that sole interest in the fee of the residue of the trust-estate, or in the lands purchased or to be purchased with that residue, which alone could give him right to the decree he asks. He has a present limited interest in the annual return from the residue, but his right to the residue itself appears to me to depend on his survivance of the date when the conveyance, in the ordinary execution of the trust, shall come to be executed.

"Even if the whole residue had been exhausted in the purchase of lands I am not prepared to say that the pursuer would be entitled to a conveyance to himself and his heirs and assignees in fee-simple. It appears to me that the heirs named after the pursuer in the destination to be inserted in the conveyance have an interest and are entitled to require the trustees to insert a destination in their favour in the deed, leaving it to the pursuer, if he think fit, after the lands have been conveyed in that way, to execute a deed defeating that destination; but it is unnecessary and would be premature to decide that question now.

"The only authority to which the pursuer's counsel referred in support of his claim was the Cluny case, Gordon, 4 Macph. 501. That case appears to me to differ entirely in all essential respects from the present. Even there a considerable minority of the Judges were against granting the decree bringing the trust to an end and declaring that Mr Gordon had right to the residue on his own receipt, but the majority of the Court proceeded on the ground that as there was no direction to insert a destination in the conveyance of the lands to be purchased, which would have given rights to a particular line of heirs or a series of persons named in succession to Mr Gordon, and as it was clear he had the present and sole right of fee in the residue of the trust-estate, he was entitled to dispense with the purchase of lands and receive the residue in money. In this respect, which was vital to the decision, the case of Gordon appears to me to differ entirely, and the difference makes all the difference in the result."

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residue applicable to the purchase of lands has been ascertained by the trustees to amount to about £60,000, of which they have already invested about £40,000 in the purchase of lands in Fife—leaving about £20,000 still uninvested. The pursuer desires to have the application of this sum in his own hands, and for that purpose he has brought the present action, concluding to have the amount at once paid over to him. His object, he says, is to build a house on the estate, which is now quite large enough; but, as the Lord Ordinary observes, if he gets the money he will, of course, be entitled to expend it otherwise if he thinks proper.

The question whether the pursuer is entitled to succeed in this action appears to me substantially to depend on whether the beneficial fee of the bequest has vested in him or not. If the beneficial fee has so vested, he is, I apprehend, the only person beneficially interested in the bequest, and, on the principle of the case of Gordon, 2d March 1866 (4 Macph. 501), he is entitled to claim the money which still remains in the hands of the trustees. On the other hand, if the beneficial fee has not vested in him, the principle of Gordon's case does not apply, and the interlocutor of the Lord Ordinary is right.

The question of vesting depends, as it always does, upon the terms of the particular deed, construed in connection with the surrounding circumstances. It is at least as clear in this case as it was in Gordon's case that if a disposition were duly executed by the trustees in the terms directed by the testatrix the pursuer would be unlimited fiar of the lands, and entitled to dispose of them, onerously or gratuitously, at his pleasure.

The subsistence of a trust-fee is not inconsistent with the vesting of a beneficial fee, and the consequent right of a beneficiary to assign or deal with that fee as he thinks proper. Accordingly, in Gordon's case the trust-fee stood in the persons of the undivested trustees, but the beneficial fee was held to have vested in the beneficiary, and to entitle him to payment of the capital fund without going through the formality of, in the first instance, investing it in the terms directed by the testator.

The question in the present case is whether the testatrix intended that the pursuer should have no power to deal with the capital, whether in a marriage-contract or in any other way, till it should be converted into land, and a feudal title to the land established in his person? In other words, whether her object, or one of her objects, in directing the conversion into land was to prevent the beneficial fee from vesting in the meantime in the pursuer?

I am disposed to answer that question in the negative. There is no express declaration by the testatrix that the pursuer was not to be entitled to deal with or dispose of his interest in the capital till some future and indefinite time, of which the trustees should be the sole judges, and by which time they should have invested the whole capital in the purchase of lands, and conveyed them to the pursuer in the terms prescribed. A power to trustees to hasten or postpone the period of vesting at their pleasure is not readily to be reared up by implication. The implication, to say the least of it, would require to be very clear. Here I think it is not so. On the contrary, there are weighty considerations the other way.

The testatrix had no sister or sister's children at the time she executed the deed. The pursuer's father was her only brother, and the pursuer (who was an only son) was her only nephew, and, failing his father, he was her heir-at-law. The father died in November 1869—that is, about nine months after the date of the deed—at the age of sixty-four, while the testatrix survived, without altering her destination of the residue, till May 1873. The pursuer was obviously the person of

all others whom the testatrix was desirous to favour. The disposition which she directed to be executed of the lands to be purchased was to be in favour of her brother "in liferent, for his liferent use only, and to the said Nathaniel James Spens and the heirs whomsoever of his body in fee." Nobody can doubt that under such a disposition the pursuer would have been unlimited fiar notwithstanding of the substitutions, which I shall advert to immediately. Her whole silver plate and plated articles she directed to be delivered to her brother, "for his liferent use, and to the said Nathaniel James Spens for his absolute use, after the death of his father." She bequeathed to the pursuer a legacy of £5000, payable, along with her other legacies, six months after the first term following her death, and she excepted entirely from the dispositive clause of her trust-deed two subjects, both of which she conveyed, by separate deeds, directly to the pursuer, in terms which undoubtedly made him immediate and unlimited fiar of both of these subjects. The one, which is first mentioned in the trust-deed, consisted of the portions (extending to 339 imperial acres) which belonged to her of the lands of Ardit in Fife, and the other consisted of 285 square yards of valuable building ground at Trinity, on the sea-coast adjoining this city, with the dwelling-house and other buildings thereon.

The clause reserving the lands of Ardit from the operation of the trust bears,—"Of which a separate disposition and settlement has been executed by me, of equal date herewith, in favour of my said brother, Nathaniel Spens, in liferent, and the said Nathaniel James Spens, his son, and the heirs whomsoever of his body in fee, whom failing, as therein mentioned." And from the deed itself, which is in process, we see that the destination was to the father "for his liferent use only, and to Nathaniel James Spens, his only surviving son, and the heirs of his body in fee," whom failing, to the pursuer's two sisters before-named in their order, and the heirs of their bodies, in verbatim the same terms with the destination directed to be inserted in the disposition to be executed by the trustees of the lands to be purchased by them.

The clause in the trust-deed reserving the subjects at Trinity bears—"Of which a separate disposition and settlement has also been executed by me of equal date herewith, in favour of Wm. Thomas Thornton, Esq., and Miss Anne Halkett Craigie, both residing at Christian Bank, Trinity, in liferent, whom failing, the said Nathaniel Spens in liferent, and the said James Nathaniel Spens and his heirs and assignees in fee." This separate disposition is erroneously described as being of equal date with the trust-deed, which no doubt it had been intended to be, but something apparently had delayed its execution till 6th May 1869—a discrepancy of no materiality here. The narrative in the trust-deed of the dispositive clause of this disposition is quite accurate, as we see from the deed itself.

Nor did the testatrix leave the pursuer's two sisters dependent for their comfortable livelihood on the chance of their succession to the lands to be purchased by the trustees. The testatrix bequeathed to each of them £5000, with the furniture and everything else in her house No. 7 Moray Place, Edinburgh, except the silver plate and plated articles bequeathed to the pursuer; and, moreover, as is likewise set forth in the trust-deed, she conveyed that valuable house itself, by a separate deed, to these ladies "equally betwixt them, and the heirs of their bodies, whom failing, as therein mentioned."

The direct conveyance to the pursuer of the lands of Ardit explains why it was that the testatrix wished the lands which were to be purchased by the trustees to be adjacent or near to Ardit, failing their being got adjacent or near

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to Craigsanquhar; and it is an important fact in the present case that preference was to be given, over all other localities, to the vicinity of Craigsanquhar, the pursuer's paternal estate, and to which he succeeded on his father's death some four years before the death of the testatrix; and it is further important that, failing adjacency or vicinity to Craigsanquhar, preference was to be given to the adjacency or vicinity of the estate of Ardit, which the testatrix had made absolutely and unconditionally the pursuer's own.

These very substantial proofs of preference for the pursuer over his sisters are to be coupled with the fact, also important, that six months after the death of the testatrix, the pursuer, failing his father, the liferenter, was to enter, at once, into the continuous enjoyment of the bequest of residue by drawing the whole annual income thereof,—alike that arising from the fund while wholly uninvested in land, and that arising from the land after partial investment, as well as from the uninvested balance.

The Lord Ordinary holds that, notwithstanding all this, there was to be no vesting of the capital of the bequest till all the land was purchased and a disposition thereof executed divesting the trustees. In consistency with this view, his Lordship ought to have held, having reference to the 10th head of the trust-deed, that it was further a necessary preliminary to the vesting that a discharge of the trust should be executed by the pursuer, and feudal titles to the lands completed in his person; for the directions on that subject in the 10th head of the trust-deed are equally explicit with those which relate to the purchase and disposition of the lands.

If it were quite clear that the object, or even one of the objects of the testatrix, in all this, was to favour one or both of the pursuer's sisters in preference to himself, there might be much to be said for the result arrived at by the Lord Ordinary. But I think it far from clear that the testatrix had any such object. If she had, it is remarkable that the pursuer and his father were to be two out of the four trustees who were to be vested with the discretionary power of fixing the period of vesting by the purchase and conveyance of lands which might readily have been got, with that view, in some part of Scotland. If one of the other trustees had died, and the father and son had survived, they would have been a majority and quorum of the trustees, and if both the other trustees had predeceased them they would have been the only trustees. It is also remarkable, upon the same supposition, that, in place of directing accumulation after the death of the liferenter, an express direction was given, which was not given in Gordon's case, to pay over the annual proceeds of the bequest to the pursuer, without reference to whether the bequest stood in the form of money or of land.

At the date of the trust-deed the pursuer was a young man of twenty-three years of age. His father, the liferenter, was alive, and might have survived the testatrix for a longer or shorter period of years. Without any desire to give either of the sisters of the pursuer a better chance than was given to him of being able to deal with the fee of the bequest, the testatrix may have thought that a substantial addition to the pursuer's landed estate would be, to him, the most gratifying form which the bequest could assume, and that, in converting it into that form his own want of experience might be usefully supplied by that of his father and the two other trustees whom she conjoined with him in the trust. It is difficult to suppose, at all events, that her object was to interpose obstacles to the pursuer attaining the position in which he could deal with the capital of the bequest, in order to increase the chance of one or other of his

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sisters of coming into that position. Colonel Gordon obviously meant to exclude all and every one of his disponees, named and unnamed, from ever being in such a position, for he directed the execution of a strict entail. He contemplated a destination which the law of Scotland did not recognise at all, but which, if it had been legally effectual, would have made none of the disponees unlimited fiar; and that created one of the greatest difficulties in the case,—namely, whether the succession was not left open to the testator's heir-at-law. Here, on the contrary, the testatrix directed a destination which is quite recognised in our practice as effectual, but the effect of which is to place the estate entirely at the disposal of the first disponee. The law in such a case as this presumes that the testatrix knew the legal effect of the words which she used, and meant them to have that effect. The testatrix must therefore be presumed to have known that the effect of postponing the vesting of the fee would not be to create an effectually protected course of succession, but simply to exclude for an indefinite period, at the discretion of the trustees, the pursuer from being unlimited fiar, for the benefit of another who must necessarily come into that position, and for whom, it is perfectly clear, that the testatrix had nothing like the same favour. I cannot think that that was her object in directing the conversion of the money into land and the completion of titles in the person of the beneficiary at the expense of the trust-estate. If that was not the object of her direction there is nothing else suggested which could possibly suspend the vesting of the beneficial fee. The only suggestion that can be so made is, at the best, doubtful and inconclusive, while there are many cogent reasons against it. I am therefore of opinion that the beneficial fee has vested in the pursuer; and, if that be so, I am further of opinion that the principle governing the case of Gordon is, *a fortiori*, applicable here. Colonel Gordon meant nobody to be unlimited fiar. But in making or directing a destination like the present the law holds that the testatrix meant somebody to be unlimited fiar, and if we were to interpose delay and obstacles to increase the chance of another than the pursuer coming into that position we should just be adopting, in more difficult and hostile circumstances, the principle which weighed with the minority in Gordon's case but which was authoritatively overruled by the majority.

If I am right in these views, the interlocutor of the Lord Ordinary must be recalled, and decree pronounced in terms of the libel.

LORD ARDMILLAN.—I concur in the observation that this case really turns upon the question of vesting, and on that question my opinion is entirely in accordance with that expressed by Lord Deas.

If there had been no trust I do not think it can be doubted that the conveyance to "Nathaniel Spens, my brother, in liferent for his liferent use only, and to Nathaniel James Spens and the heirs whomsoever of his body in fee, whom failing, the said Miss Jessie Hannah Elizabeth Spens and the heirs whomsoever of her body," &c., would have conferred upon Nathaniel James Spens, the pursuer of this action, a right of fee, and that such right of fee would have been now vested in him. There is a trust of which I think the main purpose is to protect the liferent interest of Nathaniel Spens, the brother of the truster, and to secure the administration of the estate so as to benefit Nathaniel Spens in liferent and Nathaniel James Spens in fee. It appears from the trust-deed that the truster had a great regard for Nathaniel James Spens, and this is yet more abundantly proved by other deeds before us, by which she conveyed to

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him other landed estates. There is nothing to limit or qualify the right of fee conferred upon the pursuer, and there is no indication of the intention of the truster to limit that right. His father's right was a right of liferent only, burdening but not destroying or postponing the right of fee conferred on the pursuer. The existence of a liferent is not unfavourable to the vesting of the fee. The fee vests under burden of the liferent. No entail was directed or contemplated. If a deed were executed conveying the lands purchased by the trust-funds in the exact terms directed, that deed would confer on the pursuer a title to the lands in fee-simple. He could dispose of these lands at once. No one could challenge his act or dispute his power. I need not refer to authorities to support this proposition, that the right is vested in the pursuer. It is abundantly clear—more clear than in similar cases of vesting which have been mentioned.

But the next question which arises is—Can the pursuer, having a vested right to the lands already purchased and to the trust-fund remaining as yet uninvested, now obtain payment of the balance of the fund, or must he await the prolonged administration of the trust, involving the selecting and the purchasing and the ultimate conveyance of the land? On this point I am of opinion that if the trustees are, as I think they are, bound, without undue delay, to purchase land and convey it to the pursuer so as to confer on him a fee-simple title with full and immediate power of disposal, and if there is no person whose interests, adverse to the pursuer's right, the trustees are bound to protect, then they cannot withhold the trust-funds from the pursuer. On this part of the case the decision in the case of Gordon of Cluny is applicable and important, and I retain the opinion which I expressed in that case. Looking to the older authorities, I think that the decisions in Routledge v. Carruthers,[1] in Rainsford v. Martin,[2] 1852, Pretty v. Newbigging, 1854, all well known authorities, confirm the view which I have now expressed.

I do not doubt that the trustees have acted with prudent caution in refusing payment without judicial determination. But the words of the deed conferring a right of fee, the manifest preference and favour shewn by the truster to the pursuer in this deed and in her other conveyances, the selection of the locality for the purchase of land, and the effect of a conveyance in the words directed by the deed, afford, when taken in combination, clear grounds, to my mind, for holding the pursuer's right to be vested; and if vested, and vested in the manner and to the extent contemplated and directed by the trust-deed, I can perceive no good reason for refusing his demand for transference of the remaining trust-funds.

Lord Mure.—I concur in the result of the opinions which have now been expressed, and I think that the case depends mainly upon the question of vesting. Upon that question I am disposed to hold that the fee of this estate has vested in the pursuer of the action, and that upon the grounds so clearly explained by Lord Deas. But, were the matter still open, I should, notwithstanding the fact of vesting, have had difficulty in holding that the pursuer was entitled to demand immediate payment of the residue. Since the decision in the case of Gordon of Cluny, however, that question is, I apprehend, no longer an open one. For, although it was there assumed, in the opinion of several of

[1] May 19, 1812, F. C., Buchanan's Reports, p. 121, and H. L. June 29, 1816, 4 Dow, 392, remitted Dec. 16, 1819, F. C., H. L. June 5, 1820, 2 Bligh, 692.
[2] Feb. 6, 1852, 14 D. 450.

the Judges in the majority, that cases might occur in which a direction to purchase land may be so expressed as to oblige the trustees literally to follow out that direction, and where, although the fee had vested, the money appointed so to be expended could not legally be paid over to the beneficiary named in the destination, until the time specified by the truster had arrived, or a condition attached to the bequest had been purified, it was nevertheless held that the directions there given to the trustees were not of that description. And it was decided by a majority of the whole Court, notwithstanding the pretty clear indication of intention on the part of the truster, that the trustees should hold the fund appointed to be invested in land until the investment had been made, that the beneficiary was entitled to demand immediate payment of the residue. After a careful reconsideration of that case I have come to the conclusion that the rules there laid down must be applied in the present case.

The question here raised is under the eighth purpose of the trust-deed, by which the trustees, upon the residue of the estate being wholly or within £300, invested in the purchase of land, are directed to execute a valid disposition of it in favour of Nathaniel Spens, the truster's brother, "in liferent, for his liferent use only, and of Nathaniel James Spens" (the pursuer) "and the heirs whomsoever of his body in fee." Now, I apprehend that, in this provision, when read in connection with the other circumstances of the case, most of the elements will be found which, in the case of Gordon, induced the Court to disregard the indications of intention that the bequest should not there be made available to the beneficiary until the purchase of land had been effected. Under this provision the testator makes a gift of the entire residue to the pursuer, and his primary object seems to have been to favour the pursuer, in preference to the other beneficiaries under the deed. For the gift is not made conditional, in the ordinary sense of that word, but in such unrestricted terms that, upon the estate being conveyed to the pursuer, he could, I conceive, sell or otherwise dispose of it at once. He has now, therefore, as in the case of Gordon, a *jus crediti* vested in him to demand a conveyance of heritage in the particular terms of that eighth purpose, not in an uncertain event, which might be held to operate as a condition, but at a time which must happen, viz., when the residue is laid out in land. And the circumstance that the trustees may have a discretion as to the time when the conveyance is to be made, and that there are indications of an intention that there is to be no conveyance until the fund is invested in land, cannot, I think, be held to interrupt the vesting. Against this view it was strongly contended, on the part of the defenders, that as there is here a continuing trust, with a provision that the trustees were not to be interfered with, the pursuer cannot at present demand payment of any part of the residue. But these provisions are not stronger than those which occurred in the case of Gordon, in which there were somewhat similar directions, and where, under the trust-deed, the trustees were authorised to denude only after the whole money had been laid out in land. All the clauses, moreover, in the present case, which seem to imply a continuing trust, those, for example, with regard to the management of the estate, may be accounted for by the fact that the truster's brother, who is now dead, was to liferent the property, and at the date of the trust-deed was of an age which might make it necessary to keep up the trust for a considerable period.

In these circumstances the only question remaining for consideration is whether the intention, here indicated by the truster, as to the disposal of the residue in

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the purchase of land, is so worded as to preclude the pursuer from now demanding payment as concluded for in this action. I am of opinion that it is not. For as I read the opinions in the case of Gordon, and especially that of Lord Barcaple, which was expressly adopted by several of the Judges in the majority, what was there laid down was, that when a conveyance is appointed to be made in such terms as would vest a fee-simple estate in the beneficiary, and leave it open to him to dispose of it at pleasure, he is entitled to demand immediate payment of the fund. And as most of the arguments which have been here so anxiously addressed to us on the part of the defenders against this course were brought fully under the consideration of the Court in the opinions of Lord Neaves and Lord Kinloch in the case of Gordon, I have come to the conclusion that the defences in this case must be repelled, and decree given in terms of the conclusions of the summons.

The LORD PRESIDENT was absent when the case was argued, and gave no opinion.

THE COURT pronounced this interlocutor:—"Recall the said interlocutor, and decern in terms of the libel: Authorise the trustees to pay the expenses of both parties out of the residue of the trust-estate, as these expenses shall be taxed by the Auditor as between agent and client, and remit to the Auditor accordingly."

DALGLEISH & BELL, W.S.—WILSON & DUNLOP, W.S.—Agents.

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LORD CLINTON, as Tutor and Administrator-in-Law for his Son, the Hon. Charles J. R. H. S. F. Trefusis, Petitioner.—*Lee.*

Nobile Officium—Guardian and Ward—Pupil—Authority to Feu.—Circumstances in which the Court granted authority to a father, as administrator-at-law of his pupil son, to feu part of the son's estate.

1ST DIVISION.
Ld. Curriehill.
M.

ON 13th March 1875 Lord Clinton, as tutor and administrator-in-law for his eldest son, the Hon. Charles Trefusis, who was aged about twelve years, and was proprietor in fee-simple of the estate of Pitsligo in Aberdeenshire, presented a petition to the Junior Lord Ordinary in which he prayed, *inter alia*, for authority to himself to grant feus of a portion of ground, not exceeding 20 acres in extent, surrounding the fishing village of Sandhaven, situate on the estate of Pitsligo, as shewn on a feuing plan produced, "and that at such times and in such portions as the petitioner may think fit; to fix, by interlocutor of the Court, the minimum rate or rates of feu-duty at which the said lands may be feued; to approve of the form of a feu-charter, feu-contract, or feu-disposition as the form to be made use of under the present application, from time to time, as successive feus shall be granted; and to authorise the petitioner to grant the said feus in the form so to be approved of, from time to time, as he shall think proper, subject to any conditions or stipulations which your Lordships may deem necessary."

The petition was presented in the following circumstances:—The Hon. Charles Trefusis had succeeded on the death of his mother, Lady Clinton, in 1869, to the estate of Pitsligo, which she had inherited from her father, Sir John Stuart Forbes. Sir John Forbes had, in 1838, caused a feuing-plan of the ground round the harbour and bay of Sandhaven to be prepared, and had built a pier and otherwise improved the harbour. Eleven feus, covering fully two acres of ground, had been given out during Sir John's life in accordance with this feuing-plan. The herring fishing at Sandhaven had recently been very successful, and the accom-

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modation at the harbour had been found to be too limited. The harbour had also fallen into such disrepair that in 1873 Lord Clinton, as tutor and administrator-in-law for his son, had applied to and obtained from Parliament a provisional order authorising the execution of certain works and improvements on it at an expense of £10,000, to be borrowed on the security of the harbour dues. Of this sum, at the date of the petition, upwards of £2000 had been expended. There was a great demand for house accommodation in and about the village, and the fishing was yearly increasing in value and importance. But there was a considerable risk that if building ground could not be obtained the fishing and trade might fall off.

On 19th March 1870 the Lord Ordinary remitted to Mr William Moncreiff, C.A. (the Accountant of Court), to report on the petition, with power to consult Mr Fletcher Norton Menzies, secretary to the Highland Society.

Mr Moncreiff, on 13th July, lodged his report,* along with a report which he had obtained from Mr Menzies.†

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* " . . . The petitioner craves special powers, authorising him to grant feus at Sandhaven on the unentailed estate of Pitsligo, and he has produced in support of his application—(1) A feuing plan, prepared by Mr James F. Beattie, land surveyor, Aberdeen; (2) A report by Mr James Shives, the local factor on the estate, dated 2d December 1874. The extent of ground proposed to be feued is about 20 acres, and Mr Shives states in his report that, from the success of the herring fishery at Sandhaven, the population has so increased that additional house accommodation has become absolutely necessary in the interest of the harbour and the village, that numerous applications have been made for feus for dwelling-houses, storage, curing stations and premises, &c., and that it is impossible at present to find house accommodation for the crews and others engaged in the fishery.

" The Accountant, in terms of the authority conferred on him by the Lord Ordinary's interlocutor, consulted Mr Fletcher Menzies with reference to this branch of the tutor's petition; and Mr Menzies having gone to the estate, and made careful inspection and inquiries, has lodged a report, which is herewith produced. . . . .

" The Accountant is of opinion that, if powers to feu be granted, a minimum annual feu-duty of £10 per imperial acre should be the rate on which such feus should be sanctioned.

" It is proper, however, that the Accountant should point out that doubts are entertained whether the Court can grant powers to feu in the circumstances stated in this petition. There are various decisions of the Court which have an opposite bearing. The Accountant has had specially under his attention the following:—Colt, 1801, F. C. 547; Vere v. Dale, 20th February 1804, Mor. 16,389; Thomson, 10th March 1837, 15 S. 807.

" In the last case power to feu was refused, though the application was made on the ground that it would be highly expedient to feu.

" These decisions are to the effect that expediency is not a sufficient ground to warrant the Court in granting feuing powers to a tutor. On the other hand, however, the reporter is aware that feuing powers have been granted by the Court to *curators bonis* in certain cases. He may refer to the case of Jamieson, *curator bonis* to W. C. Bontine, 18th June 1868, where authority was granted to a curator to carry out feuing powers which had been granted by the Court to an entailed proprietor, and for that purpose to grant feus of various portions of the estate; and to the case of Jamieson, *curator bonis* to C. Mackenzie, 9th July 1873, where, in an application by the *curator bonis* to a fee-simple proprietor for authority to grant feus or long leases, power was given to grant leases for ninety-nine years in favour of certain parties who had applied for such. The printed papers in these applications are herewith produced."

† (After details as to the extent of the tonnage, export of herrings, &c.)—" I went over the ground proposed to be feued, and carefully compared it with the

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On 20th July the Lord Ordinary reported the petition and reports to the First Division.*

plan by Messrs Beattie and Son, and considering that the existence of the present village prevents the making of an independent plan, I think it is most carefully and conveniently laid out. I failed to find any objection to its being adopted. There is an abundant supply of excellent spring water.

"There is a good road from the village to Fraserburgh, distant about two miles, and it is evident that there is a very great need of more accommodation to put up those employed in the fishing and curing, as well as of ground for curing yard stations.

"The harbour is already greatly deepened and improved, and the natural facilities for a fishing station are very great. There is a good channel to the harbour, with a range of rocks which shelter the bay inside, and afford safe anchorage for the fishing boats at all times.

"When the whole proposed plan of harbour is finished it will be very complete. I have no doubt there will be a great increase of ships and fishing boats using the harbour when there is more convenience, and the want of accommodation in the village is already felt. There were three ships unloading salt when I was there, and I was told there were often five or six ships in at a time of from 60 to 100 tons.

"I may mention that one curer from Fraserburgh has put up a large curing station already in the hopes of getting a feu, should the Court grant authority; so great was his need of a station that he has run the risk. I also observed that a one-storied house (an old feu) had been unroofed, and two stories added, to give additional sleeping room for the curers.

"I have no doubt that there will be a great demand for the feus if granted, and that it will be a great advantage to the property to give authority to feu.

"I ascertained that the late Sir John Stuart Forbes, Bart., let eleven feus with charters at the rate of 8d. per square yard, or £161, 6s. 8d. per acre of purchase money or grassum, and one farthing the square yard, or £5, 0s. 10d. the acre of feu-duty. Calculating the purchase money at 4 per cent, this would give a total return of £11, 19s. 7d. per acre.

"I see by the petition that the minimum feu-duty proposed is £5, and no mention is made of grassum or purchase money.

"I do not know if there is a preference for the above system of feuing, but if there is not a great prejudice in favour of a grassum, I would advise that it be given up, and the land be feued at a minimum duty of £10 per imperial acre. If a purchase money or grassum is preferred, I would make a minimum feu-duty of £5 per annum, and a minimum purchase money of £125, which at 4 per cent would be equivalent to the other £5.

"In conclusion, I must say that it would be in my opinion a fatal mistake not to allow the proposed feus to be granted. There is no doubt the place will become a very important fishing village, and it is naturally well suited for one.

"The white fishing has been commenced since the railway was opened to Fraserburgh, and is now flourishing, and if there was more accommodation for fishermen there is no doubt it would become an important trade from the village.

"I will only add that, from the natural capabilities of the place and the harbour works completed as proposed to be carried out, I think there is a dire necessity to increase the accommodation of the village, otherwise the crowding of the people together at the curing seasons may induce evil results in the shape of fever, &c."

* "NOTE.—The petitioner, Lord Clinton, as tutor and administrator-in-law for the Honourable J. R. H. Stuart Forbes Trefusis, the proprietor of the estates of Sligo and Fettercairn and others, has presented this petition for authority to accept renunciations of leases, and to grant new leases of certain farms on these different estates, and to expend various sums of money in repairs and improvements on these farms, and to feu certain parts of the estate of Pitsligo. Although

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Argued for the petitioner;—It was settled that the Court had a discretionary power to grant leave to feu or burden a pupil's estate.[1] A case

the petitioner is not a tutor under the superintendence of the Accountant of Court, or within the operation of the Pupils Protection Act, I considered it expedient to remit the application to Mr William Moncreiff, C.A. (the Accountant of Court), to inquire into the circumstances and to report, empowering him to consult Mr F. N. Menzies, secretary of the Highland Society, as to the amount of the proposed feu-duty and as to the leases, &c.

"After considering Mr Moncreiff's report, special powers were granted to the petitioner, by interlocutor of 16th July 1875, in terms of the prayer of the petition, except that part in which he asks authority to feu, as to which I entertained some doubts.

"The village of Sandhaven is situated on the sea-coast of Aberdeenshire, and forms part of the pupil's unentailed estate of Pitsligo; and the petitioner asks authority to grant feus of 20 acres of land surrounding the village. It appears that herring-fishing is extensively carried on there, but that there is a great scarcity both of harbour and of house accommodation. With a view to enlarge and improve the harbour, the petitioner, in 1873, applied to and obtained from Parliament a provisional order authorising his ward to execute various works which are at present being carried on, and by which it is expected that the harbour will be materially improved and enlarged. It also appears that there is a great demand at present for house accommodation in and about the village; that the whole available ground in and around the village belongs to the pupil, and that accommodation cannot be had on any other ground in the district. Mr Menzies reports that the ground proposed to be feued is conveniently situated and well adapted for the purpose; and that he has no doubt that it will be a great advantage to the property if the feus proposed were to be granted. The present agricultural rental is stated to be £2 per acre, while the minimum rate of feu-duty recommended by Mr Menzies and approved of by Mr Moncreiff is £10 per acre.

"Although it is evident that if the 20 acres in question were to be all feued out at the rate suggested, the return would be increased from about £40 to £200 per annum, it does not appear to me that, so far as regards the interests of the pupil and of the property of Pitsligo, there is any case of necessity for feuing made out by the petitioner. The income of his ward appears to be ample, and it would not be increased by the proposed feuing to such an extent as to make the granting the powers sought a matter of necessity, or even of great expediency, so far as regards the ward himself or the estate. The desire of fishermen and others to become householders in Sandhaven can hardly be said to make it a necessity for the ward and his estate that the proposed feus should be granted.

"On the other hand, if feus are not granted, the result may perhaps be—although I do not see this noticed in any of the reports—that fishermen and skippers may fail to resort to the harbour, and that the harbour dues may thus become inadequate as a return for the funds of the ward which have been expended in enlarging and improving the harbour.

"In the general case, the Court will not give powers to the guardian of a pupil, or other person under disability, to grant feus of his ward's heritage, unless in the case of necessity,—the avoidance of considerable loss to the ward's estate being generally held to amount to necessity. The general rule applicable to such cases is laid down in the case of Maconochie, 3d February 1857, 19 D. 366. As illustrating the class of cases in which such special powers may be granted, reference may be made to the cases noticed by Mr Moncreiff in his report, and to the case of Alexander, 26th June 1857, 19 D. 888. But in the latter case, and in the case of Jamieson (1868), the special powers were granted because the ward had himself, before becoming incapable, commenced feuing on an extensive scale, the interruption of which would have seriously diminished the

[1] Colt v. Colt, July 3, 1801, M. App. *voce* Tutor, No. 1.

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of necessity, however, required to be made out.[1] Tutors-at-law and nominate had been allowed to borrow money on entailed estates[2] and fee-simple estates,[3] to grant long leases,[4] and even to sell to meet heritable debts.[5] Feus had been granted of land in this village in Sir John Forbes', the pupil's grandfather's, time, and a *curator bonis* had been allowed to complete feuing commenced by his ward, and even to grant new feus.[6] The Court had certainly always limited itself to cases of necessity, and not of mere expediency;[7] but a clear case of necessity had been made out here.

At advising,—

LORD PRESIDENT.—The Court will not sanction the alienation of a pupil's heritage by a tutor except in a case of necessity; but there may be a difficulty in deciding what is a case of necessity, and I think the true rule is to be found in the observations made from the bench in the case of Colt, which are as follows:—"The Court may, with propriety, sanction an alienation of a pupil's heritage when the sale is necessary for payment of debts for the minor's aliment, and in case of urgency to avoid loss. But the Court ought not to interfere merely from views of procuring future advantage to the minor."

Now, proceeding on that principle, it is very clear that the Court went wrong in their original decision in the case of Vere, because the only reason for sanctioning the course there taken was to secure some advantage in the way of increasing the returns which were to be obtained from the pupil's estate. But

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value of his estate. And in the case of Jamieson (1873), where the Court refused to grant general feuing powers, they authorised the curator to grant three long leases of small specified lots of ground, after inquiring into the special circumstances of the case.

"On the other hand, as illustrating the class of cases in which authority will be refused, reference may be made to the cases of Thomson and of Vere, referred to by Mr Moncreiff, the last of which resembles the present in many points, and to the cases of Watt, 23d February 1856, 18 D. 652, and M'George, 8th March 1856, 18 D. 792.

"The question raised by the report of Mr Moncreiff is thus attended with difficulty, and as the 'necessity' for alienating a pupil's heritage is less a matter for legal proof than for the discretion of the Court, I have thought it better, instead of disposing of the case by a judgment, to report it for the consideration of the Inner-House. And I should have followed the same course even if I had been clearly of opinion that the special powers sought ought to be granted, because I think that, as the petitioner has no contradictor, these powers, if they are to be granted at all, should not be granted by a single Judge.

"In the event of power to feu being granted, it is right to notice that, although the minimum feu-duty suggested by the petitioner was only £5 per acre, Mr Menzies and Mr Moncreiff are both of opinion that £10 should be the minimum. But it will be seen from the report of Mr Menzies that even that sum is considerably less than the feu-duty paid for the existing feus in the village, eleven of which were granted by the late Sir John Stuart Forbes, a former proprietor, at the rate of £11, 19s. 7d. per acre; and the minimum feu-duty ought therefore not to be less than £12."

[1] Vere v. Dale, Feb. 29, 1804, M. 16,389.

[2] Earl of Buchan, March 7, 1839, 1 D. 637.

[3] Crawford, July 6, 1839, 1 D. 1183.

[4] Kincaid, July 5, 1856, 18 D. 1208, 28 Scot. Jur. 611.

[5] Mackenzie, Jan. 27, 1855, 17 D. 314.

[6] Alexander, June 26, 1857, 19 D. 888.

[7] Maconochie, Feb. 3, 1857, 19 D. 366, 29 Scot. Jur. 171; Fraser on Parent and Child, p. 493, and cases there cited.

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in other cases, such as that of Mackenzie, the Court have proceeded on grounds of high expediency.

In the present case the circumstances are very peculiar. It appears that as far back as 1838 the late Sir John Stuart Forbes, the then proprietor of this estate, set about erecting the village of Sandhaven, and had a feuing plan prepared, and articles and conditions of feu drawn up to regulate all the transactions in the way of giving off land at Sandhaven. In Sir John's time these were acted on to the extent of feuing out eleven feus in all, amounting to about two acres. Such was the state of affairs when Sir John died, and he was succeeded by Lady Clinton, his daughter, who did not long survive her father, and was in turn succeeded by her son, this pupil. The application is made by his father as his administrator-in-law, who is thus in the same position as a tutor-at-law or tutor-nominate.

In 1873 a provisional order was obtained from Parliament sanctioning the execution of certain works for the improvement of the harbour of Sandhaven. Powers were granted to borrow £10,000, and a sum of upwards of £2000 has already been expended on these works. The pupil thus has a deep interest in the prosperity of the village of Sandhaven, and the provisional order never would have been granted unless Parliament had been convinced that Sandhaven was an increasing place. But nothing can be done without granting feus. The provisional order thus creates a necessity for our endeavouring, if possible, to allow the petitioner to give off feus. I think, on the whole, that there is here a strong case of necessity, and that we should therefore grant the powers prayed for.

LORD DEAS.—This is a very delicate matter. It is clear enough from the case of Vere that our authority is not an absolute protection to a tutor against subsequent responsibility, so we must be careful not to mislead the tutor.

I am, however, disposed to concur, very much on the grounds given by your Lordship. We have here Parliamentary authority for expenditure on this harbour, which clearly implies the necessity of such procedure as is now proposed to be taken. Without such, the expenditure authorised by statute would be thrown away.

LORD ARDMILLAN.—I agree with Lord Deas that this is a very delicate matter. That the Court can grant the prayer of this petition I do not doubt. But such powers are exceptional, and only granted on strong and clear grounds. At the same time, it would be with regret that we should refuse to grant powers where they are not only manifestly desirable and expedient, but where they are substantially necessary. Mere expediency, however high, will not be sufficient; but the peculiarity here is, that the original contemplation of the whole course of procedure in raising up this village of Sandhaven commenced with Sir John Stuart Forbes himself. Obviously he contemplated making and establishing and extending this fishing village, and for that purpose he intended to feu. Therefore, whatever is done now in granting this petition is done in accordance with and in furtherance of the views of the last proprietor. Then, we see that in 1873 a provisional order was obtained from Parliament to carry out the intentions of Sir John, who commenced operations thirty-five years before.

The objects of the petitioner thus are (1) to obtain power to carry out Sir John's intentions, and (2) to be enabled to execute, as contemplated, this pro-

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visional order. The case, then, is one of entire accordance with the intentions of Sir John, and with the views indicated in the provisional order; and the procedure for which power is craved is of the highest possible expediency—so high as to come very closely indeed to absolute necessity. I think, putting these in combination, we have enough here to entitle us to give the authority craved.

LORD MURE.—I concur, on the specific ground that this proposal to feu appears to me to be necessary for the proper administration of this estate, and in order that the money which, under the authority of the provisional order granted by Parliament, is being expended on the extension of the estate harbour, may not be thrown away.

THE COURT pronounced this interlocutor:—"The Lords, on report of Lord Curriehill, having heard counsel for the petitioner, and considered the petition, and the reports by the Accountant of Court and Mr Fletcher Menzies, remit to the Junior Lord Ordinary to grant the power and authority to feu as prayed for, but under condition that the minimum feu-duty shall not be less than £12 per acre."

MACKENZIE & KERMACK, W.S.—Agents.

No. 16.
Oct. 30, 1875.
Wright v. Wightman.

CHARLES WILLIAM WRIGHT, Petitioner and Respondent.—*M'Kechnie.*
HELEN WIGHTMAN, Respondent and Appellant.—*Rhind.*

Lease—Dwelling-House—Hypothec—Obligation to Furnish—Sheriff.—The landlord of a house in a town presented a summary petition to the Sheriff to have the tenant ordained to plenish the house with sufficient furniture to secure the current year's rent, as also arrears of rent, and a sum payable along with the rent for hire of fittings, or to find caution for the same, and, failing the tenant obtempering the order, for a warrant to eject the tenant, and let the house. The tenant objected to the competency of the application, on the ground that it was virtually a declarator of irritancy of the lease not within the provisions of the A. S. 1756, and which the Sheriff had therefore no power to entertain. *Held* that the petition was competent in the Sheriff Court, but that the landlord was only entitled to be thus secured for the current year's rent.

Observed that the lease in such cases is not brought to an end by the warrant of ejectment.

2D DIVISION.
Sheriff of Midlothian, &c.
I.

IN June 1875 Mr C. W. Wright presented a petition in the Sheriff Court at Edinburgh, setting forth that he was proprietor of a dwelling-house and pertinents in Greenside Place, Edinburgh, which he had let to Mrs Wightman for three years from Whitsunday 1874 at a yearly rent of £30, payable at Martinmas and Whitsunday, with a further sum of £2 a-year, payable half-yearly along with the rent, for the use of fixtures and fittings situated in the house, and belonging to the petitioner; that at Whitsunday last Mrs Wightman was in arrear of rent; that he accordingly applied for sequestration, which was executed, and that, after deducting the net proceeds of the sale, there remained a balance of £17, 3s. 3d. of arrears still due to him; that Mrs Wightman was still in possession of the house, and at the present time there was not sufficient household effects and plenishing to pay the current rent, exclusive of the arrears due.

The prayer of the petition was "to order this petition to be served on the said Mrs Helen Wightman, and to appoint her to enter appearance and state defences within a certain short space, and thereafter, on resuming consideration of this petition, with or without appearance, to ordain the

said respondent to plenish the said dwelling-house with furniture and other effects, so as to afford security sufficient in value equal to the sum of £32 sterling, and of the foresaid balance of £17, 3s. 3d., at the sight and to the satisfaction of a licensed appraiser to be named by your Lordship; and failing her doing so, or finding caution for said rent acted in your Lordship's Court, to grant warrant summarily to eject the respondent, her servants and dependants, goods, gear, furniture, and other effects, furth and from said dwelling-house and pertinents, and convey any furniture or other effects belonging to the respondent to a place of safe custody, there to remain subject to the petitioner's claims for rents, when an application for the sale thereof can be applied for; and further, to grant warrant to the petitioner to let the said dwelling-house and pertinents at such rent as he can procure therefor, to be applied *pro tanto* of any balance of any rent that may remain over unpaid after a sale of said effects; to grant warrant to open shut and lockfast places, so far as may be necessary for carrying into effect the warrants herein craved, and to find the respondent liable in the expenses of this application, and of all proceedings to follow thereon."

Mrs Wightman lodged a minute of defence, stating a counter claim to the extent of about £15, and a variety of other defences, but not objecting to the competency of the petition.

Upon 6th July 1875 the Sheriff-substitute (Gebbie) pronounced the following interlocutor:—"Having considered the closed record, ordains the respondent, within ten days from this date, to stock and plenish the premises in question with furniture and effects sufficient to afford security for the current year's rent thereof, amounting to £32 sterling, and for the balance of rent due at Whitsunday last, as set forth in the petition, and to produce a certificate under the hand of any licensed appraiser to that effect; or within said period to find good and sufficient caution acted in the Sheriff Court books for payment of said current year's rent, and also for said balance due at Whitsunday last, and to produce a certificate, under the hand of the Clerk of Court, to that effect, with certification that if she fail to stock and plenish, or find caution as aforesaid, warrant to eject will be granted, all as craved; meantime reserves further consideration of the cause."

Mrs Wightman appealed to the Sheriff (Davidson), who, on the 24th July 1875, adhered to the interlocutor of his Substitute, and renewed the order upon the respondent to plenish or find caution within ten days from that date (24th July).

Upon the 31st August 1875 the Sheriff-substitute (Hamilton) pronounced the following interlocutor:—"In respect the respondent, Mrs Helen Wightman, has not obtempered the last interlocutor of Court, of date 24th July last, grants warrant to summarily eject the respondent, all as craved, and to open doors if necessary: Finds the repondent liable in expenses of process."

The Sheriff adhered on appeal.

Mrs Wightman appealed to the Court of Session.

Argued for the appellant;—The petition to the Sheriff was incompetent. It was virtually a declarator of irritancy of the lease, which the Sheriff had no power to entertain except under A. S. 1756.[1]

For the petitioner the undernoted authorities were cited.[2]

[1] Horn v. M'Lean, January 19, 1830, 8 S. 329, 2 Scot. Jur. 148; see Lord Cowan's opinion in M'Dougall v. Buchanan, Dec. 11, 1867, 6 Macph. 120, 40 Scot Jur. 67; and the Lord President's opinion in Lyon v. Irvine, Feb. 13, 1874, *ante*, vol. i. 512 (see p. 518).

[2] Adam v. M'Dougall, Feb. 5, 1830, 8 S. 457, 2 Scot. Jur. 213; Hunter on Landlord and Tenant, vol. ii. p. 133.

No. 16. At advising,—

Oct. 30, 1875. Wright v. Wightman.

LORD JUSTICE-CLERK.—This case raises an important general question in regard to procedure in the Sheriff Courts. The prayer of the petition is as follows—(reads). The Sheriff ordered the party either to plenish or to find caution, and on her failure to do either he granted warrant to eject her, as craved. The first question is whether the Sheriff had jurisdiction to pronounce this order. It is maintained that the Sheriff had no right to bring a lease to an end, except under the Act of Sederunt of 1756, applicable to agricultural leases. I am quite satisfied that there is no foundation for this contention. We do not think it necessary to order any inquiry as to practice, and I have no doubt. Indeed, it would be impossible to carry out the relations between landlord and tenant in burghs if the Sheriff was not vested with such powers. There is nothing in the petition asking that the lease shall be put an end to, and there is certainly nothing in the warrant of ejectment to put an end to the lease. On the contrary, the authority to relet is in aid of bygone rents. It is not necessary to determine what the appellant's rights would be if she came forward at any time during the currency of the lease and paid up arrears and plenished the house. I am inclined to think she would be entitled to be reinstated in possession.

I think, therefore, the Sheriffs are right in principle, but there must be some change in the interlocutor. The arrears of rent and the £2 for hire of fittings ought not to have been included in the order for caution. They are mere ordinary debts, and must be recovered in the ordinary way. The result is that the appellant ought to have had the option to find security for £30, and I think she should still have that option. I propose that we should remit to the Sheriff to ordain the appellant to plenish the house with sufficient furniture to secure the current rent of £30, or in her option to find caution for that sum, and, if she fails to do so, to pronounce an order of ejectment.

LORD ORMIDALE.—I am of the same opinion.

Two grounds were maintained in support of the appeal. In the first place, it was said that the only remedy competent in the Sheriff Court in such circumstances as the present was under the Act of Sederunt 1756, which has not been libelled on. But the Act of Sederunt is not applicable to the circumstances of the present case; and in particular it has no application to urban subjects. It applies exclusively to agricultural subjects. Accordingly, every one of the cases cited in the argument applied to farms. The next point maintained for the appellant, that which appeared to be chiefly relied on, was that the deliverance of the Sheriff complained of amounted to a rescission of the lease, and that a rescission of the lease was competent only in the Supreme Court. It would be very much to be lamented if we were obliged to give effect to such a plea as this in the circumstances of the present case, when the value of the action is so small, and it might have been smaller. But I am quite satisfied that the plea is ill-founded. The landlord in this case does not seek to rescind the lease. His object is rather to enforce it; not, certainly, to cut it down. It is the tenant—the appellant—who brings the lease practically to an end, because she will not do what reason and justice require, viz., plenish the subjects, or, if she prefers it, find caution for the rent. Applications like the present are, I believe, quite well known, and of frequent occurrence in the Sheriff Court. Accordingly, the

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minute of defence does not contain any objection whatever to the competency of the petition.

The petitioner was not, however, entitled to security for the arrears of rent, and his counsel at once gave up that point. The sum also of £2 payable to the landlord as hire for the use of certain articles must be laid aside, the order to plenish or find caution being applicable only to the rent of the heritable subject, and not to the hire of moveables, which is merely a personal debt. I cannot doubt that this matter, as well as that relating to the arrears of rent, would have been set right by the Sheriff if they had been brought under his notice, which they do not appear to have been.

LORD GIFFORD concurred.

LORD NEAVES was absent.

THIS interlocutor was pronounced:—"Sustain the appeal: Find that the petition in this case is competent before the Sheriff: Recall the judgment complained of, in so far as the appellant is thereby ordained to plenish the premises in question to the extent, or to find caution for, the sum of £17, 3s. 3d., and the sum of £2, for which reserve the petitioner's claim and the appellant's answer thereto, and remit to the Sheriff to proceed in conformity with these findings: Find no expenses due to either party in this Court, and decern."

T. & W. A. M'LAREN, W.S.—D. MURRAY, L.A.—Agents.

No. 17.

Nov. 3, 1875.
Farquhar v. Farquhar's Executors.

JAMES FARQUHAR, First Party.—*Asher.*
MRS DIANA OCTAVIA SCOTT OR FARQUHAR AND OTHERS (Farquhar's Executors), Second Parties.—*Fordyce.*

Mortis Causa Settlement—Extrinsic Evidence.—In the construction of a will *observed*,—

1. That it was an important element of interpretation that the words of conveyance employed were not at the date of the will habile to convey heritage in Scotland, though they afterwards became so by a change in the law several years before the testator's death.

2. That instructions to prepare a *mortis causa* deed are not admissible in construing the deed as evidence of the testator's intention.

3. That deeds and holograph writings made subsequently are admissible as evidence.

2D DIVISION. R.

MR JAMES FARQUHAR, a domiciled Englishman, died on 8th March 1875, possessed of property of large amount in England, both heritable and moveable, and of the estate of Hall Green in Kincardineshire. He left a will in the English form, dated 6th October 1866, with six codicils of different dates between 1869 and 1875, by which he appointed his wife Mrs Farquhar, who survived him, and others, his trustees and executors.

The will contained the following clause:—"Whereas I am possessed of an estate in Scotland called Hall Green, and it is at present mortgaged or charged to the extent of £30,000 or thereabouts. Now, I do declare that it is my intention to free the said estate during my lifetime, but should I fail so to do then I give and bequeath unto my said son James Farquhar such a sum of money as will equal the amount of such mortgage or charge, and the interest thereof, as shall remain due at my decease. And as to all the rest, residue, and remainder of my estate and effects whatsoever, and wheresoever, I direct the same shall be divided into five equal parts; and as to one equal fifth part thereof I give and bequeath the same to my

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said son James Farquhar." James was the testator's eldest son by his first marriage. Three of the remaining fifths were given to three other sons by the same marriage, and the other fifth (afterwards increased by codicil to a fourth) to the testator's children by his second marriage.

The whole debt affecting Hall Green was paid by the testator before his death.

Captain James Farquhar, the eldest son, of the first part, and the executors of the second part, presented this special case for the judgment of the Court, on the question whether the first party was entitled as heir-at-law *ab intestato* of his father to his heritable estate in Scotland, or whether said heritable estate was conveyed by the will and fell to be distributed as part of the residue.

The second parties maintained that the bequest of residue was sufficiently wide to include Hall Green, and that these lands were conveyed in respect of the provisions of sec. 20 of the Titles to Land Consolidation Act, 1868.[1]

In support of his contention, Captain James Farquhar relied not only upon the terms of the will, but also upon certain facts and writings. The second parties denied that these could competently be taken into view in construing the will, and the facts and writings were set out, under reservation of their objections. They were as follows:—(1) Holograph instructions of the testator upon which his solicitor prepared his will, stating that the residuary clause was to apply only to "residuary personal estate." (2) Verbal statements made to various persons by the testator subsequently to making his will of his intention that Hall Green should go to his eldest son James. (3) Correspondence with his solicitor in Scotland, at the time when he was making the will, and with one of his executors, about making an entail of Hall Green on his heirs-male (which was never done). (4) Letter to his factor in 1873, in which he stated that he hoped Hall Green would go to his eldest son in due course of time.

Lord Justice-Clerk.—I think it is perfectly clear that when the testator here dealt with the residue of his estate and effects he did not mean this estate of Hall Green to be included, and that is quite sufficient for the decision of this case. I do not mean to say that the words, "I direct that the same shall be divided into five equal parts, and as to one equal fifth part thereof I give and bequeath the same," &c., are not quite habile to carry heritage in Scotland, if that had been included in the gift and bequest; but I am quite clear from the whole context that the words, "rest, residue, and remainder of my estate and effects" did not include, and were not intended to include it, and that the only construction the words admit of comes to that. In the first place, the immediately preceding clause deals with the estate in Scotland called Hall Green, and putting aside altogether the mode in which it was to be dealt with, I think the natural collocation of the words shews that when it comes to giving and bequeathing the rest of his estate, he means the rest exclusive of what he had already dealt with. But when we come to see what the instructions are in regard to Hall Green it seems to me that they are clearly inconsistent with the idea that the rest, residue, and remainder of his estate and effects included Hall Green. He declares that it is his intention to free the estate during his lifetime, that is, according to the contention of the second parties, to give £30,000 to pay off the debt upon an estate which was to be divided upon his death into five equal parts,

[1] 31 and 32 Vict. c. 101.

[2] Glendonwyn v. Gordon, July 20, 1870, 8 Macph. 1075, 42 Scot. Jur. 630, H. of L. May 19, 1873, 11 Macph. 33, 45 Scot. Jur. 183.

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and necessarily converted into money. But not only so; if he does not clear the estate, the result is to be that his eldest son James is to get £30,000—not a fifth part of the value of Hall Green, but £30,000. Therefore, it is perfectly clear that the rest, residue, and remainder of the estate did not include the estate of Hall Green; and therefore I do not think it necessary to go further into these words. In addition to that, although it is quite true that where the intention is plain, these words, although used before the statute came into operation, would be sufficient to sustain a conveyance of heritage, the testator having survived the passing of the Act, yet the fact of the conveyancer writing this deed at a date when the words would not have conveyed Scotch heritage is a most important fact in ascertaining the intention of the party. On the whole matter, therefore, I should be inclined not to go beyond the four corners of this settlement. I think the testator's intention of leaving Hall Green to descend according to law without conveyance is plain enough, and I am prepared to give effect to it.

In regard to the writings, I think there is a distinction. I do not think that writings prior to a settlement have, so far as I know, ever been admitted to construe the words used in the setttement, for very obvious reasons; and I have not given any weight to the instructions that have been founded on. The declarations of the testator after he had executed his deed are of considerably more importance, for he certainly is the man who knew best the meaning of the words he had used; and if the best witness says he meant one thing, it is a strong thing for a Court of law to say another. And, therefore, if I had been asked to give an opinion upon that question, as to the subsequent letters, I should have been inclined to take them into account, and if they are taken into account they are absolutely conclusive, and leave no doubt about the fact at all. I think that in judging of a question of intention it is a strong thing to leave out of view altogether that which may be the best evidence on the subject. But, apart from that, my opinion is that we should answer these questions in favour of the first party, and find that he is entitled as the heir-at-law *ab intestato* of his father to suceed to the estate of Hall Green.

LORD ORMIDALE concurred.

LORD GIFFORD.—I am of the same opinion. I think it may be quite clearly gathered from the words of the will itself that the estate of Hall Green was not intended to be conveyed. The testator did not mean to convey the estate of Hall Green to his English trustees, and when he spoke in his will of the "rest, residue, and remainder of my estate," he meant to exclude and did exclude the estate of Hall Green, of which he had immediately before been speaking. It is also of considerable importance that at the date of the will the words used were not such as could carry Scotch heritage.

As to extrinsic evidence, that is, evidence other than the will itself, it may be divided into three classes. 1. Instructions for the preparation of the deed,—I agree with your Lordship that these cannot be admitted in evidence, for the plain reason that they are liable and likely to be altered in the will itself. By revising the draft will, and even by considering and adopting the words of the extended deed, the testator may and does supersede or alter all previous instructions. The same principle is applicable to nearly all previous writings. 2. Subsequent writings, I mean writings of the testator or under the testator's hand subsequent to the date of his will,—I think it has been decided by the case of Glendonwyn that these may be looked at when they are formal deeds. But I am prepared to express my individual opinion that holograph writings of

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other descriptions may equally with formal deeds be taken into consideration. 3. Conversations of the testator in my opinion are not admissible, for that would be to control the written words of the testator by the uncertain recollection of his verbal expressions.

If the subsequent writings of the testator are to be looked to, as I think they are, these put an end in the present case to all doubt.

LORD NEAVES was absent.

THIS interlocutor was pronounced:—"The Lords are of opinion and find that the party of the first part is entitled as the heir-at-law *ab intestato* of his father, James Farquhar, to the whole heritable estate in Scotland which belonged to his said father at his death, and decern."

DALMAHOY & COWAN, W.S.—TODS, MURRAY, & JAMIESON, W.S.—Agents.

No. 18.
Nov. 5, 1875.
Noble v. Noble.

ALEXANDER NOBLE, Pursuer.—*M'Laren—J. A. Reid.*
ANDREW NOBLE AND OTHERS, Defenders.—*Adam—Asher.*

Writ—Subscription.—Held that it did not invalidate the subscription of the maker of a deed that he was assisted by having his hand held about the wrist, the hand not having been led in the formation of the letters.

2D DIVISION. Ld. Curriehill. I.

ALEXANDER NOBLE, fisherman, Fraserburgh, by disposition and assignation dated 25th November 1857, conveyed certain heritable subjects belonging to him in Fraserburgh to his second son Andrew. He died in 1861. In 1874 Alexander Noble junior, grandson and heir-at-law of the deceased Alexander Noble, brought an action of reduction of the deed, with conclusions for removing, and count and reckoning, against Andrew Noble, and George, a brother, to whom he had conveyed the subjects, with which a supplementary summons against one George Hay, who had acquired the right of George Noble, was conjoined.

The pursuer averred that at the date of the deed Alexander Noble senior was paralyzed, and wholly unable to write his name, and that his hand was led during the subscription. He pleaded that the disposition by Noble "being not his deed, his hand having been led during the pretended subscription thereof, was null."

On a proof, it appeared that Noble was an old man, and "very shaky." At one time he had been able to sign his name well, but had not done so for many years. John Dunlop, clerk to the solicitor who prepared the deed, deponed,—"He was very shaky at the time. He asked me if I would steady his hand, and I did so. I steadied it by taking him by the wrist. (Q.) Was it above the wrist? (A.) I really cannot particularise at this date exactly where I placed my hand, but it was so as to steady his hand while he made his signature. (Q.) You think, from what you remember, that it was by the wrist? (A.) I should not have the slightest hesitation in saying so; but I would not have taken hold of it otherwise, as I should have been leading his hand." Fraser, another clerk, an instrumentary witness, deponed,—"Dunlop steadied his hand while he wrote his name, so far as I recollect. (Q.) Am I right in understanding you to mean that Dunlop placed his hand upon Noble's? (A.) I think so; he steadied it. (Q.) In order to steady it what did he do? (A.) I believe he placed his hand over Noble's hand. . . . . Do you think that the hand was guided at all? (A.) My impression is that it was, but I could not say distinctly at this distance of time." Mowat, also a clerk, the other instrumentary witness, deponed,—"The granter's hand was not

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led or assisted in adhibiting his signature otherwise than that Mr John Dunlop steadied it by holding his arm above the wrist. To the best of my recollection, all that Mr Dunlop did was simply to steady the arm of the granter when adhibiting the signature."

The testator took a long time to sign, some witnesses said ten minutes, others a quarter of an hour or twenty minutes.

It was clearly proved and not disputed that Noble intended to convey his property in terms of the deed to his second son.

The Lord Ordinary pronounced this interlocutor:—"Finds in point of fact—(1) That the pursuer is the nearest and lawful heir in general of the deceased Alexander Noble senior, *alias* 'Joseph;' (2) that the said deceased Alexander Noble senior was, on the 25th day of November 1857, being the date of the disposition and assignation (first) sought to be reduced, unable to sign his name without assistance; (3) that while the said Alexander Noble senior was writing his name at the end of said disposition and assignation John Dunlop, then a clerk in the office of Lewis Chalmers, the law-agent who had prepared said deed, held the said Alexander Noble's hand about the wrist, and supported his said hand, and assisted him to write his name; (4) that the defenders have failed to prove that any consideration was given by the defender Andrew Noble, *alias* 'Joseph,' for the said diposition and assignation being granted in his favour; and (5) that no consideration was given by the defender George Noble, *alias* 'Gunner,' or by the defender George Hay, for the disposition and assignation (second) sought to be reduced being granted in favour of the said George Noble: Finds in law that the said dispositions and assignations are null and void or reducible: Therefore, in both the conjoined actions, decerns in terms of the conclusions for reduction, declarator, and removing."*

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* "NOTE.— . . . . Now, the question is, in that state of matters, was there such assistance given by Dunlop to Alexander Noble in signing this deed as to nullify it? There is no case, so far as I am aware, precisely the same as this, but there are circumstances in two of the reported cases, viz., Moncrieff v. Monypenny, July 15, 1710, M. p. 15,936, affirmed, Robertson, p. 26, and Falconer v. Arbuthnot, January 9, 1751, M. p. 16,817, and Elchies, *voce* Writ, No. 26, which are very similar to those of the present case. The fullest and best report of the facts of Falconer v. Arbuthnot is contained in the report by Elchies, from which it appears that sundry bonds were granted at different times, some at one month and some at two months before her death by a lady who was blind or paralytic and shaky. The subscription of the old lady being quarrelled, it was proved that in granting any receipts to tenants she was in use so far to take the assistance of her son, who commonly led her hand. As to the bonds quarrelled, some of the witnesses said that he held her by the wrist; others that his hand was upon hers; others that he only held the end of the pen. None of the witnesses heard the bonds read over to her, but she said to them that the papers had been read to her, and therefore she desired them to witness her subscription. But as she was so blind that she could not read any of them herself, and for anything that appeared in the proof bonds of another tenor, or for different sums, might have been read, so that there was no evidence that she knew what was signed, the Court reduced them all. Now, in that case it was not proved distinctly what the amount of interference was, but it was one of three things—either that the wrist was held, or that the hand was held, or that the pen was held. And the mere taking by the wrist seems to have been considered as sufficient assistance to prevent the signature from being held as the true signature of the party. In the case of Moncrieff v. Monypenny it appears from the report in Morr. p. 15,936, that the granter, George Moncrieff, had signed his Christian name 'George' and 'Mon,' the first three letters of 'Moncrieff,' and that he could not from weakness finish the subscription, where-

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The defenders reclaimed, and argued;—It was not a sufficient ground to reduce a will that the testator received assistance in subscribing, unless his hand was led in forming the letters. Noble's hand was not led. The cases founded on by the Lord Ordinary did not support his conclusion, because in Moncrieff v. Monypenny it was proved that the hand was led, and in Falconer v. Arbuthnot the ground of judgment was that the maker of the deeds was blind.

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upon the writer of the deed assisted him. The depositions of the witnesses as to what was the actual amount of assistance given are not set forth in the report, but the judgment seems to have proceeded upon this, that he was assisted by the hand being steadied or supported. In the argument for the pursuer, which was sustained by the Court, the defender's argument, which was repelled, is thus commented on :—'As to the pretence that fixing his arm could not direct his fingers, whose motion only frames the letters, they oppone the witnesses' depositions that he could not have perfected the subscription without that' —*i.e.*, without fixing the arm—'for he began to stagger, and the syllable "Mon" is a downright scribble.' The Lords having advised the depositions and debate, sustained the reasons of reduction, and found them both relevant and proved, and therefore reduced the testament. The interlocutor is given in the report of the appeal case, Robertson's Appeals, p. 26, whereby on 15th November 1710 the Court found 'that the testator did not complete his subscription, but that his hand wavering he was supported by the writer, who assisted him to write the last syllable, and therefore declared said will null and void.' In the appellant's argument, where he is treating of the evidence, he says that the will had been written out according to the directions of Moncrieff; but Watson, who was the writer of the deed, perceiving his hand to waver, took him by the 'shackle bone,' and supported his hand while he wrote the rest of his name. Nevertheless, the Court found that the taking of him by the 'shackle bone,' and supporting him by the hand while he wrote his name, was such assistance as to compel them to declare the deed null and void.

"Now, I think that these judgments, and also the judgments in other cases, which will be found noted in Menzies, p. 105, all proceed upon general grounds of policy, viz., that it is extremely dangerous to allow any interference with a person in the act of signing a deed. It is not necessary to hold that a general support may not be given to the body of the granter; he may be propped up with pillows, or perhaps even supported by the arm of another, so as to enable him to assume an attitude convenient for writing, but any interference with or approach to his hand is an amount of assistance which the law will not tolerate. It is obviously impossible to draw the line nicely between support to the wrist and support to the hand, and if the hand of another approaches, or is in contact with the hand of the party who is supposed to execute the deed, there is room for a very great deal of dangerous manipulation. The duty of the agent of the granter in such a case is to call in the assistance of notaries in terms of the statute. It is said that the granter of the deed in question, Alexander Noble, had given instructions beforehand for the preparation of the deed, and that several people knew that he had intended to make this disposition of his property; but that goes for nothing. In the report of the case of Falconer v. Arbuthnot, in Morrison, 16,817, it is stated that the bonds were reduced, 'notwithstanding the deeds appeared rational, and that some evidence was brought of her previous intention to give some donations to her grandchildren.' And it will also be found that that case proceeded upon this general ground, that the Court would not enter upon the question whether there had been any imposition upon the part of the beneficiaries, and that interference with parties signing deeds cannot be allowed: 'The Lords were in noways moved by the argument brought by the pursuer to prove imposition, but they thought there was the utmost danger in sustaining these deeds in those circumstances, whatever reasons there might be to think there was no imposition in the case; yet the law suspected, and even presumed it.' . . . ."

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The pursuer argued that the rule of law was that if the maker of the deed was physically unable to write without assistance the only legal course was to call in notaries. The cases went beyond the doctrine that actual leading was necessary. For example, in Moncrieff v. Monypenny, the interlocutor quoted by the Lord Ordinary shewed that assistance given by only supporting the hand was a sufficient ground of reduction.

LORD ORMIDALE.—I have come, without much difficulty, to the conclusion that the Lord Ordinary's interlocutor cannot stand, and the considerations which have chiefly influenced me in doing so may be briefly stated.

In the first place, it appears to me to be clearly established that there was no improper motive or conduct on the part of any of those who were present at the execution of the deed or on the part of those persons in whose favour it was granted. If there had been room for suspecting fraud or undue influence that would have been a very material element in the case. But it was distinctly admitted at the bar that the deed is in the terms in which the granter desired to make it, and that the granter had not been tampered with by any one.

Another important consideration to be attended to is the distance of time which has elapsed since the granter's death before there was any challenge of the deed. The pursuer lived in the same place, and we must, I think, take it that the deed was seen soon afterwards by the pursuer himself, as well as others interested, or who supposed they might be interested in it. But the pursuer allows fourteen years to pass without challenging it. If, therefore, there is any defect or obscurity in the evidence, or any failure in the memory of the witnesses, he is answerable for it, and must blame himself for the consequences.

Keeping these considerations in view, what was the issue which the pursuer undertook and was bound to establish? It was that the settlement in question was not the deed of the granter, and the Lord Ordinary has found that the witness Dunlop "held his hand about the wrist, and supported his hand and assisted him to write his name," and on this ground the deed has been set aside. Now, I am willing to take Dunlop's own account of the matter, and he must have known better than any one else what took place. He says,—"I really cannot particularise at this date exactly where I placed my hand, but it was so as to steady his hand when he made his signature." Then, when he is asked, "You think from what you remember that it was by the wrist?" he replies, "I should not have the slightest hesitation in saying so; but I would not have taken hold of it otherwise, as I should have been leading his hand." He thus acted at the time on the distinction between leading and steadying the hand of the granter in writing his name. On the authorities there is, I think, room for that distinction. I think you may steady a man's hand provided that you do not lead it in the formation of the letters. Some degree of support and assistance, it is conceded, may legitimately be given. In the well known case of Lord Fife (1 Sh. App. 498), who was blind, another person put down his finger, which he, Lord Fife, felt for and wrote his name at the place where he found it. In this way Lord Fife was assisted in executing the deed, and without some such assistance he, being perfectly blind, could not have subscribed the deed. But that was not held to invalidate the signature. In short, if the assistance stops short of guiding or leading the hand in the formation of the letters, or some of them, it ought not to found a good objection to the execution of a deed. In the present case I do not think on the evidence that the assistance did amount to that.

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Indeed, it would be extremely difficult, if not impossible, to guide or lead a man's hand or fingers in forming the letters of his signature by merely taking hold of his wrist. In the case of Moncrieff v. Monypenny, as I read the report of it, there was leading of the hand, and it was on that ground that the deed was not sustained. In Falconer v. Arbuthnot it seems to have been held that because the party was blind she could not subscribe a deed, but that is no longer sound law according to more recent decisions, and, especially, the case of the Earl of Fife, as decided in the House of Lords. I cannot help thinking, therefore, that the Lord Ordinary has allowed himself to be too much influenced by the cases cited in his note, which had reference to a time when the art of writing was comparatively less known and practised than it is now, and when fraudulent attempts were more frequently made to impetrate deeds from persons who could not write than in more recent times.

For the reasons I have now stated, and after a careful examination of the whole evidence, I am of opinion that no sufficient cause has been established for reducing the deed in question on the very technical ground on which the Lord Ordinary has proceeded, and therefore I think his interlocutor ought to be recalled, and the defenders assoilzied from the conclusions of the action.

Lord Gifford.—I have come to be of the same opinion, after very anxious consideration. I was at first much moved by the reasons assigned by the Lord Ordinary for his judgment, and the authorities quoted in support of it, but on a closer examination of the case and of the authorities I have become satisfied that there is no good objection to the signature of the late Alexander Noble.

On the evidence it seems to me to be proved that the hand of the testator at the time the signature was affixed was not led, but only that it was supported. I think the distinction between these two things is a sound one, and that mere support to the hand or arm, which does not control the formation of the letters of the testator's name, does not affect the validity of the subscription. But, while I take this distinction, I can imagine cases in which the Court would easily reach the conclusion that something more than support had been given, notwithstanding the disavowal of the person who assisted. For example, if there was discrepancy in the spelling or the formation of the letters from the granter's usual style. In all such cases it is a question of evidence, a question of fact, that question being, did the testator form the letters of his own signature, or were the letters formed by another guiding hand? It seems to be conceded that some degree of support or assistance may be given without affecting the validity of a subscription. And it is easy to suppose cases in which the person assisting did not even know the testator's name, or that the signature was so peculiar and characteristic that it could only have been made by the testator himself.

I think, therefore, that the distinction between supporting and leading is sound, and that the result of the evidence in the present case seems to me to be that the assistance given was not of such a character as to prevent Noble from signing effectually. On this point I am disposed to believe the evidence of John Dunlop, by whom the testator's hand is alleged to have been led, and of Magnus Mowat, one of the instrumentary witnesses. Both these witnesses distinctly negative the allegation that the testator's hand was led in the sense that he did not himself form the letters of his signature, and I do not think their evidence is shaken by the very doubtful evidence of James Fraser, the other

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instrumentary witness, who, at the strongest, can only speak to an impression which he has formed, he cannot well say when.

When narrowly looked at none of the cases conflict with this view. Moncrieff v. Monypenny is the strongest. But, notwithstanding some ambiguous expressions in the reports, both in this Court and in the House of Lords, it appears that the last part of the signature was made by guiding the hand.

If the matter were doubtful the considerations referred to by Lord Ormidale would come in. If the evidence is weakened by the time that has elapsed, the pursuer is to blame for it. The objection is purely technical. There is no doubt whatever of the true intention of the disponer. There is no suggestion of fraud, and in the whole circumstances there arises a very strong presumption in favour of the deed.

LORD JUSTICE-CLERK.—I have come to the same conclusion without much hesitation, although not quite on the same grounds as your Lordships. I think there is no doubt upon the evidence that the man's wrist was held by Dunlop for some ten minutes or quarter of an hour. Further, I cannot say that the Lord Ordinary has gone wrong upon the authorities. In Moncrieff v. Monypenny I see no reason to doubt that the fact which was disputed and was proved was the same as has been proved in this case. It does not appear that the hand was led. Holding the wrist was dealt with as the material fact. But I am not prepared to follow the case of Moncrieff. I think it inapplicable to the present state of society. I am far from saying that holding the wrist of the writer is the same thing as only supporting him, because mere support does not contribute to the formation of the signature. The serious question is, whether, when the assistance is such that it can control the writing, that fact is enough to vitiate the subscription. I think it is not if it be made clear that there was no intention to guide the hand, and in this case it is in my opinion proved on the evidence that there was no such intention. Even if Dunlop assisted involuntarily in the formation of the letters, which is extremely probable, I do not think that is enough to vitiate the subscription.

THIS interlocutor was pronounced:—"Recall the said interlocutor, and assoilzie the several defenders from the conclusions of the respective summonses against them, and decern: Find the pursuer liable in expenses to all the defenders," &c.

DAVID WILSON, S.S.C.—PEARSON, ROBERTSON, & FINLAY, W.S.—Agents.

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M'Connachie v. Great North of Scotland Railway Co.

JAMES M'CONNACHIE, Pursuer and Respondent.—*Balfour—Jameson.*
THE GREAT NORTH OF SCOTLAND RAILWAY COMPANY, Defenders and Appellants.—*Sol.-Gen. Watson—Asher.*

Reparation—Railway—Railway and Canal Traffic Act, 1854 (17 *and* 18 *Vict. c.* 31), *sec. 7—"Just and Reasonable Condition"—Detention of Perishable Goods.*—A railway company gave consignors of fish the option of having their goods carried at a rate lower than the ordinary rate for fish, upon condition of the consignor undertaking by special contract to relieve the company of all liability for delay, except upon proof that the detention "arose from the wilful fault or negligence of the company's servants."

A fish-curer on two different days delivered consignments of fresh fish to the company to be forwarded, according to his practice, under the special contract. In consequence of an intermittent block at a junction arising from a diversion

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of traffic caused by a break down on another company's line, which had taken place a few days before the first consignment was despatched, both consignments were detained on their way to market, and damaged. *Held* that the special contract was just and reasonable within the meaning of the Railway and Canal Traffic Act, 1854, and had the effect of throwing upon the pursuer the burden of proving fault on the part of the company; but upon the evidence (*dub.* Lord Gifford as to the first consignment), that fault had been proved against the company, in respect that while the pressure of traffic at the junction could have been foreseen, and while the block had in fact commenced the night before the first consignment was sent off, they had failed to make sufficient arrangements for securing the despatch of perishable goods, and further that they had neglected to warn the consignor, when they received the goods, that the line had been blocked, and that the goods were in danger of being delayed in transmission.

Observed (*per* the Lord Justice-Clerk) that temporary or accidental detention from unexpected pressure of traffic is a risk incidental to railway traffic, and one of which the customer must to a certain extent take his chance, but that the case is different when the causes of probable detention are known and foreseen, and are not specifically disclosed to the customer when his goods are accepted.

2D DIVISION. Sheriff of Elgin, &c. I.

JAMES M'CONNACHIE, fish-curer in Lossiemouth, brought this action in the Sheriff Court of Elgin against the Great North of Scotland Railway Company for the damage sustained by him through the defenders' failure timeously to deliver in Glasgow certain quantities of fish.

The following facts were admitted or proved:—

The pursuer had been in the habit of despatching consignments of fish to Glasgow by the defenders' line to Aberdeen and thence by the Caledonian Railway by Perth to Glasgow, and usually the fish despatched from Lossiemouth one morning arrived in Glasgow the morning after.

On 17th September 1873 the Bridge of Dun on the Caledonian line, between Aberdeen and Perth, was carried away by a flood, and the traffic was suspended for about ten days, and in consequence the defenders, who had also a line from Lossiemouth by Craigellachie, along Speyside, to join the Highland line at Boat of Garten, carried their traffic in the interval by that route, the Highland Railway carrying it on to Perth.

On 23d September, six days after the Bridge of Dun had been carried away, the pursuer sent a consignment of fresh fish by the defenders' line, which ought to have arrived in Glasgow next morning, but did not arrive until the 26th. He sent a second consignment on the 24th, which was duly delivered next morning. He sent a third consignment on the 25th which was not delivered till the 27th. The first and third consignments were rendered unsaleable by the delay, and their value was the damage sued for in the present action.

The defenders had two rates of carriage for fish from Lossiemouth to Glasgow, the ordinary rate of 42s. 6d. per ton, and a cheaper rate of 31s. 6d. per ton. If the customer wished his goods to be carried at the cheaper rate he was required to sign a risk note in the following terms:—"To the Great North of Scotland Railway Company.—Deliver as under the undermentioned goods, to be carried at the reduced rate below the company's ordinary rate; in consideration whereof I undertake to relieve the Great North of Scotland Railway Company, and all other companies over whose lines the goods may pass, from all liability in case of loss, damage, or delay, except upon proof that such loss, detention, or injury arose from wilful fault or negligence on the part of the company's servants.

"When, for the convenience of senders, the company book goods to stations on other lines, shipping companies, or other public carriers, they do so at the sole risk of the owners, and subject to the rules and regulations of such companies and carriers; but they do not undertake to forward or deliver goods in time for any particular conveyance or for any

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particular market. They only undertake to deliver goods within a reasonable time, and they will not entertain claims for compensation for alleged loss occasioned by late delivery. If consignor desires the articles to be conveyed by passenger train, the words 'per passenger train' must be written across the face of this note, and initialed by the party."

The pursuer was in the habit of sending his fish at the lower rate, and in regard to both the consignments in question the "risk notes" were duly signed by the pursuer's foreman on his behalf. Both lots were ticketed as "perishable."

In consequence of the break down on the Caledonian line the goods traffic on the defenders' Craigellachie branch, which was a single line, was increased about ten-fold. The result was that the number of waggons which came up to Boat of Garten from Craigellachie gradually became unmanageable. The Highland Railway gave the preference to goods coming by their own line from the north, while the defenders' waggons were shunted into sidings waiting for their turn. In this way it happened that trucks containing perishable goods, and amongst others the pursuer's fish, got to the end of sidings, from whence they could not easily be extricated. Waggons arriving later were sometimes shunted in front of waggons arriving earlier, and thus the latest comers sometimes went on first.

David Shaw, stationmaster at Boat of Garten, deponed,—"All the officials at Boat of Garten are in service both of defenders and of Highland Railway, and the station is a joint station. We sent forward all the defenders' traffic, up to and including Sunday 21st September, and it was on the night of Monday the 22d that we began to get blocked. We did not get the station clear that night. The traffic up Speyside then got heavier. In ordinary circumstances, we sort the trains as they arrive. If we had had engine power I believe we could have sorted the trains and kept the station clear as before, but we had not enough of engine power. With the exception of some Caledonian engines sent north from Perth the Highland Railway did all the engine work south of Boat of Garten. The defenders did none of it. The additional assistance I had during the block consisted of two porters, a number-taker, and a clerk."

James Imlah, guard of the Speyside train by which the pursuer's fish travelled, gave evidence to the like effect. "Interrogated, Could any special waggon have been picked out? Depones, Yes; but it might have taken about three-quarters of an hour, and I do not think there was time for this, there were so many trains running."

The block continued for three or four days, though it appeared that it was partially relieved upon the 24th.

Immediately upon the occurrence of the accident at Bridge of Dun the defenders had sent circulars to their station-agents informing them of the fact, and with directions for the conduct of the traffic. The stationmaster at Lossiemouth deponed,—"As soon as I got it (the circular) I informed the traders, and among them I informed the pursuer. We had a conversation about it. Our talk was about the difference it would make in the traffic, but I don't think we anticipated any stoppage." No intimation was, however, sent to the stationmaster of the block at Boat of Garten, and according to his evidence he did not know of the block till the pursuer complained to him of the fish in question having been delayed. The pursuer received no information before sending off either consignment that there was any stoppage on the line.

The Highland Railway had a station at Elgin, six miles from Lossiemouth. It was proved that goods sent by the Highland Railway from Elgin *via* Forres were forwarded to the south at this time without detention.

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M'Cammon v. Great North of Scotland Railway Co.

The defenders pleaded, inter alia:—3. The alleged delay complained of not being attributable to the defenders or to those for whom they are responsible, but having arisen from circumstances over which they had no control, the defenders are entitled to be assoilzied. 4. The pursuer having by the special written contract produced undertaken, in respect of his goods being carried at a reduced rate, to relieve the defenders and all other companies over whose lines the various goods in question might pass from all liability in the event of "delay," except upon proof that such detention arose from wilful fault or negligence on the part of the railway servants, and the alleged delay not having arisen from any such fault or negligence, the defenders are entitled to be assoilzied.*

The Sheriff-substitute (D. M'Leod Smith) pronounced an interlocutor of which the principal findings were as follows:—"Finds that the defenders have failed to shew that the causes of delay beyond the usual periods of transit were reasonable or necessary: Finds, *separatim*, that there was a block or interruption of traffic in operation more or less continuously on the defenders' line at or about the times when they received the pursuer's goods as aforesaid, and that the defenders so received and undertook to carry the same on the usual footing without disclosing to or informing the pursuer that there was any risk of delay to his goods from such block or interruption: Finds in law, in the whole circumstances, that the limitations contained in the notes Nos. 52 and 53 of process of the ordinary legal liabilities of the defenders are not just and reasonable, and that the defenders are liable for the damages sued for as adjusted by the said minute: Therefore repels the defences, decerns against the defenders for the said sums, amounting together to the sum of £78, 0s. 9d. sterling, with interest thereon, in terms of the conclusions of the summons: Finds the pursuer entitled to his expenses," &c.

The Sheriff (B. R. Bell), upon appeal, pronounced the following interlocutor:—"Recalls the interlocutor appealed against: Finds in fact that the pursuer, at the times and places set forth in the summons, delivered to the defenders the fish stated in the summons: Finds that the defenders undertook and engaged to convey the same in due course, and to deliver them in proper time in Glasgow: Finds that they failed to perform this undertaking: Finds that this failure was caused by the defenders voluntarily and knowingly undertaking to carry a quantity of goods greater than it was possible they could carry, or if not so, then by their voluntarily omitting to send forward the pursuer's fish, which were duly ticketed as "perishable," in advance of goods not perishable: Finds that the pursuer thereby suffered loss to the amount of £78, 0s. 9d. sterling: Finds in law that the defenders are liable to the pursuer in the said amount, as also for expenses of process," &c.

The defenders appealed to the Court of Session.

Argued for the appellants;—Even at common law the liability of

* Railway and Canal Traffic Act, 1854, sec. 7.—"Every such company as aforesaid shall be liable for the loss of, or for any injury done to, any horses, cattle, or other animals, or to any other articles, goods, or things, in the receiving, forwarding, or delivering thereof, occasioned by the neglect or default of such company or its servants, notwithstanding any notice, condition, or declaration made and given by such company contrary thereto, or in anywise limiting such liability; every such notice, condition, or limitation being hereby declared to be null and void; provided always that nothing herein contained shall be construed to prevent the said companies from making such conditions with respect to receiving, forwarding, or delivering of any of the said animals, articles, goods, or things as shall be adjudged by the Court or Judge before whom any question relating thereto shall be tried, to be just and reasonable."

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carriers did not embrace a guarantee against delay in transit.[1] At all events the effect of the special contract was to throw the burden upon the customer of proving that the delay was caused by the fault of the company.[2] No tangible fault had been proved in this case. It was not enough to say that something might possibly have been done which would have prevented the detention.

Argued for the pursuer;—Even assuming the special contract to be effectual, fault or negligence had been sufficiently proved. The defenders ought to have provided sufficient engine power at Boat of Garten for marshalling the trains so as to give perishable goods the preference.[3] The cessation of traffic between Perth and Aberdeen would have enabled them to get any number of Caledonian engines. But even if the block at Boat of Garten was unavoidable, they ought to have telegraphed the state of matters to Lossiemouth on the night of the 22d or morning of the 23d, and warned the pursuer of the risk of delay.[4]

At advising,—

LORD JUSTICE-CLERK.—This case raises a question as to the responsibility of railway companies as carriers under somewhat special and unusual circumstances. The respondent, who is a fish-curer in Lossiemouth, had been in the habit of despatching consignments of fish to the Glasgow market by the line of the appellants *via* Aberdeen and the Caledonian Railway to Perth and Glasgow. On the 17th September 1873 the Bridge of Dun on the Caledonian line was carried away by a flood, and the traffic on that line was suspended for a period of about ten days, and in consequence the appellants, who had also a branch to Craigellachie to join the Highland line at Boat of Garten, carried their traffic in the interval by that route, the Highland line carrying it on to Perth. On the 23d of September, being six days after the Bridge of Dun had been carried away, the respondent sent a consignment of fish by the appellants' line, which ought to have arrived the next morning in Glasgow. They did not so arrive until the 26th. He sent a second consignment on the 24th which was duly delivered on the 25th. He sent a third consignment on the 25th which was not delivered until the 27th. He now sues for the value of the first and the last consignments, which, it is admitted, were rendered unsaleable by the delay. The Sheriff-substitute and the Sheriff decided in favour of the respondent, and we are now to consider their judgment.

The appellants plead, in the first instance, that they had a special contract with the respondent, which was in the following terms:—"To the Great North of Scotland Railway Company.—Deliver as under the undermentioned goods, to be carried at the reduced rate below the company's ordinary rate; in consideration whereof I undertake to relieve the Great North of Scotland Railway Company, and all other companies over whose lines the goods may pass, from all liability in case of loss, damage, or delay, except upon proof that such loss, detention, or injury arose from wilful fault or negligence on the part of the company's servants.

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[1] Finlay v. North British Railway Co., July 8, 1870, 8 Macph. 959, 42 Scot. Jur. 552 (see opinion of Lord President); Anderson v. North British Railway Co. (2d branch), Feb. 18, 1875, *ante*, vol. ii. p. 443.

[2] Finlay v. North British Railway Co., *supra*.

[3] Macdonald and Co. v. Highland Railway Co., May 20, 1873, 11 Macph. 614, 45 Scot. Jur. 391.

[4] Jarvie v. Caledonian Railway Co., March 18, 1875, *ante*, vol. ii. p. 623.

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The defenders pleaded, *inter alia*;—(3) The alleged delay complained of not being attributable to the defenders, or to those for whom they are responsible, but having arisen from circumstances over which they had no control, the defenders are entitled to be assoilzied. (4) The pursuer having, by the special written contracts produced, undertaken, in respect of his goods being carried at a reduced rate, to relieve the defenders and all other companies over whose lines the various goods in question might pass from all liability in the event of "delay," except upon proof that such detention arose from wilful fault or negligence on the part of the railway servants, and the alleged delay not having arisen from any such fault or negligence, the defenders are entitled to be assoilzied.*

The Sheriff-substitute (D. M'Leod Smith) pronounced an interlocutor of which the principal findings were as follows:—"Finds that the defenders have failed to shew that the causes of delay beyond the usual periods of transit were reasonable or necessary: Finds, *separatim*, that there was a block or interruption of traffic in operation more or less continuously on the defenders' line at or about the times when they received the pursuer's goods as aforesaid, and that the defenders so received and undertook to carry the same on the usual footing without disclosing to or informing the pursuer that there was any risk of delay to his goods from such block or interruption: Finds in law, in the whole circumstances, that the limitations contained in the notes Nos. 5/2 and 5/3 of process of the ordinary legal liabilities of the defenders are not just and reasonable, and that the defenders are liable for the damages sued for as adjusted by the said minute: Therefore repels the defences, decerns against the defenders for the said sums, amounting together to the sum of £78, 0s. 9d. sterling, with interest thereon, in terms of the conclusions of the summons: Finds the pursuer entitled to his expenses," &c.

The Sheriff (B. R. Bell), upon appeal, pronounced the following interlocutor:—"Recalls the interlocutor appealed against: Finds in fact that the pursuer, at the times and places set forth in the summons, delivered to the defenders the fish stated in the summons: Finds that the defenders undertook and engaged to convey the same in due course, and to deliver them in proper time in Glasgow: Finds that they failed to perform this undertaking: Finds that this failure was caused by the defenders voluntarily and knowingly undertaking to carry a quantity of goods greater than it was possible they could carry, or if not so, then by their voluntarily omitting to send forward the pursuer's fish, which were duly ticketed as "perishable," in advance of goods not perishable: Finds that the pursuer thereby suffered loss to the amount of £78, 0s. 9d. sterling: Finds in law that the defenders are liable to the pursuer in the said amount, as also for expenses of process," &c.

The defenders appealed to the Court of Session.

Argued for the appellants;—Even at common law the liability of

* Railway and Canal Traffic Act, 1854, sec. 7.—"Every such company as aforesaid shall be liable for the loss of, or for any injury done to, any horses, cattle, or other animals, or to any other articles, goods, or things, in the receiving, forwarding, or delivering thereof, occasioned by the neglect or default of such company or its servants, notwithstanding any notice, condition, or declaration made and given by such company contrary thereto, or in anywise limiting such liability; every such notice, condition, or limitation being hereby declared to be null and void; provided always that nothing herein contained shall be construed to prevent the said companies from making such conditions with respect to receiving, forwarding, or delivering of any of the said animals, articles, goods, or things as shall be adjudged by the Court or Judge before whom any question relating thereto shall be tried, to be just and reasonable."

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carriers did not embrace a guarantee against delay in transit.[1] At all events the effect of the special contract was to throw the burden upon the customer of proving that the delay was caused by the fault of the company.[2] No tangible fault had been proved in this case. It was not enough to say that something might possibly have been done which would have prevented the detention.

Argued for the pursuer;—Even assuming the special contract to be effectual, fault or negligence had been sufficiently proved. The defenders ought to have provided sufficient engine power at Boat of Garten for marshalling the trains so as to give perishable goods the preference.[3] The cessation of traffic between Perth and Aberdeen would have enabled them to get any number of Caledonian engines. But even if the block at Boat of Garten was unavoidable, they ought to have telegraphed the state of matters to Lossiemouth on the night of the 22d or morning of the 23d, and warned the pursuer of the risk of delay.[4]

At advising,—

LORD JUSTICE-CLERK.—This case raises a question as to the responsibility of railway companies as carriers under somewhat special and unusual circumstances. The respondent, who is a fish-curer in Lossiemouth, had been in the habit of despatching consignments of fish to the Glasgow market by the line of the appellants *via* Aberdeen and the Caledonian Railway to Perth and Glasgow. On the 17th September 1873 the Bridge of Dun on the Caledonian line was carried away by a flood, and the traffic on that line was suspended for a period of about ten days, and in consequence the appellants, who had also a branch to Craigellachie to join the Highland line at Boat of Garten, carried their traffic in the interval by that route, the Highland line carrying it on to Perth. On the 23d of September, being six days after the Bridge of Dun had been carried away, the respondent sent a consignment of fish by the appellants' line, which ought to have arrived the next morning in Glasgow. They did not so arrive until the 26th. He sent a second consignment on the 24th which was duly delivered on the 25th. He sent a third consignment on the 25th which was not delivered until the 27th. He now sues for the value of the first and the last consignments, which, it is admitted, were rendered unsaleable by the delay. The Sheriff-substitute and the Sheriff decided in favour of the respondent, and we are now to consider their judgment.

The appellants plead, in the first instance, that they had a special contract with the respondent, which was in the following terms:—"To the Great North of Scotland Railway Company.—Deliver as under the undermentioned goods, to be carried at the reduced rate below the company's ordinary rate; in consideration whereof I undertake to relieve the Great North of Scotland Railway Company, and all other companies over whose lines the goods may pass, from all liability in case of loss, damage, or delay, except upon proof that such loss, detention, or injury arose from wilful fault or negligence on the part of the company's servants.

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[1] Finlay v. North British Railway Co., July 8, 1870, 8 Macph. 959, 42 Scot. Jur. 552 (see opinion of Lord President); Anderson v. North British Railway Co. (2d branch), Feb. 18, 1875, *ante*, vol. ii. p. 443.

[2] Finlay v. North British Railway Co., *supra*.

[3] Macdonald and Co. v. Highland Railway Co., May 20, 1873, 11 Macph. 614, 45 Scot. Jur. 391.

[4] Jarvie v. Caledonian Railway Co., March 18, 1875, *ante*, vol. ii. p. 623.

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"When, for the convenience of senders, the company book goods to stations on other lines, shipping companies, or other public carriers, they do so at the sole risk of the owners, and subject to the rules and regulations of such companies and carriers; but they do not undertake to forward or deliver goods in time for any particular conveyance or for any particular market. They only undertake to deliver goods within a reasonable time, and they will not entertain claims for compensation for alleged loss occasioned by late delivery. If consignor desires the articles to be conveyed by passenger train, the words 'per passenger train' must be written across the face of this note, and initialed by the party."

They maintain that under this contract it is incumbent on the respondent to prove that the delay arose from the fault or negligence of the appellants. To the extent to which this plea was maintained from the bar I entirely accede to it. It was maintained that it placed the burden of proving fault or negligence on the customer. I think it does so, and that, as the goods of the customer were carried at a lower rate in consequence of this stipulation, it was one entirely reasonable.

But then it merely places the burden on the customer, and it is a burden which may easily shift according to the circumstances, and the question which arises in the present case is whether the appellant has not sufficiently sustained this burden and transferred to his opponents the duty of exonerating themselves.

While the contract unquestionably lays the proof of fault or negligence on the respondent, it does not liberate the appellants from their primary duties as carriers. They are still bound to carry the goods of their customers safely, and they are bound to provide sufficient appliances in carriages, engine power, and otherwise, to enable them to do so. In the present instance there was no unexpected or unforeseen cause which intervened. Whatever might have been the case on the 18th, on the 22d they knew, when they undertook to carry the goods of the respondent, that they were to carry them by a new and overcrowded line. They were bound to take such measures as were within their power to secure their safe transit by that line quite as much as they were when they carried by the former line. They were also bound in the case of perishable goods to carry them in preference to goods not perishable. As might have been expected a great and nearly unmanageable amount of traffic arrived day by day at Boat of Garten Station; and the real cause of detention arose, as is very clearly proved, from the Highland Railway giving a preference to goods attached to their own trains, while the goods which came by the appellants' line were shunted into sidings, and from want of sufficient engine power to marshal the trains and separate the trucks containing perishable goods from the others the latest comers went on instead of the earlier. Thus, while the goods sent on the 23d were not delivered till the 26th, those sent on the 24th were delivered on the 25th. It appears farther that a block occurred on the 22d, and another on the 25th at Boat of Garten.

It will thus be observed that this is not a case in which any unforeseen event delayed the delivery of the goods. On the contrary, the event which did occur, namely, the block on the line, was one which the railway were bound to have foreseen, not only because a block had occurred the day before these goods were received, but also because from the nature of the traffic on the line it was a very probable contingency. The appellants were bound either to have taken measures against this occurrence, if such were in their power, or to have warned

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the respondent that such was not within their power. That they failed in one or other of these obligations seems quite clear from the proof.

In the first place, it is sufficiently proved by the witness Shaw, that the whole delay of these perishable goods would or might probably have been averted if there had been sufficient engine power at Boat of Garten Station to assist in marshalling the trains in the sidings. I think the appellants were as much bound to have engine power for this purpose as they were bound to provide engine power for the ordinary conveyance of goods. It was as much part of their contract to provide it, if it were necessary to secure the due transit and delivery of the commodities; and the respondent by proving that this engine power was not provided, proves fault on the part of the appellants. Even if the latter had proved that they could not obtain sufficient engine power, this would only shew that they had made a contract which they were unable to perform. But they have proved nothing on the subject. On the contrary, I think that it is sufficiently established that they made no such effort as the emergency demanded to overcome the difficulty. But, secondly, if they did endeavour to obtain engine power and failed, they were certainly bound to have given notice to the respondent when they accepted his goods that they could not undertake to deliver them at the usual time because there was the risk of detention at Boat of Garten which they had no means of preventing. In regard to the second consignment, that sent on the 25th, this is too clear for argument. They knew or were bound to have known that the line had been blocked on the 22d, and they were not entitled to accept the respondent's goods for carriage, knowing their perishable nature, without informing him of the risk. As regards the goods sent on the 23d the case is much more narrow, and if it had rested on want of notice alone I should have hesitated. Still the obstruction was one which the company knew, and if they did not inform their stationmaster at Lossiemouth, they were bound to have done so. And apart from the first ground of my opinion, I am not disposed as regards want of notice to distinguish between the two contracts.

I will only add that temporary or accidental detention from unexpected pressure of traffic is a risk incidental to railway transit, and one of which the customer must to a certain extent take his chance. But it is quite a different thing when the causes of probable detention are known and foreseen, and are not specifically disclosed to the customer when his goods are accepted.

LORD ORMIDALE.—I have arrived at the same result, but chiefly on the ground afterwards explained, that the defenders by wilful fault neglected to make the pursuer aware, as it was their duty to do, of the block which had occurred at Boat of Garten, and consequent risk of delay in the transmission of his goods, when they received the fish in question from him on the 23d and 25th of September 1873.

Another ground of liability was referred to by your Lordship, viz., the failure of the defenders to provide sufficient engine power for marshalling the waggons at Boat of Garten, and this ground has certainly some support in the evidence. Shaw, the stationmaster at Boat of Garten, expressly says that if they had had sufficient engine power, they might have kept the station clear; and Imlah says that it was quite possible to pick out and forward the waggon containing the pursuer's perishable goods, although it would have taken three-quarters of an hour extra to have done so. Still there is a little difficulty

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attending this ground of liability,—keeping in view that in consequence of the special contract of parties, the import and legal effect of which, as stated by your Lordship, meets with my entire concurrence, the *onus* has been thrown on the pursuer. It may therefore be said that the pursuer ought to have followed up Shaw's evidence by shewing that the defenders might have got engine power by using proper exertions. But I rather think your Lordship is right in holding that the pursuer has done enough, by the evidence of Shaw and Imlah, to shift the *onus*, so as to have made it incumbent on the defenders to shew that they could not have got engine power, even if they had used reasonable exertions to do so.

But independently of that part of the case, I am clearly of opinion, both with reference to the fish which was booked with the defenders at Lossiemouth on the morning of the 23d, and still more so with reference to the fish booked with them at the same place on the morning of the 25th, that they must be held answerable as for wilful negligence, on the ground stated by me at the outset. According to the evidence of Shaw, they knew that the block had begun at Boat of Garten on the evening of the 22d, and I cannot doubt that a message might have been forwarded by them from Boat of Garten to Lossiemouth either on the night of the 22d or morning of the 23d, in order that the pursuer might have been informed of the great risk there was of delay in the transmission of his perishable goods. But no such message was sent, or at any rate the pursuer got no notice whatever of the block at Boat of Garten, or of the risk of delay in the transmission of his goods. He booked his goods with the defenders at Lossiemouth as he had been in the practice of doing for fifteen years, in the belief that they would be forwarded and delivered in Glasgow in time for the market of the following day. This was done without any warning being given by the defenders of the imminent risk of delay from the block at Boat of Garten. I think it was the duty of the defenders to have given such warning. It appears to me, therefore, that although the circumstances were different, the principles of decision in the case of Jarvie and Husband v. The Caledonian Railway Company, 18th March 1875 (2 Court of Session Cases, 4th series, p. 623), are applicable, and that on these principles the defenders are liable for the loss which the pursuer has sustained. They ought to have given the pursuer notice of the block and of the consequent risk of detention, so that he might judge for himself whether to forward his goods by the defenders, or keep them and make the best of them at Lossiemouth, or send them elsewhere; and in this view it is not immaterial that it is proved he could have sent them to Elgin, six miles from Lossiemouth, and that from thence they could have been forwarded in good time for the Glasgow market next day. I must therefore hold that the defenders by wilful negligence failed in their duty to the pursuer in not informing him of the block at Boat of Garten, and warning him of the consequent risk of detention of his perishable goods by that route. And it is chiefly on this ground that I concur in the result at which your Lordship has arrived.

Lord Gifford.—I have great difficulty in concurring with your Lordships in regard to the first parcel of goods. I agree with your Lordships that the special contract, giving it the interpretation which your Lordships have done, is a reasonable one, and therefore that it is under the special contract that the question of liability of the railway company arises. I think it was reasonable for the railway company to say, "Our ordinary charge for fish is so much, but if you will agree

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that we shall not be liable for delay except upon proof of wilful fault or negligence on the part of the company's servants, we will carry the fish at a cheaper rate," and if the merchant who is sending the goods agrees to this condition, and gets his goods carried on cheaper terms on that account, that seems to be a reasonable bargain. And I understand both your Lordships, differing from the Sheriff-substitute, to hold that the special contract in this case must receive effect.

The first claim arises from the detention of the goods sent from Lossiemouth on the 23d, which were not delivered in Glasgow till the 26th. The cause of the delay was the alteration or extraordinary increase in the company's traffic occasioned by the breaking down of the Bridge of Dun on the Caledonian line. Now, I do not think that the giving way of the Bridge of Dun was not a fault for which the Great North of Scotland Company were liable. All that can be said is, that they must do what was necessary in consequence of the derangement of traffic which the breakdown caused. Now, they did give additional service at Boat of Garten, and did what they fairly and honestly thought would be required, and the stationmaster at Lossiemouth, who had a conversation with the pursuer about the breaking down of the Bridge of Dun, says, "Our talk was about the difference it would make in the traffic, but I don't think we anticipated any stoppage." If there was a fault, it was an error in judgment, not foreseeing the extent of the difference it would make in the traffic. I do not think that is a fault which falls under the head of "wilful fault or negligence." In point of fact the anticipation of the stationmaster was well founded for several days, for it was not till the evening of Monday the 22d September that, as Shaw, the stationmaster at Boat of Garten, says "we began to get blocked," and it was only that night for the first time that they did not get the station clear. Here again the block which occurred that night can hardly, I think, be held to be the wilful fault of the company's servants, and, unless the fault comes up to this, it is not fault for which the defenders are responsible. The first lot of the pursuer's fish was sent off at seven next morning, and the only other fault which is mainly relied on by the pursuer is that notice was not sent of the stoppage. I think that is too narrow a ground to enable me to affirm that the sending on of the fish on the morning of the 23d should have been stopped, and that the failure to stop the fish at Lossiemouth was in the sense of the special contract "wilful fault or negligence." It comes to this, that because the station at Boat of Garten was not clear on Monday night, the defenders were bound to send word to all their customers that there was a possibility that the block which had begun that night would continue. It is a strong thing to say that this was a duty incumbent on the stationmaster at Boat of Garten in reference to all stations which might send goods that day; and, therefore, I think that the detention of this first parcel was just one of those detentions against which the company were protected by the terms of the special agreement.

As to the second parcel, I have not the same difficulty. There, I think, the observation is very important,—why did not the stationmaster at Boat of Garten let the stationmaster at Lossiemouth know that the pursuer's fish which had been sent off on the 23d were still at Boat of Garten on the 25th? And, therefore, as to the second parcel, I concur with your Lordships.

LORD NEAVES was absent.

THIS interlocutor was pronounced:—"Find that when the appellants received the goods libelled they knew that owing to the accumula-

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tion of traffic at Boat of Garten Station these goods were liable to be delayed in their transit; and find that in fact a block had taken place at that station on the 22d of September 1873, and that another block took place on the 25th of the same month, and that in consequence thereof the first consignment of the goods libelled was not delivered until the 26th of September, and that the second consignment was not delivered till the 27th of said month, and that these delays were occasioned by the fault and neglect of the appellants in not sufficiently providing for the due transmission of the goods: Find, *separatim*, that the appellants neglected to give notice to the respondent when they received the goods that the line had been blocked and that the goods were in danger of being delayed in transmission: Therefore find that the loss libelled arose through the fault and negligence of the appellants; dismiss the appeal, affirm the judgment appealed from, and decern: Find the appellants liable in expenses," &c.

BOYD, MACDONALD, & LOWSON, S.S.C.—JOHN HENRY, S.S.C.—Agents.

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Nov. 8, 1875.
Whitelaw, &c.

TEIND COURT.
Teind Clerk.

ALEXANDER WHITELAW AND OTHERS, Petitioners.—*Lee.*

(Disjunction and Erection of Flowerhill.)

Parish—Disjunction and Erection quoad sacra—8 *and* 9 *Vict. c.* 44, *sec.* 8—*Intimation.*—This was an application for the disjunction and erection of the church and parish of Flowerhill. The district sought to be attached to the said church was situated wholly within the *quoad sacra* parish of Airdrie, which had been itself disjoined and erected from the parish of New Monkland. The Court appointed intimation to be made in the parish churches both of New Monkland and Airdrie.

J. B. M'INTOSH, S.S.C.—Agent.

No. 21.

Nov. 9, 1875.
Macfarlane v. Mochrum School Board and Others.

DUNCAN MALCOLM MACFARLANE, Pursuer.—*Balfour—Jameson.*
MOCHRUM SCHOOL BOARD, Defenders.—*R. V. Campbell.*
BOARD OF EDUCATION FOR SCOTLAND, Defenders.—*D.-F. Watson—Trayner.*

School—Schoolmaster—School Board—Relevancy—Malice—Education (Scotland) Act, 1872, 35 *and* 36 *Vict. cap.* 62, *sec.* 60, *sub-sec.* 2—*Jurisdiction—Reduction.*—A school board resolved to "require a special report from an inspector" of schools under sub-section 2 of section 60 of the Education Act, 1872, on a school and teacher. The inspector, at the end of an unfavourable report upon the school alone, stated,—"Upon the whole I consider that the resolution come to by the . . . school board is borne out by the state of the school and the result of the teacher's labours." The school board then gave judgment removing the schoolmaster, which judgment was subsequently confirmed by the Board of Education. The schoolmaster raised an action of reduction both of the judgment of the school board and of the confirmation by the Board of Education, on the grounds (1) of deviation from statutory procedure, in respect that the inspector's report was one on the school and not on the teacher, and (2) of malice and oppression. In preliminary defences the defenders pleaded (1) that the Court had no jurisdiction, and (2) that the pursuer's statements were not relevant. *Held* (1) that the Court had jurisdiction in the action, in so far as based on relevant averments of deviations from the statutory procedure, although it had no power to review the judgment of a school board on its merits; (2) that the averment that the inspector's report, in as much as it referred only to the school and not to the teacher's qualifications, was not in conformity with the statute, was relevant; and (3) that averments of malice

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against the school board in forming their judgment upon the inspector's report were irrelevant as a ground of reduction of their judgment.

Observed (*per* Lord President) that he reserved his opinion as to the relevancy of averments of oppression as distinguished from malice on the part of a public board in the execution of a statutory duty.

DUNCAN MALCOLM MACFARLANE, who had been appointed schoolmaster of the parish of Mochrum in 1848, raised an action on 26th March 1875 against the school board of that parish, and the Board of Education for Scotland, concluding for reduction of (1) a minute of the school board, dated 6th January 1875, whereby they resolved to remove him from the office of teacher of the public school of Mochrum, and (2) a minute of the Board of Education for Scotland, dated 26th February 1875, confirming the resolution of the school board; and for declarator that he was the teacher of the public school of Mochrum, and entitled to receive the emoluments of that office.

The pursuer pleaded;—1. The minute or judgment of the school board of Mochrum, of date 6th January 1875, ought to be reduced, in respect—(1) That the report upon which it proceeded was not a proper report, in terms of 'The Education (Scotland) Act, 1872;' (2) that no proper copy of said report was furnished to the pursuer in terms of said Act; (3) that said judgment was malicious and unjust, and proceeded on a report which was itself unjust, and had been maliciously, oppressively, and unjustly obtained by the said school board at the time it was so obtained; (4) that the whole proceedings of the school board towards the pursuer in obtaining said report, and in dismissing the pursuer, were oppressive, malicious, and contrary to justice. 2. The minute or deliverance of the Board of Education for Scotland, dated 26th February 1875, ought to be reduced, in respect—(1) That it followed upon the inept and wrongous proceedings mentioned in the foregoing plea; (2) that it proceeded upon reasons furnished by the school board which were incorrect in point of fact, and which the pursuer had no opportunity of answering; (3) that it was oppressive and unjust to the pursuer.

Preliminary defences were lodged against satisfying production.

The school board pleaded;—1. The special report of Her Majesty's inspector not being reduced, the present action is excluded. 2. The school board's resolution removing the pursuer, and the confirmation thereof by the Board of Education, not being subject to the review of the Court, this action is excluded. 3. The pursuer's averments being irrelevant and insufficient, the action should be dismissed.

The Board of Education pleaded;—1. The pursuer's statements are irrelevant and insufficient to warrant the conclusions of the summons. 2. The deliverance of the Board of Education for Scotland, sought to be reduced, having been pronounced in exercise of the jurisdiction conferred upon them by the said statute, is not subject to review, and the present action is incompetent.

The pursuer averred that after the school board came into office in May 1873 they made certain agreements with him as to the amount of his salary, but that subsequently, owing to a misunderstanding between him and the clerk to the school board as to the collecting of the fees, the members of the board conceived an animus against him, and in consequence rescinded the agreement as to salary. This agreement he had been compelled to enforce in another action in the Court of Session, in which he had succeeded. The remaining articles of the condescendence and answers thereto for the defenders, in so far as they are material, were as follows:—(Cond. 4) "In the month of March 1874 the school board resolved, as per minute of that date, to apply to the Department of Educa-

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tion in London for advice regarding two pupil teachers and a sewing mistress, whom they stated, but untruly, to have been refused admittance to the school by the pursuer, and they further instructed their clerk to write to the Department requesting that Her Majesty's inspector make a special report regarding the Mochrum public school and its teacher. The inspector subsequently visited the school on 14th April 1874, and made a favourable report, and a Government certificate of competency was sent to the pursuer as the result of said inspection. The school board took no action, however, on said inspection and report." (Answer 4 for Mochrum School Board) "The minute here mentioned is referred to for its terms. The visit of Her Majesty's inspector, on 14th April 1874, was made in the ordinary course of his duty, under sec. 66 of the Act, and not at the instance of these defenders with a view to special report, such as was subsequently obtained, and which is referred to. *Quoad ultra* denied." (Answer 4 for Board of Education) "Explained that the inspection and report here referred to were not made under the 60th section of the Education Act." (Cond. 5) "On 3d June 1874 the school board took up a new position with regard to the agreement for salary, alleging that it was for one year only; and of the same date they also resolved to ask for another special report on the Mochrum school and teacher, and they did so without coming to any resolution to the effect that the teacher was inefficient, as they were bound to do in terms of the 60th section of 'The Education (Scotland) Act, 1872,' and although not two months had elapsed since the last report. In consequence of said request Her Majesty's inspector made a second inspection of the school on 27th October 1874, and thereafter issued his report thereon; said report is in the following terms:—" * (Answer 5 for Mochrum School Board) . . . The de-

* "1. School Board of Mochrum; 2. Mochrum Public School, A. G. S.—Education Act (Scotland), 1872, section 60 (2).—In accordance with my instructions to report on Mochrum public school under section 66, I visited it on the 14th April 1874. Taking into consideration that it was its first inspection I was able to report that it made on the whole a fair appearance in elementary work. I was afterwards instructed to report on the school under section 60 (2), and accordingly I again visited it on the 27th October 1874.

"As on the occasion of my former visit I found that the examination schedule was not filled up, and that there were no registers, no time-table, and no pupil teachers, although two candidates had been admitted at the previous inspection.

"There were 70 scholars present, and of these 39 were presented for examination under standards I., II., III., and IV., the same standards under which the scholars present in April were examined. I had no means of determining whether the same scholars were examined under the same standards on both occasions. The following were the results of the examination:

"Standard I.—13 scholars. Reading and penmanship on the whole fair. Spelling and arithmetic moderate. Notation and subtraction very imperfect.

"Standard II.—10 scholars. Reading and penmanship fair. Spelling moderate. Notation very imperfect.

"Standard III.—10 scholars. Reading and penmanship fair. 4 failed in writing, and none made a respectable pass in arithmetic.

"Standard IV.—6 scholars. Their knowledge in grammar was so imperfect that only one was fairly entitled to a pass in reading. 3 failed in writing, and 4 in arithmetic.

"Grammar, history, and geography (Article 19 c.) were subjects quite unknown.

"The children under 7 read pretty fairly.

"On the whole, I consider that the resolution come to by the Mochrum School Board is borne out by the state of the school and the result of the teacher's labours. A. Ogilvy Barrie, *H. M. I.*"

fenders made only one application for and obtained only one special report under section 60, sub-section 2, of the Act. . . . The resolution referred to by the inspector is the school board's resolution of 11th March 1874, to require a special report under the said 60th section of the Act. *Quoad ultra* denied." (Cond. 6) "Said report was not made in accordance with the requirements of sub-section 2 of section 60 of 'The Education (Scotland) Act, 1872,' inasmuch as it is not a report upon the teacher, but only upon the school. Said report was also unjust and unfair to the pursuer, owing to its having proceeded on an inspection which was made at a time when, owing to the actings of the school board, and partly to other circumstances, the school was in a disorganised condition. A few days before the school board requested the second inspection they collected the accumulated school fees of three or four quarters, and charged fees which were not only higher than had been customary, but also very much higher than they themselves had advertised would be charged. In consequence of this about thirty of the scholars, chiefly those who were the most advanced, were withdrawn from the school. The school board next resolved that the school vacation was to commence on 17th June, which was an unprecedentedly early date for an agricultural district, and they directed the school to be re-opened on 27th July, so near the commencement of the corn and potato harvest as to be quite fatal to the regular attendance of pupils in a country parish. The irregularity of attendance was further increased by the outbreak of an epidemic whooping-cough, by which about fifty of the pupils were kept from school. The school board had at first directed the pursuer to teach according to use and wont, but after the inspection in April they changed the system, and required the pursuer to teach according to the Scotch Education Code, 1873, and the new system was only beginning to get into working order when the school was broken up for the vacation. The said inspection of 27th October was thus made at a time when it was impossible for any teacher to have got his pupils into a fit state to undergo examination under a new system which had been so recently introduced, and under which, from interruption and irregularity of attendance, the teacher had not proper opportunities for preparing the pupils to undergo an examination. The members of the school board were well aware of the state of things in the school, and in that knowledge they maliciously and oppressively requested a report from Her Majesty's inspector, with the purpose, and in the expectation, of obtaining a report from him unfavourable as to the state of the school, and upon which they might therefore venture to dismiss the pursuer. The pursuer believes and avers that the school board, or the majority thereof, and notably the Rev. William Allan, the parish minister (to whose recent induction into the parish the pursuer, as an elder of the congregation, had been opposed, and who took the leading part both in public and in private in promoting the pretended dismissal of the pursuer), were actuated by malice and ill-will towards him in requesting a report at the time they did, when by their own actings they had thrown the school into a state of disorganisation." (Answer 6 for Mochrum School Board) "Denied, under reference to the report. The school had been open after the vacation for three months before H. M. inspector's visit on 27th October 1874, and there was an average attendance of pupils." (Answer 6 for Board of Education) "Denied that said report was not made in accordance with the requirements of the statute." (Cond. 7) "It was quite impossible for the pursuer, from the copy report furnished to him, to know why he should be dismissed, or upon what ground he was being found fault with. Said report does not even bear that he was inefficient; and it refers to a resolution, no copy of which was furnished to him, and of

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the terms of which he is entirely ignorant. The pursuer has thus been deprived of the opportunity to defend himself, which it was intended should be afforded him by said Act." (Answer 7 for Mochrum School Board) "Denied. The special report had come to hand about 24th December 1874. . . . . A copy of the report as received, certified by the chairman as correct, was accordingly sent by the clerk to the pursuer next day." (Answer 7 for Board of Education) "Denied. The pursuer was duly furnished with a copy of said report. Explained that the pursuer was afforded every opportunity of defending himself before the Board of Education for Scotland, and that he availed himself of the opportunity so afforded for that purpose. The pursuer laid before said board several statements in reference to the proceedings of the school board and the report of Her Majesty's inspector, which were duly considered before the said board pronounced their deliverance confirming the judgment of the school board removing the pursuer from his office." (Cond. 8) "Notwithstanding that the school board were fully aware of the circumstances under which said report had been made and issued, and also that the pursuer had had no opportunity of defending himself, owing to the defective nature of the copy report furnished to him, they yet, upon 6th January 1875, proceeded most wrongfully, oppressively, and maliciously to resolve to remove the pursuer from his office. Said resolution or judgment is embodied in the minute of which reduction is first sought. The said Rev. William Allan presided at the meeting which resolved on the pursuer's pretended dismissal. The board's proceedings, with regard to the pursuer previous to their pretended dismissal of him, and the said dismissal itself, were oppressive, malicious, and unjust, and said judgment of dismissal was pronounced by said board maliciously and without probable cause; said proceedings were taken by the said board with the corrupt purpose, among others, of escaping from their contract as to the pursuer's salary, which, contrary to their contention, has been held binding on them, and which they had otherwise attempted to evade, but without success." (Answer 8 for Mochrum School Board) "Admitted that these defenders having considered Her Majesty's inspector's report, by resolution contained in their minute of 6th January 1875, removed the pursuer from his office, they having seen cause for this judgment, in terms of section 60 of the Act. *Quoad ultra* denied." (Cond. 9) "The judgment embodied in said resolution was submitted to the defenders, the Board of Education for Scotland; and the said board, proceeding upon the false, or at least misleading statements made by the other defenders, which were not communicated to the pursuer, and which he had no opportunity of answering, and upon the unjust report already referred to, proceeded oppressively to confirm the said judgment, although the same was inept, and had been arrived at in defiance of the provisions of the statute, and was otherwise inept and unjust. The said Board of Education embodied said confirmation in a minute or deliverance, which is the second deed of which reduction is concluded for." (Answer 9 for Mochrum School Board) "Admitted that these defenders' judgment removing the pursuer was duly confirmed in terms of the Act, by the Board of Education for Scotland. *Quoad ultra* denied. The pursuer made statements of dates 15th, 22d, and 28th January 1875, to the said board, containing the substance of his averments in this action. These statements these defenders were called upon by the said board to answer, and they did answer the same before the said board's confirmation, issued on 26th February 1875. The pursuer sent other communications to the said board, dated 6th and 9th January 1875, which these defenders did not see. Copies of pursuer's statements, as sent to them for answer, are herewith produced."

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On 18th June the Lord Ordinary closed the record on the summons and preliminary defences, and on 17th July pronounced the following interlocutor:—"Having heard the counsel for the parties on the record which has been closed on the summons and preliminary defences, finds that the action is not excluded or incompetent on any of the grounds stated in said defences: Therefore repels the defences so far as preliminary, reserving their effect as defences on the merits for future consideration: Appoints the defenders, the School Board of Mochrum, to satisfy the production by the first box day in the ensuing vacation: And in respect the defenders, the Board of Education, state that they intend to reclaim against this interlocutor, grants leave to them to reclaim, and finds them liable in the expenses of the preliminary discussion, and appoints," &c.*

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* "NOTE.—The School Board of Mochrum, some months ago, under sec. 60 of the Education (Scotland) Act, 1872, pronounced a judgment, which was confirmed by the Board of Education, removing from his office the pursuer, who had been schoolmaster of the parish since 1848. In the present action the pursuer challenges the validity of the judgment of the school board on various grounds, one of them being that the report of Her Majesty's inspector, on which it proceeded, was not a proper report in terms of the statute; and another, that the whole proceedings of the school board in procuring the report and dismissing the pursuer were oppressive, malicious, and contrary to justice. And he challenges the deliverance of the Board of Education, on the ground that the judgment which it confirmed was in itself inept; that the deliverance proceeded upon reasons furnished by the school board, which were incorrect in point of fact, and which the pursuer had no opportunity of answering; and that it was oppressive and unjust to the pursuer.

"In all the cases of removal of a schoolmaster under the Education Act which have hitherto been before the Court the validity of the judgment of removal has invariably been assumed, and the only question has been whether the removal was occasioned by such fault on the part of the teacher as to disentitle him to a retiring allowance. In the present case, however, the schoolmaster challenges the validity of his removal altogether, and he concludes for reduction of the minute or judgment of the school board dismissing him, and of the minute or deliverance of the Board of Education confirming that judgment, and for declarator that he is the teacher of the late parochial school of Mochrum, and that he alone is entitled to fulfil the duties of said office, and to receive the emoluments appertaining to him as such teacher.

"The pursuer has called as defenders both the school board and the Board of Education, and preliminary defences have been lodged for both defenders against satisfying the production. Several of the pleas are manifestly defences upon the merits, and do not here require to be farther noticed. The pleas which the school board maintain as preliminary and as excluding the action are (1) that the special report of Her Majesty's inspector, upon which their judgment proceeded, is not reduced; and (2) that their own judgment and the confirmation thereof by the Board of Education are not subject to the review of this Court. The Board of Education pleads that the action is incompetent, in respect that their deliverance, which is sought to be reduced, was pronounced in exercise of the jurisdiction conferred upon them by the statute, and is not subject to review.

"The objection to the action, founded upon the statement that the report of the inspector has not been reduced, is, in my opinion, ill-founded. It is not alleged by the pursuer that it is an untrue or dishonest report, or that the inspector was acting maliciously or oppressively in making it; and the report must therefore be deemed and taken to be a faithful, honest, and true report of the result of the inspector's examination. Whether it is a proper report in terms of the 60th section of the Act, and one upon which the defenders were entitled to proceed in removing the pursuer, is another and a totally different question, which, in my opinion, does not arise, and cannot be discussed as a

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The school board acquiesced in this interlocutor, but the Board of Education reclaimed, and argued;—(1) Whenever a new jurisdiction, which did

preliminary defence to this action, which proceeds upon the footing that, while the report is a true report of what the inspector observed, it was obtained by the school board under circumstances which render their applying for it, and acting upon it, malicious, oppressive, and unjust.

"The other preliminary defences, however, raise questions of difficulty and of great importance in connection with the working of the Education Act, the main question being, whether and how far the judgment of a school board dismissing a schoolmaster, and the deliverance of the Board of Education in confirming such judgment, are or are not subject to the review of the Court of Session? Now, so far as regards the merits of such judgments or deliverances—that is to say, the incompetency, unfitness, or inefficiency of the schoolmaster, and generally the sufficiency of the grounds upon which the judgment proceeded, it appears to me that all review is excluded. The grounds of removal are, I think, left entirely to the discretion of these statutory boards. The words of the statute (sec. 60) conferring the jurisdiction are as follows:—'Any teacher of a public school, appointed previously to the passing of this Act, may be removed from his office in manner following, that is to say, ... (sub-sec. 2) If the school board of any parish or burgh shall consider that any such teacher is incompetent, unfit, or inefficient they may require a special report regarding the school and teacher from Her Majesty's inspector charged with the duty of inspecting such school; and on receiving such report the school board may, if they see cause, remove such teacher from office, provided that, before proceeding to give judgment on the matter, they shall furnish to the teacher a copy of such report, and that a judgment removing the teacher shall not have effect until confirmed by the Board of Education.' I think the fair, natural, and sound construction of the statute is, that the removal of a schoolmaster is subject to certain checks, to be at the discretion of the school board, if they shall consider the teacher incompetent, unfit, or inefficient. These checks are, first, the preliminary one of requiring the school board, before pronouncing any judgment, to procure a report upon the school and the teacher from one of Her Majesty's inspectors of schools; and the other check is by declaring that the judgment of removal, when pronounced, shall not take effect until confirmed by the Board of Education.

"The intention of the Legislature clearly was (1) to secure that, while the administration of the school, including the power of removing the teacher, was to be lodged in the hands of the representative body forming the school board, such an important discretionary power should not be exercised without due deliberation on the part of the board, with the assistance of a special report on the school and teacher by an experienced inspector; and (2) that, in order to secure still further that justice should be done alike to the ratepayers, and the teacher, and the school, the confirmation of the Board of Education should be obtained before the judgment of removal could take effect. But I cannot think that it ever was intended that, where all these precautions were duly observed, the Court of Session should be made a Court of review for investigating and discussing the educational requirements of every parish and school district and burgh of Scotland, the capabilities of the schoolmaster, and his fitness or unfitness for the office. And my opinion is not affected by the circumstances that under the statute the confirmation by the Board of Education cannot be obtained after the lapse of three, or at most four years, from the passing of the Act, the existence of the board being limited to one or other of these periods. The discretionary power will then be exercised by the school board without the confirmation of any other board, and, unless flagrantly abused, it will not be interfered with by the Court.

"In a case somewhat similar which recently arose under the Poor-Law Act, which empowers the Board of Supervision to dismiss any inspector of the poor who may, in their opinion, be unfit for his office, it was held that the deliverance of the board removing the inspector was final and conclusive, and could

not exist before, was conferred upon, and the administration of an Act of Parliament was committed to, a board answerable to Parliament, the Courts of

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not be reviewed on its merits (Clark v. The Board of Supervision, 10th December 1873, 1 Rettie, 261). And in all the cases which have arisen under the Education Act, particularly the cases of Logiealmond, 5th February 1875, 2 Rettie, 417, and 21st May 1875, 2 Rettie, 698, and Glenshiel, 28th May 1875, 2 Rettie, 715, it was assumed in argument, and, I think, also in the opinions of several of the Judges, that an honest judgment of removal by a school board, confirmed by the Board of Education, could not be reviewed by this Court on its merits. But in all these cases, as well as in the case of the Board of Supervision, it seems to have been equally assumed that when a case of unfairness, malice, or oppression is stated against the school board this Court may interfere. Such interference, however, will not be by way of reviewing the judgment or investigating whether it proceeded on sufficient or insufficient grounds, but by inquiring whether the school board in their proceedings have violated the provisions of the statute, or exceeded the powers thereby conferred on them, or have oppressed, or were actuated by malice towards the schoolmaster.

"Nor will it be enough for the schoolmaster simply to say that the school board were actuated by malice towards him, unless he can also make out that the board, knowing or believing the school to be temporarily in a state of disorganisation from causes beyond the control of the teacher, maliciously procured a visit and report from the inspector at a time and under circumstances calculated to convey to his mind the erroneous belief that the unsatisfactory state of the school was due to the incompetency, neglect, or inefficiency of the teacher. But, if such a case shall be averred by a teacher, I think that it would not be right to prevent him from having his complaint investigated, merely because, in the ordinary case, an honest judgment of a school board is final under the statute.

"In the present case I have come to be of opinion that the averments of the pursuer amount substantially to the statement of a case of deviation from the statute, and of malice and oppression sufficiently distinct to entitle him to have it considered. He avers (1) that the inspector's report is not conform to the statute, because it is a report only upon the school and not upon the teacher. Had this been the sole ground of action I should have hesitated to sustain it, because I think that the report, although not expressly, is virtually a report upon the teacher when tested by the result of his labours. But (2) the pursuer avers that the report was applied for when the school was disorganised by unusual proceedings of the board regarding the school fees; by an outbreak of whooping-cough, which caused the absence of many of the scholars from tuition during the period preceding the inspection; by a sudden and unprecedented change in the vacation of the school, made by the school board, in consequence of which, for a long time after the school re-opened in the end of July 1874, many of the children were detained for a considerable time from school by their parents for harvest work and potato-lifting; so that when the inspection took place in October thereafter they were necessarily in a very imperfect state of tuition, and that the board had changed the subjects taught in the school from those which had been previously in use to the standards of the Revised Code, which it requires some time to render familiar to the scholars. These causes and others all being beyond the pursuer's control, operated, it is said, to disorganise the school and to cause the scholars to be temporarily in a backward condition at the date of the inspector's visit, and to convey to his mind an entirely erroneous notion of the true average condition of the school, and of his fitness as a teacher; and he says that the school board being aware of this state of matters, and having conceived personal animosity towards him in consequence of disputes and litigation between him and them regarding his salary and the collection of the school fees, they maliciously asked for the inspection at this juncture, in the hope and with the expectation of getting a report which would justify them in dismissing him. Now, I think that an action for the purpose of inquiring into averments such as these and reducing the judgment of removal, if they are proved, is not a review of the judgment on its merits, but is an investigation into the honesty of

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law were excluded.[1] Where a discretionary power, such as to dismiss a schoolmaster, was put into the hands of a board they were entitled and bound to inquire into all the circumstances. The resolution of a school board had no vitality until it was confirmed, so the schoolmaster could not be affected by it. The duty of the Board of Education was not of the nature of a review or appeal; it was confirmation on inquiry. The sort of questions which arose in such cases were not fitted for Courts of law; they were much better suited to be scrutinised by a board specially appointed. The Court could not interdict the Board of Education from considering the resolution of the school board with a view to confirming it. It was bound to assume that the board would act properly. Questions such asthis were the very ones entrusted to the Board of Education, and they were responsible to the Education Department of the Privy Council if they went wrong. After the statutory period of existence of this board expired the power of confirmation was given direct to the Committee of the Privy Council. (2) There had been no deviation from the procedure laid down in the statute. There was an examination by an inspector, a report by him, and following thereon a resolution by the school board and a confirmation of that by the Board of Education. There

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the school board throughout the whole proceedings in connection with the removal of the pursuer, and that is not excluded by the statute.

"I am therefore of opinion that so far as the preliminary defences of the school board are concerned they are not well founded.

"As to the defence for the Board of Education, I think that if the allegations of the pursuer regarding the judgment of the school board are correct, and in the present discussion they must be assumed to be so, the deliverance of the Board of Education confirming that judgment must stand or fall with the judgment itself, although neither malice, nor oppression, nor irregularity, is or can be averred against that board. If the judgment of the school board was irregular, malicious, and oppressive, the presumption is that the circumstances were unknown to the Board of Education when they confirmed the judgment, and that had they known all the facts they would have withheld their confirmation. They no doubt allege, although the pursuer does not admit the statement, that they gave the pursuer an opportunity of making any statement which he desired in reference to the judgment before they confirmed it, and it does not appear whether they made any investigations into the allegations which the pursuer now makes as to malice and oppression on the part of the school board. These, however, are matters for investigation, if hereafter the allegation shall be found relevant.

"The present discussion, however, is not whether the pursuer has made averments in whole or in part relevant, for that is a question as to the merits of the action, but whether the defenders have stated sufficient grounds to exclude the action altogether as incompetent. And on the whole matter I am of opinion that the defences stated are not proper preliminary defences against satisfying the production, that they should therefore be repelled so far as preliminary, reserving their effect as defences hereafter on the merits, and that the school board should be ordered to satisfy the production. After the production is satisfied defences will be ordered on the merits, and the relevancy of the averments of the pursuer, and the extent and mode of proof, will then fall to be discussed upon a closed record, containing the full and final statements of both parties. At present I express no opinion as to whether all or any of these averments are sufficient, if proved, to entitle the pursuer to decree of reduction. This is not the proper stage for discussing that question. It is enough that a *prima facie* case of malice and oppression is stated to entitle him to have the production satisfied.

"As the defenders, the Board of Education, have intimated their intention to reclaim they have been found liable in the expense of discussing the preliminary defences."

[1] Clark v. Board of Supervision, Dec. 10, 1873, *ante*, vol. i. 261.

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was no averment of deviation from statutory procedure in the pursuer's record; all that was averred was malice on the part of the school board. But whether the school board had been malicious or not the true question was, had the Board of Education acted within their discretionary powers or not?

Argued for the pursuer;—The action should be sustained on two grounds,—

1. Statutory deviation. There had been three distinct deviations from the procedure laid down in the statute. (1) The school board had come to no resolution that the schoolmaster was unfit and inefficient before they called for a special report. (2) The report of the inspector was not on the master but on the school. (3) The copy of the report sent to the schoolmaster did not contain a copy of the resolution referred to in it, and as presumably the object of the rule in the statute, that he was to get a copy of the report, was that he might have an opportunity of defending himself, the copy sent was not in conformity with the statute. Even with the resolution it did not contain the information necessary for this purpose.

2. Malice and oppression. From the opinions of the Judges in the Logiealmond[1] and Glenshiel[2] cases it was clear that if a relevant case of malice and oppression was averred this Court would interfere and allow an inquiry. It was quite usual for the Court to inquire into cases even where their jurisdiction was expressly excluded, provided there were, as here, relevant averments of malice and oppression.

At advising,—

LORD PRESIDENT.—The pursuer of this action, Duncan Macfarlane, was teacher of the public school of the parish of Mochrum, but he was dismissed from that office by a minute or resolution of the school board of the parish, dated 6th of January 1875, which was confirmed by a deliverance of the Board of Education on the 26th of February following. By this action of reduction he seeks to set aside both these resolutions—the resolution of the school board dismissing him, and the resolution of the Board of Education confirming that dismissal.

The school board of the parish maintain, among other defences, that their "resolution removing the pursuer, and the confirmation thereof by the Board of Education, not being subject to the review of the Court, this action is excluded;" and the Board of Education plead that their deliverance "having been pronounced in exercise of the jurisdiction conferred upon them by the said statute, is not subject to review, and the present action is incompetent." These defences are stated as objections to satisfying the production.

The Lord Ordinary by his interlocutor has repelled these defences as preliminary, reserving their effect on the merits for future consideration; and he has further appointed the production to be satisfied. The school board have acquiesced in the interlocutor, but the Board of Education bring it under review by this reclaiming note; and the question raised is undoubtedly one of considerable importance.

The pursuer was in office as parish schoolmaster of the parish at the passing of the Act of 1872; and he belongs therefore to a class of schoolmasters who are dealt with in the statute in a somewhat exceptional way. The 60th section

[1] Robb v. Logiealmond School Board, Feb. 5, 1875, *ante*, ii. 417, and May 21, 1875, *ante*, ii. 698.

[2] Morrison v. Glenshiel School Board, May 28, 1875, *ante*, ii. 715.

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of the statute, particularly, provides for the manner in which they may be removed from office. In the event of their being charged with immoral conduct, or cruel or improper treatment of the scholars under their charge, the school board must prosecute before the Sheriff, and the Sheriff is authorised to entertain the complaint, and to pronounce the schoolmaster to be guilty or not guilty after considering the evidence adduced; and it is further provided that his sentence shall be final, and not subject to review.

But there is another class of cases provided for by sub-section 2 of section 60, with which we are more immediately concerned. "If the school board of any parish or burgh shall consider that any such teacher is incompetent, unfit, or inefficient, they may require a special report regarding the school and the teacher from Her Majesty's inspector charged with the duty of inspecting such school; and on receiving such report the school board may, if it see cause, remove such teacher from office;" but it is provided that, "before proceeding to give judgment on the matter, they shall furnish to the teacher a copy of such report," and also that their judgment is to have no effect until it is confirmed by the Board of Education. Now, it seems to me that although there is nothing said in this sub-section about the resolution of the school board confirmed by the Board of Education being final and not subject to review, it still must be held to be quite as much so as a sentence of a Sheriff under the first sub-section would be. In short, I think that in the case of a board of this kind, appointed by statute, and vested with a jurisdiction which does not belong to any Court in the kingdom, and which is rather of an administrative than a judicial character, it is a matter of necessity that their decision should be final, and should not be reviewable in a Court of law.

But the pleas which are stated both by the school board and by the Board of Education proceed upon a failure to distinguish between the review of a judgment of this kind by a Court of law and the reduction of such a resolution or sentence as we have before us on the ground of incompetency. The school board of a parish and the Board of Education are both of them the creatures of statute. They can do nothing except under statutory authority. They can exercise no power whatever, except that which is given to them by this statute; and if they do not conform to the conditions upon which the statute authorises them to exercise that power then they are no longer acting under the statute, and their proceedings would be liable not to be reviewed but to be set aside as incompetent. The same observations would apply to the sentence of a Sheriff under the first sub-section of section 60, although these are declared by the statute itself to be final, and not subject to review. If the Sheriff were to proceed to the trial of a schoolmaster for some offence which is not specified in that part of the statute, or if he were to conduct the trial in such a manner as to be inconsistent with what is prescribed in this part of the statute, his sentence would be subject to be set aside beyond all question, as not having the statutory authority which can alone give it validity and effect.

The Board of Education seemed to contend, in the argument which was addressed to us, that they stand in a peculiarly protected position here, as being in effect a department of Government. It appears to me that there can be no distinction of persons as regards a matter of this kind. Whatever is directed to be done by statute must be done as the statute enjoins, and if it is not done as the statute enjoins this Court will set it aside. Suppose that the Board of Education—the proceedings of which are regulated to a great extent by the 3d

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section of the Act before us—were to proceed at one of its meetings, in the performance of a duty such as that which we are now considering, to violate some of the conditions which are thereby imposed upon them—(it is provided, for example, that two members shall be a quorum)—suppose they proceeded to pronounce sentence, or to confirm the sentence of a public school board, by one of their number only, could it be maintained for one moment that that would have effect? It matters not in the least what the body may be who are to perform the statutory duty; if the duty is statutory this Court has jurisdiction to determine whether it has been performed in the way that the statute has prescribed; and if it has not, this Court has jurisdiction to set it aside. But that is not review of a sentence in any proper sense of the term; and therefore the pleas which have been stated as objections to satisfying the production are in their form and expression inapplicable to the case before us, if I rightly understand that case,—what I understand to be the main ground of reduction being that the school board of the parish of Mochrum did not proceed, in dealing with the pursuer, in the manner provided by the second sub-section of section 60.

Now, it is necessary to attend very particularly to what are the alleged deviations from the statute. It does not appear to me that the allegation in the 4th article of the condescendence is of much importance, because I think it sufficiently appears upon the face of that article itself that the report, which is said to have been obtained from the inspector somewhere in the month of April 1874, was not a special report, and was not intended by him to be a special report within the meaning of the 2d sub-section, and therefore the proceedings begin with what is alleged in the 5th article, where it is said that on the 3d of June 1874 the school board took up a new position with regard to the agreement for salary, and they "resolved to ask for another special report on the Mochrum school and teacher, and they did so without coming to any resolution to the effect that the teacher was inefficient, as they were bound to do in terms of the 60th section of the Education (Scotland) Act, 1872." Now, I do not think there is any departure from the statute in what is here alleged. I do not think the school board were under any necessity of coming to a resolution, or recording their resolution in a minute, before they applied to the inspector to give them a special report. What the statute says is, that if they shall consider that the teacher is incompetent, unfit, or inefficient, they may require a special report regarding the school. Now, of course, if by a resolution is merely meant an act of the will, then unquestionably there must have been such before they could go to the inspector. But if by a resolution is meant a recorded resolution —a minute of the body—then I can see no countenance for that contention in this part of the statute. It is enough that they should make up their minds to have a special report without recording that in their minutes. But then the report which they obtain from the inspector is open to some very serious observations. He reports that he has visited the school, and he states very particularly how many scholars were present, viz., 70,—that 39 of these "were presented for examination under standards 1, 2, 3, and 4, the same standards under which the scholars present in April were examined. I had no means of determining whether the same scholars were examined under the same standards on both occasions." And then he gives the result of the examination; and unquestionably the result was unsatisfactory—that is to say, the scholars appear to have been very little advanced. They do not seem to have learned much; they are not good in arithmetic; they are not good in spelling, and in a great many other things they are

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very deficient. All that is reported with considerable detail, and in the end he says, "grammar, history, and geography were subjects quite unknown."

Now, nobody can doubt that that is a very unsatisfactory state of the school; but down to this point of the report there is not a word said about the schoolmaster; and the remaining paragraph is expressed thus,—"On the whole, I consider that the resolution come to by the Mochrum School Board is borne out by the state of the school and the result of the teacher's labours." Now, that is the report which is presented to the board; and a copy of it is furnished to the teacher, the object of which, of course, is that he may be enabled to state any objections that he has to the report, or give any explanations that may be necessary for the purpose of defending himself; and he complains of this report, in the first place, that while it is a report upon the school, it is not a report upon the teacher at all, and that there is nothing stated here against him personally against which he is called upon to defend himself; and, in the second place, he says that when the inspector states his opinion that the resolution come to by the Mochrum School Board is borne out by the state of the school, he does not know what the inspector means, for he is not aware of any such resolution as is here referred to, and he does not know what that resolution was. Now, the answer which is given to this allegation of the pursuer is somewhat important. It is—"Admitted that her Majesty's inspector made his inspection under said section of the statute on 27th October 1874, and his report is referred to for its terms. The resolution referred to by the inspector is the school board's resolution of 11th March 1874, to require a special report under the said 60th section of the Act." Now, it would appear from this answer that there had been a resolution to require a special report from the inspector upon the 11th of March; and if so, that would be a very sufficient answer to the objection which is otherwise unfounded, that there was no such resolution. But while the inspector's report is certainly quite sufficient to justify the school board's resolution of the 11th of March 1874 to require a special report, surely the special report itself ought to lead to something further before it can be acted upon. The school board, when they see the school in a state of inefficiency, as they conceive, are entitled to require a special report, and the inspector's special report is that they were justified in coming to that resolution, and that is all the length it goes. Now, that seems a very anomalous and extraordinary result, because the statute contemplates a very different report as a special report. The school board are to require a special report regarding the school and the teacher from Her Majesty's inspector of schools, and here is a report which deals with the school, represents the unfavourable condition in which it appears, and then concludes by saying that that unfavourable condition of the school justifies the school board in having asked him to make a special report, and there is not a word about the teacher at all. Now, we have seen enough of the working of this Act, and we know enough generally of the subject of elementary teaching and those in whose hands it is vested, to be aware that a school may be in a very unfavourable condition indeed without the fault of the teacher. Such things have been, and will be again; and there cannot be a better illustration than what this gentleman, the pursuer, himself alleges to have been the cause of the bad appearance of his scholars when the inspector visited the school. He says there had been an epidemic of whooping-cough, which had carried away a great many of the scholars for a very long time, that there had been a number of other untoward circumstances that had prevented the scholars from attending the school, and

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that, in point of fact, from these causes they could not but be in the unfavourable condition in which the inspector reports them to be. Now, that may be all perfectly true, or it may not be true, we know nothing about that at present; but at all events it shews that a school may be in a very bad condition, indeed, from accidental causes over which the teacher has no control; and certainly a report to the effect that a school is in that condition is not a report concerning the teacher, or stating anything with regard to the teacher that can justify his dismissal under the 2d sub-section, because the ground of dismissal is quite distinctly specified; it must be incompetency, unfitness, or inefficiency. Now, I confess, it appears to me that this was not such a report as the school board were entitled to use as the ground for removing the schoolmaster from office. The statute, I think, is very distinct upon this subject. The school board may have formed a bad opinion of the school and of the teacher; indeed, it is almost assumed that before they ask for an inspector's report they have at least an unfavourable impression of the school and of the teacher; and they go to Her Majesty's inspector for the purpose of having that impression confirmed or removed. It is therefore quite plain that what they must receive from the inspector, in order to justify further action, is a report which shall deal with the teacher as well as the school, and which shall give them ground, which they had not without such a report, for proceeding to remove the teacher from office. If they see cause, they may remove such teacher from office, that is to say, if they see such cause in the report which has been presented to them.

It has been alleged further by the pursuer that the members of the school board had been actuated by malice in their proceedings against him; and it is said, further, that they have acted oppressively towards him. Now, I have great difficulty in seeing how malice can be any ground, or even any element in a ground, for setting aside such a resolution as this, passed by the school board and confirmed by the Board of Education. If this teacher was inefficient, and was reported to be inefficient by Her Majesty's inspector, then it was the duty of the school board to remove him; and it was the duty of the Board of Education to confirm that resolution. But it is quite possible, and not a thing by any means unknown in practice, that parties should perform an unpleasant duty of that kind, or what would be an unpleasant duty to impartial persons, with a great zest and liking for the duty, or, in other words, maliciously. They may have been gratifying their own private malice at the same time that they were performing an obvious act of public duty. But will that invalidate the act of public duty? Most certainly not. If the thing ought to be done, the circumstance that the person who did it has the greatest rancour and hatred against the object of that resolution will not make the resolution invalid if it is well-founded in itself. And therefore I dismiss from consideration altogether the allegations of malice in this case. I think they have no relevancy whatever. Whether a case of oppression could be made out, as distinguished from malice altogether, against a public board in the execution of a statutory duty, I give no opinion. I think there is no case alleged here to justify any interference upon our part, except upon the ground which I have dealt with, viz., deviation from the statute; but upon that ground I arrive at the same conclusion with the Lord Ordinary. I think the pursuer has relevantly averred a deviation from the statute, in respect that this is not such a report of the inspector of schools as that inspector was called upon to give, or such a report as the school board were entitled to proceed upon to remove the schoolmaster; and that being so,

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the confirmation by the Board of Education can never make it any better. On the contrary, the basis of the whole proceedings being bad, all that has followed upon it must necessarily fall.

Lord Deas.—As regards the amount of control which this Court may competently exercise over a school board in a different form of action than a reduction I do not think it necessary to say anything. That is a delicate matter, and a matter upon which I rather think there has been some judicial difference of opinion. It is not necessary to go into it here, because this is a process of reduction; and in such a process I very much agree with nearly all the observations which have been made by your Lordship. More particularly, I agree in thinking that there are here relevant averments of deviation from the statute. As regards the report of the inspector, upon which the school board professedly proceeded, I cannot doubt that there may be a great distinction between a report upon the state of the school and a report (which is what the statute requires) upon the efficiency of the schoolmaster, more especially if the fact averred by the schoolmaster here be true, viz., that the state of the school arose from causes (several of which he specifies) over which he had no control. He says that the school board, after the lapse of several quarters, during which fees at a certain rate had been charged, had suddenly raised the fees beyond what they had ever been before, and beyond the amount which they themselves had advertised, and that the new scale was applied even to scholars who had been allowed to attend for several quarters without paying the fees at all, and from whom was demanded a slump sum of arrears at the higher rate, which they were unable to pay, in consequence of which about thirty scholars left the school. Then he says that the whooping-cough was prevalent among the children, and from that cause about fifty more were absent at the time when this report was made. He adds a third cause of diminution of the number of scholars, viz., that the school board had determined that the vacation should commence at a different period from what it used to do, and terminate at a different period, viz. 27th July, when the corn and potato harvest, at which many of the children used to be employed in vacation time, was just coming on. From these and other causes it is said the number of scholars was very greatly reduced, and that the absentees included many of the more advanced scholars, who were therefore not seen by the inspector.

Perhaps these things may not be so, but we cannot judge of that at present. I cannot doubt the relevancy of these averments apart altogether from the averment that the object of all that was done was to get rid of the pursuer, and from the allegations of malice, which, as your Lordship has said, it is always a delicate matter to define in cases of this kind. I think if the pursuer proves the specific facts alleged this will at least shew how very different a report upon the school may be from a report upon the efficiency of the schoolmaster.

With these explanations, I entirely concur with your Lordship's observations, and think it unnecessary to say more.

Lord Ardmillan.—This is an important question. The action is one of reduction of a judgment of the school board, confirmed by the Board of Education. I concur in the result of the opinion expressed by your Lordships, that is, in appointing the production to be satisfied, and in declining to dismiss the action *in limine* as altogether irrelevant.

I have on former occasions expressed, and I still entertain, the opinion that

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the judgment of the school board, under the 2d section of the 60th clause of the Act, proceeding on the report of Her Majesty's inspector of schools, and confirmed by the Board of Education, is not reviewable on the merits. Where the ground of removal is stated, and that ground is within the provisions of the statute, and the procedure has been according to the statute, I think that review is excluded. The matter is within the power and the discretion of the school board, and is left to their decision, qualified by the checks afforded by the inspector's report, and by the supervision and the deliverance of the Board of Education. When the procedure for removal of a schoolmaster is according to the enactments of the statutes, I am of opinion that the law trusts the school board, and rightly and wisely abstains from interfering with the discretion of the board.

But, if the school board has not obeyed the statute, which alone is the source of the jurisdiction exercised,—if the statutory pre-requisites to a judgment of removal have been neglected or omitted,—if the judgment is not according to the statute, but is pronounced in disregard of its enactments,—then the protection of the statute cannot cover the deviation, and cannot avail the board.

Review, in the proper meaning of the term, is excluded. But, at the same time, if a judgment is contrary to the statute, it can on that ground be quashed or set aside by this Court. Deviation from the statute, on the part of a body created by the statute, is matter for consideration of the Court, and that is sufficient in the present position of the cause, for the defenders' pleas are reserved to be considered on the merits. All that we now do is to open the door of the Court for consideration of the case presented by the pursuer.

I need not repeat what your Lordship in the chair has so well explained. I agree in the view which your Lordship has taken of the procedure. I do not proceed on the absence of a recorded resolution prior to the inspector's report. But, if there was no resolution by the school board in regard to the efficiency of the teacher prior to the inspector's report of 27th October, and if that report, giving the result of his visits on the 14th April and on the 27th of October, is to be read without such prior resolution, then the inspector reports unfavourably on the school, but does not report the unfitness or inefficiency of the teacher. Now, so far as yet appears, there was no prior resolution in regard to the teacher, to the effect required, to support removal, and if there was no such resolution then the report does not set forth inefficiency, since it only refers to a non-existing resolution, and nothing more than the report was communicated to the teacher. Thus the ground of removal has not been reported on or made known, as directed by the statute, though the report is careful and intelligent, and by a most intelligent inspector. If the report by the inspector had stated distinctly that the teacher was inefficient, the absence of a recorded prior resolution would not in that case have been a fatal objection. If, on the other hand, there had been a recorded prior resolution that the teacher was inefficient, the omission of the matter in the report, apart from the expression of approval of the resolution, would not have been a fatal objection, for then the report would have supported an existing prior resolution. But here, in the absence of a resolution, the report, which only refers to a resolution, and does not set forth inefficiency, appears to me to be defective. I therefore think that a deviation from the statute is relevantly alleged, and that, reserving their effect on the merits, the preliminary pleas against satisfying the production have been rightly repelled by the Lord Ordinary.

I do not proceed on the separate ground that malice is here alleged. "The

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members of the school board were well aware of the state of things in the school, and in that knowledge they maliciously and oppressively requested a report from Her Majesty's inspector, with the purpose, and in the expectation, of obtaining a report from him unfavourable as to the state of the school, and upon which they might therefore venture to dismiss the pursuer. The pursuer believes and avers that the school board, or the majority thereof, and notably the Rev. William Allan, the parish minister (to whose recent induction into the parish the pursuer, as an elder of the congregation, had been opposed, and who took the leading part both in public and in private in promoting the pretended dismissal of the pursuer), were actuated by malice and ill-will towards him in requesting a report at the time they did, when by their own actings they had thrown the school into a state of disorganisation." These allegations against the school board, and made especially and personally against the minister of the parish, might avail to support an action of damages, but are not sufficient to support reduction of the judgment of the school board, confirmed by the Education Board. On this point I agree entirely with your Lordship in the chair.

It is suggested, though not very distinctly alleged, on the record and at the bar, that the pursuer had no opportunity of defending himself before the Board of Education. This is very improbable, and it is specifically and distinctly denied by the Board of Education; and one of the results of permitting the cause to proceed will be to ascertain the truth on this point. It is a matter within the pursuer's own knowledge; it will now be seen whether the statement is or is not true.

Lord Mure.—I entirely concur with your Lordship in the chair as regards the rules by which questions as to the finality of the proceedings of statutory boards are to be regulated, and as to the application of these rules to the circumstances of this case. And I shall only add that it appears to me that the decision now to be pronounced, relative to the jurisdiction of this Court to entertain complaints of the present description, will be in strict conformity with the decisions pronounced here and in the House of Lords under the Schoolmasters Act, 43 Geo. III. c. 54. I allude to the well-known case of Brown v. the Heritors of Kilberry, 15th Nov. 1825, and to the case of Ross v. Findlater, 2d March 1826, both reported in the fourth volume of Shaw; and the former of which was affirmed on the 12th of June 1829, apparently without any hesitation (3 W. and S. p. 441). By the Act of 1803 the proceedings of presbyteries relative to the trial of schoolmasters were declared to be final, in the most distinct terms, and not subject to review "by any Court, civil or ecclesiastical;" but it was nevertheless held in those cases that this Court had jurisdiction to deal with complaints against the judgment of a presbytery, where it was alleged that there had been deviations from the rules of procedure required by the statute. In the present case there is, I think, a relevant allegation that the report, which the Education (Scotland) Act, 1872, requires that school boards must obtain as to the conduct of a teacher, before they proceed to dismiss him, was not laid before them in compliance with the statute. That, I apprehend, is a very serious objection, and one which entitles the party who makes it to have the proceedings in question inquired into.

The Court adhered, and remitted to the Lord Ordinary to proceed.

George Cotton, S.S.C.—Maitland & Lyon, W.S.—Donald Beith, W.S.—Agents.

ALEXANDER AND GEORGE MILLER AND COMPANY, Pursuers and Respondents.—*D.-F. Watson—Asher.*
POTTER, WILSON, AND COMPANY, Defenders and Appellants.—*Balfour—Mackintosh.*

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Miller & Co. v. Potter, Wilson, & Co.

Ship—Powers of Master—Liability of Owners for Repairs—Bottomry—Maritime Risk—Agent and Principal.—P. W. and Company ordered a ship on commission for a Colonial navigation company, advanced money on her outfit, and appointed a captain with instructions to take her out to New Zealand, there to await the instructions of the company. The ship was originally registered in the name of P. W. and Company, but before she sailed the title was transferred to the manager of a bank for the purpose of securing an advance by the bank. On her voyage out the ship suffered damage, and put into a foreign port to refit. The captain, for sums advanced to him for necessary repairs, granted a bond binding himself, his heirs, executors, and administrators, and also the ship, and the freight to be earned on her voyage, and at the same time drew bills, payable thirty days after sight, on P. W. and Company, for the same amount. The navigation company having become insolvent, P. W. and Company obtained a transfer of the ship from the bank, sold her, and received the price. In an action against P. W. and Company by the holders of one of the bills granted by the captain, for the amount of the bill, which they refused to accept, *held*, that as P. W. and Company were the employers of the captain, and at the date of the repairs had control of the ship, and were virtually the owners, they were liable for the sum sued for, the necessity for and application of the advance not being disputed, and that this liability was not affected by the captain having granted, as an additional security, the bond above-mentioned, which the majority of the Court were of opinion was not a valid bottomry bond.

Opinions (*per* Lord Gifford and Lord Ormidale), that the bond, although granted by the master in circumstances which entitled him to grant a bottomry bond, was void, in respect that the repayment of the sum advanced was not made contingent on the safe arrival of the vessel at its destination.

Observations (*per* Lord Justice-Clerk) on the English cases of Stainbank v. Fenning, May 30, 1851, 11 Scott's C. B. Rep. p. 51; and Stainbank v. Shepard, Feb. 14, 1853, 13 Scott's C. B. Rep. p. 418.

2D DIVISION. Sheriff of Lanarkshire. I.

THIS action was raised on 7th May 1872 in the Sheriff Court at Glasgow by A. and G. Miller and Company, merchants, Glasgow, against Potter, Wilson, and Company, merchants and shipowners there, for payment of £250, "being the contents of a bill drawn by William Graham, master of the steamer 'Pareora' of Glasgow, then at Paramaribo, upon the said Potter, Wilson, and Company in favour of Messrs Miller Brothers and Company of Paramaribo, and endorsed by them to the pursuers, dated 17th July 1867, and payable thirty days after sight, and which bill was duly protested for non-payment and non-acceptance; which bill the said Potter, Wilson, and Company were bound to have accepted and paid, in respect that it was drawn by the said master in security or payment of necessary furnishings or advances made to or on account of the said vessel, which had put into Paramaribo aforesaid in distress, and which advances and furnishings could not otherwise be obtained, the defenders being at the time of the drawing, and when the said bill was presented for acceptance, the employers of the said master, and the real owners or parties beneficially interested in the property of the said steamship, and *lucrati* by the advances and furnishings foresaid, and having ultimately sold and received the full price thereof, notwithstanding a bottomry bond granted by the said master to Mr Duncan Cameron Munro, now deceased, British Consul at Paramaribo aforesaid, dated 19th July 1867, which bottomry bond was held by the said Duncan Cameron Munro in

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trust for the pursuers to the extent of the amount of the bill founded on in the present action, . . . together with the interest thereof at the rate of five per cent per annum from the 24th day of September 1867, when the said bill fell due, and was presented and protested for non-payment, till payment."

The defenders stated in defence that they were not the owners of the vessel when the furnishings mentioned in the summons were made, that they were not the employers of Captain Graham, that they did not authorise him to draw on them for the sum sued for, nor to pledge their credit therefor, and that they were not *lucrati* by the advances and furnishings in question.

They further maintained that the alleged bottomry bond was invalid.

The following facts were admitted or proved :—

In the beginning of the year 1866 the defenders ordered for the Southern Steam Navigation Company in New Zealand, in this country, the steamship "Pareora," and advanced considerable sums on her account, which were not repaid. The defenders appointed Captain William Graham to the command of the vessel, with instructions to take her out to New Zealand, and thereafter to take instructions from Messrs George Gray Russell and Company, Dunedin, who acted on behalf of the Southern Steam Navigation Company. The vessel sailed from Glasgow on 31st October 1866.

The "Pareora" was originally registered in the name of the defenders, but before she sailed she was transferred to that of Mr Steele, manager of the New Zealand Bank, for the purpose of securing payment of certain bills for the price of the vessel discounted with the bank.

On her voyage out to New Zealand the "Pareora" suffered damage, and in April 1867 put into Paramaribo to refit, where she remained some time. Captain Graham granted to Mr Duncan Cameron Munro, British Consul at Surinam, a bond for £675 (No. 12/2 of process),* referred to in

* The document was in the following terms :—"Know all men by these presents, that I, William Graham, master of the screw-steamer 'Pareora' of Glasgow, belonging to William Johnstone Steele, of No. 50 Old Broad Street, London, banker, am held firmly bound unto Duncan Cameron Munro, Her Britannic Majesty's Consul and Lloyd's agent at Surinam, in the sum of £675 sterling of British lawful money, to be paid to the said Duncan Cameron Munro, or to his certain attorney, executors, administrators or assigns, for which payment well and truly to be made I bind myself, my heirs, executors, and administrators, and also the said screw-streamer 'Pareora' of Glasgow, with her tackle, apparel, machinery, and furniture, and the freight to be earned by her on her voyage after-mentioned, by these presents, sealed with my seal on this the 19th day of July 1867.

"The said screw-steamer arrived at Paramaribo, Surinam, on the 1st day of April 1867 from Greenock, Scotland, she being unable to proceed to her port of destination, viz., Dunedin, New Zealand, from the want of proper sails and rigging, and the hindrance caused by two large iron elbows under the quarter for supports to the shafts of the screw propellers rendering said steamer quite unmanageable, and obliging her to put into this port in distress for want of provisions, and to have that done to the steamer that was necessary to enable her to prosecute her voyage to the port of destination, such as to procure coals or fuel, as also engineers, with all other necessaries, to enable her to prosecute the voyage successfully to Dunedin, New Zealand, aforesaid; and the said William Graham, in order to be enabled to pay for the necessary and lawful disbursement and expenses to enable him to proceed to sea with her on the said intended voyage, hath requested the said Duncan Cameron Munro to lend and advance the sum of £675 sterling, for which amount the said William Graham has given off three setts of bills of exchange, all dated the 17th day of July

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the summons as a bottomry bond, and also bills drawn upon the defenders for the same amount. The bond and bills were granted by the master for sums advanced and expended in payment of accounts for necessary repairs and furnishings to the ship at Paramaribo in circumstances which entitled the master to grant a bottomry bond.

After leaving Paramaribo the "Pareora" got into more difficulties, and had to stop at Bahia, before reaching which Captain Graham died. At Bahia the crew were paid off, and the defenders sent out a person to take possession of the ship. The defenders having retired the bills discounted by the Bank of New Zealand, the vessel was again registered in the defenders' name, and was sold at Bahia, without prejudice to the rights of parties. The proceeds of the sale, £4457, 18s. 2d., were received by the defenders, who paid all expenses at Bahia. The Southern Steam Navigation Company became insolvent, and had nothing more to do with the "Pareora."

One of the bills drawn by Captain Graham upon the defenders was granted in favour of Miller Brothers and Company of Paramaribo, who endorsed it to the pursuers. The defenders refused to accept the bill.

The Sheriff-substitute (Erskine Murray), on 13th July 1874, pronounced this interlocutor:—(After findings in fact, the substance of which has been given in the preceding narrative)—"Finds (11) that pursuers now sue on the bills, pleading that the defenders are liable because they received the price as a *surrogatum* for the 'Pareora,' which was liable for the amount of the bond 12/2 of process, that document being a bottomry bond; and, secondly, that the defenders are liable, because the master was their agent to do what was necessary for the ship, and they were *lucrati* by his so acting, and took advantage of it, receiving the price of the ship, which contained fittings, &c., bought with money received under the bond; while defenders deny that 12/2 of process is a bottomry bond, or that they were *lucrati* by it, the repairs not having been done for their behoof, but to enable the steamer to proceed out to New Zealand: Finds on the whole case and in law (I.) that the bond 12/2 of process is substantially a bottomry bond, although not corresponding in every particular with the usual form of that document; (II.) that the defenders retained all along an interest in the 'Pareora,' as the Southern Steam Navigation Company could not claim her until they paid in the Bank of New Zealand the balance of defenders' advances, up to which time the defenders were entitled, on their retiring themselves the bills they had cashed into the bank, to redemand a transfer, as they ultimately did; (III.) that Graham, the captain, appointed by defenders, was no doubt bound, after the vessel should have been transferred to the Southern Steam Navigation Company, to act under their orders, but up to that time his powers over the vessel were subordinate, not to the Southern

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1867, at thirty days' sight, on Messrs Potter, Wilson, and Company, Glasgow, one sett in favour of Messrs Miller Brothers and Company for the sum of £250 sterling, one sett in favour of D. C. Munro, Her Britannic Majesty's Consul, endorsed to Thomas Green, Esq., for the sum of £250 sterling, and the other sett for the sum of £175 sterling in favour of D. C. Munro, Her Britannic Majesty's Consul, and endorsed over to Alexander Denoon, Esq., 34 Old Broad Street, London. On the acceptance and due payment of the aforesaid bills of exchange, amounting in all to £675 sterling, this bond, given on vessel, machinery, furniture, and freights as well, so far as in my power, binding self, owner, and agents of said vessel, viz., Messrs Potter, Wilson, and Company of Glasgow, for the due and proper fulfilment of this my engagement, which, when duly fulfilled and implemented, this bond shall be thereby nullified and cancelled. WILLIAM GRAHAM."

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Steam Navigation Company, but to the defenders; (IV.) that thus Graham, in granting the bond and bills, was, to a certain though limited extent, acting on behalf of defenders; (V.) that as the advances received under the bond 12/2 of process refitted the 'Pareora' and enabled her to proceed to Bahia, where she was sold, and defenders received the proceeds, defenders were undoubtedly *lucrati* by the advances in question; (VI.) that therefore on both grounds the defenders must be held liable in repayment of these advances: Therefore repels the defences, and decerns against the defenders as libelled: Find the defenders liable to the pursuers in expenses," &c.*

The defenders appealed to the Sheriff (Dickson), who, on 7th April 1875, pronounced the following interlocutor:—"Adheres to the findings under heads (1) one to eleven (11) inclusive, and to the finding under head I., 'on the whole case and in law,' in the interlocutor appealed against: For the reasons stated in the note hereto, recalls the remaining findings therein: Finds that the master of the 'Pareora' had not power to bind the defenders by bills for the repairs or furnishings to the vessel, and finds that the defenders are not liable for the said repairs and furnishings on the ground that they have been *lucrati* thereby: Finds that the defenders are liable therefor, in respect of having become owners of the vessel while the same was hypothecated under the said bottomry bond: Therefore adheres to the interlocutor in so far as it repels the defences, and decerns against the defenders as libelled: Adheres also thereto as regards expenses, and decerns."†

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* "NOTE.—The question whether 12/2 of process is a bottomry bond is a very nice one. The fact that the owner is mentioned, not indeed in the bond itself, but in the appended narrative, is, to a certain extent, unfavourable to it; but it has been held that such an obligation is simply to be held surplusage. Besides, the terms in which the owner is mentioned,—'This bond given on vessel, machinery, furniture, and freight as well, so far as in my power, binding self, owner, and agents,' &c., 'for the proper fulfilment of this my engagement,' seem just to mean for the 'fulfilment of this bottomry engagement, so far as I can bind them to it.'

"The fact that no special rate of premium is named has been held in former cases not to invalidate a bottomry bond. The absence of a distinct statement of maritime risk is a more important want; but the English Courts have shewn themselves inclined to spell such a statement out of the most meagre and apparently insufficient grounds. For instance, it was held (Simonds v. Hodgson, 1832, 3 Barn. and Ad. 50), that when a captain in such a bond bound himself that it was to be repaid 'whenever I arrive in London,' that implied that the vessel should get safely there; whereas under these terms the captain might naturally have remained bound though he escaped there from a shipwreck. Here the statement that the captain binds not only the vessel but the freight to be earned by her on her voyage, which, of course, would not be payable if she were lost, shews that in his statement of liability he was contemplating her eventual safety. This is, at least, as good an indication of the intention of the captain as the words in the case above mentioned. In fact, the decisions seem to shew that if it appears from the circumstances that the intention of the parties was to execute a bottomry bond, its terms are to be very leniently construed, not only because it is often executed where good legal advice is not to be got, but also because while a bottomry bond is generally granted abroad, the forms of it are very different in different countries. Here the circumstances lead to the conclusion that a bottomry bond was certainly intended, and the terms of the document are not so inconsistent with that view as to render it null."

† "NOTE.—The Sheriff has experienced great difficulty in this case. Upon the main ground of action, viz., that No. 12/2 of process is a bottomry bond, he concurs, but with considerable hesitation, with the Sheriff-substitute.

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The defenders appealed to the Court of Session.

Argued for them;—The master had no power to hypothecate the ship on an ordinary bond, but only upon the peculiar contract of hazard known

"The principles on which it has to be decided, whether the document is a bottomry bond or not, are thus stated in the most recent treatise on the law of merchant shipping:—'It is an essential part of the contract of hypothecation that the repayment of the money should be dependent upon the ship's arrival at her destination. If the deed makes the loan repayable at all events, the contract is invalid as an hypothecation. But as these instruments are the creatures of necessity and distress, and usually contain the language of commercial men, and not of lawyers, they receive a liberal construction. It is not, therefore, necessary that the risk should be mentioned in express terms; it is sufficient if it can be fairly and reasonably inferred from the whole document that it was the intention of the parties to make the repayment of the money dependent on this contingency.' See Maude and Pollock on Merchant Shipping, 2d ed., 391.

"The chief circumstances against the view that the document in question is a bottomry bond are—(1) that it does not bear to be so in express terms; (2) that it does not bear a rate of interest indicative of a maritime risk; (3) that it contains a clause in these terms:—'On the acceptance and due payment of the aforesaid bills of exchange, amounting in all to £675 sterling, this bond, given on vessel, machinery, furniture, and freights, as well so far as in my power binding self, owner, and agents of said vessel, viz. Messrs Potter, Wilson, and Company of Glasgow, for the due and proper fulfilment of this my engagement, which, when duly fulfilled and implemented, this bond shall be thereby nullified and cancelled.'

"Of these considerations, the first is of little or no moment. The second is important, because it may be assumed in general that a merchant will not make advances on a security subject to the risks of the sea without such an extra rate of interest as will cover the extra risk. The absence of such a rate has been held in several cases to shew that the document is not a bottomry bond (see 'The Emancipation' 1840, 1 Wm. Robinson's Appeal Cases, 124). But it is settled law that, while it is an element, and an important one for consideration, it is not conclusive (see MacLauchlan on Merchant Shipping, p. 49, 'Royal Arch' 1840, 1 Swab. Admiralty Reports, 269).

"In the present case the bond seems to have been taken, not so much as a direct and primary obligation in favour of the party making the advances, but as an additional security on account of it being doubtful whether the master could bind the defender by the bills.

"The defenders' argument, that the existence of these bills shews that the lender dealt with the case as an ordinary trade risk might be good if they admitted their liability under the bills. But it will hardly do for them to deny that the master had power to secure the advances by these bills, and at the same time contend that the granting of the bills proves that the advances were made on the security which they were supposed, but erroneously, to afford. It is more reasonable to hold that the lenders took the same view as the defenders do of the master's authority to grant the bills; while knowing that he had authority to give security on the vessel by a bottomry bond, and to hold that accordingly the lenders trusted to the bond rather than to the bills for repayment.

"Besides, it is settled that a bottomry bond is not rendered ineffectual by the existence of bills as collateral securities (see 'The Emancipation,' cited above, and other cases in Maude and Pollock, 2d ed. p. 390, 3d ed. p. 439).

"The Sheriff cannot adopt the defenders' argument that the idea of a maritime risk is excluded by the master having pledged his personal credit to the lenders, from having used the words, 'I bind myself, my heirs,' &c. These words, being followed immediately by those which give security on the ship, would seem not to infer personal liability by the master for the advances (see Simonds v. Hodgson, 1832, 3 Barnwell and Adolphus, p. 50).

"Looking to the scope of the document as a whole, and taking into view the

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as a bottomry bond. The document relied on by the pursuers was wanting in all the *indicia* of a bottomry bond. It was not called a bottomry bond; no maritime interest was stipulated; and above all, it wanted the essential requisite that the liability of the lender to the sea risks must either appear or be fairly collected from the instrument.[1] The master was no doubt entitled to pledge the personal credit of the owners, but the defenders were at the date of the furnishings neither the registered owners, nor the true owners, nor was their credit relied on.

Argued for the pursuers;—(1) The bond was a good bottomry bond.[2] (2) If it was not, the defenders were liable as the employers of the master,[3] and as the persons who were really interested in the ship.

At advising,—

Lord Gifford.—This is an important case, and in many respects is attended with a good deal of difficulty. It raises several questions of great general interest in mercantile and maritime law.

After full consideration, however, I have formed a pretty clear opinion that the defenders, Messrs Potter, Wilson, and Company, are liable to the pursuers in the sum sued for. I think that the result which has been reached by both the Sheriffs is well founded, although I have come to this conclusion upon different grounds from those relied on by the Sheriffs.

It is admitted that the sum sued for, £250, forms part of larger sums which were advanced to the master of the steamship "Pareora," at or near Surinam, which sums were required to pay and were actually expended in paying for necessary repairs of and supplies to the "Pareora," to enable her to proceed on

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doubts which it indicates, and which the defenders' pleas shew to have been well founded as to the sufficiency of the bills, looking especially to the strong terms in which the security is taken on the vessel and her freight 'for her voyage,' looking to the narrative of the objects for which the advance was required, and to the absence of any other security or obligation for its repayment, the Sheriff considers that the parties must be held to have intended the document to be a bottomry bond.

"As to the other grounds of action, it is thought that the defenders are not liable under the bills drawn on them by the master, because they were not the registered owners of the vessel at the time, because they put in the master, not on their own account, but with the view of carrying out the directions of the shipping company on whose orders the ship was commissioned by them, and because they did not give the master authority to incur obligation on their credit.

"Nor, again, is it sufficient to infer liability that the defenders had an interest in the ship, or were afterwards *lucrati* by the transaction,—as witness the case of mortgage creditors or owners under a time charter, all of whom may profit eventually by repairs and furnishings to a ship in which they are interested, but who are not liable for debts incurred for these purposes by the master.

"Besides, it is not proved that the defenders have been *lucrati*; for there is nothing to shew that they would have been in any worse position if the vessel had been sold at Surinam, unencumbered by the debt there incurred, than they now hold, in consequence of her having been sold at Bahia."

[1] "The Emancipation," Jan. 31, 1840, 1 Wm. Robinson's Admiralty Cases, p. 124; Stainbank v. Fenning, May 30, 1851, 11 C. B. Rep. 51; Stainbank v. Shepard, Feb. 14, 1853, 13 C. B. Rep. 418, 22 L. J. (N. S.) Ex. 341; Abbott on Shipping (11th ed.), 133; Maude and Pollock on Shipping (3d ed.), 439; Bell's Comm. (M'Laren's ed.), i. 578, &c.

[2] "The Nelson," July 2, 1823, 1 Hagg. Ad. Rep. 169 (see Lord Stowell's judgment, 176); and cases cited in the Sheriff's note.

[3] Abbott on Shipping (11th ed.), 108.

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her voyage. It is also admitted that the said sums were borrowed at a time and place, and under circumstances which entitled the master to grant bottomry bond for said sums. There is therefore no question as to the necessity or propriety of the advances or as to their actual and beneficial application, and there is also no question as to Captain Graham's power to borrow the sums, for the parties admit that he borrowed the money in circumstances which entitled him to grant bottomry bond therefor.

It is also admitted or sufficiently proved that the pursuers, Messrs Miller and Company, are in right of the £250 now sued for. They are indorsees of the captain's draft for that amount, the authority of the indorser being admitted in a joint minute, and although there is no formal assignation in favour of the pursuers of the so-called bottomry bond, still the bond, whether one of bottomry or not, is by the very terms of it so connected with the captain's drafts that I have no doubt of the pursuers' right to found upon the bond, whatever its true legal effect may be.

The only question in dispute therefore is, whether the present defenders, Messrs Potter, Wilson, and Company, are in point of law liable to the pursuers for the £250 now in question, and that either by reason of their position when the advances were made to the captain, or by reason of the so-called bottomry bond, or on any other grounds in law.

Now, I am of opinion that, apart altogether from the so-called bottomry bond, the defenders by their position and actings became liable for the necessary and indispensable advances made to Captain Graham at Surinam, and of which the sum now sued for forms part.

The captain of a ship at a foreign port who is without the means of communicating with his owners or employers, and where repairs or supplies to the vessel are indispensable, is entitled to get such necessary repairs executed or necessary supplies made, and to pledge therefor the credit of his owners or employers, and if that credit fails, that is, if the captain cannot obtain what is absolutely necessary on the personal credit of his owners or employers, he is entitled to get the money on a bond of bottomry, or, if he requires to pledge the cargo also, on a bond of *respondentia*. It seems quite fixed, however, that the captain's first duty is to obtain the necessary money or supplies on the personal credit merely of his owners or employers. This is the best and the cheapest mode of raising the money, and it is only when this fails or is found impossible that the captain can resort to the far more costly and expensive mode of raising money on a bond of bottomry or *respondentia*. The maritime interest, as it is called, or the price of the hazard or risk for which in a bond of bottomry the lender stipulates, is often very high, sometimes even a third of the sum advanced, and the law very properly will not allow the captain to impose this heavy burden upon his owners of he can raise the money on their credit or on cheaper terms. I need not cite authorities for this doctrine, for it was not disputed at the bar, and is completely established by many cases, and is laid down by most of the institutional writers. Professor Bell states the rule shortly thus (Bell's Coms., M'Laren, i. 579)—"In a foreign country the master is allowed to enter into bottomry if he can no otherwise procure the supply, but where he has already received the money on the footing of a personal credit he has no power to convert the personal contract into a bottomry transaction." And again (note 4)—"It is the master's duty, if possible, to obtain the advance on the personal credit of his owner." See the cases cited.

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Now, I am of opinion, on the facts proved in the present case, that Captain Graham, proceeding strictly according to law, tried to obtain and did obtain the advance in question, not on a bond of bottomry strictly so called, but on the personal credit of the present defenders, Messrs Potter, Wilson, and Company, whom he regarded and with whom he dealt as his owners and employers, and upon whom as such he drew bills for the sums advanced. No doubt, besides the drafts, he also granted the bond which has raised so much difficulty in the present case, and the effect of this bond I shall consider by-and-by, but it seems to me perfectly clear upon the proof that Captain Graham intended to pledge and attempted to pledge for the advances the personal credit of Messrs Potter, Wilson, and Company, and it was upon them alone that he drew the bills for the amounts advanced.

Now, the question is, and I think it is the first question in the case, had Captain Graham power to bind the defenders for the necessary debts he incurred at Surinam? I am of opinion that he had. No doubt the rule of law is generally stated that in circumstances like the present the captain can only bind his owners, and the defenders maintain that at the date of the advances they were not the owners of the "Pareora," but merely the agents for the owners, "The Southern Steam Navigation Company (Limited)" holding a security over the ship for their advances, and the ship being then registered in name of Mr Steele, one of the directors of the Bank of New Zealand, London. I think, in law, however, and for the purposes of this action, the defenders at the time of the advance must be regarded as the owners, whom the captain had power to bind and did actually bind, for the necessary supplies. It is not necessarily the person whose name is on the register who is to be regarded as owner in a question like the present, but it is the person who has the real control of the ship, and from whom alone the captain derives his authority. The expression "the captain can bind his owners" is a little ambiguous and misleading; the language of the Roman law which we have adopted is more accurate. The captain binds the exercitors of the ship, and does so in virtue of his powers derived from them. The exercitor of a ship is the person who employs the ship and captain, by whom the captain is *præpositus navi*, and with whom alone the captain has a contract. The real question is, for whom did the captain act—who gave him power to act—who was his mandant—for the captain after all is only the mandatary of his employers. Lord Tenterden—(Tenterden on Shipping, 11th ed. p. 108) says, in reference to cases like the present,—"It should be observed also that the owners here spoken of are not in all cases the persons in whom the absolute legal title of the ship may be vested, but rather those from whom the master derives his authority, and whose agent he is on the particular occasion;" and this doctrine is recognised in a great many of the cases which have occurred.

It appears to me to be quite clear, not only that the present defenders were the only mandants with whom Captain Graham had any contract, and from whom alone he derived his powers, but that the defenders were the only parties who had the real control of the ship, and, as it turned out, the real interest in her. No doubt the defenders were agents for the Southern Steam Navigation Company, and if everything had gone right she would ultimately have been delivered to that company, but she never was delivered, and the company never had any active title or *jus in re* in the ship. The defenders apparently ordered her from the builders on their own credit and responsibility. The defenders registered themselves at first as the only owners, and though for a

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while the defenders pledged her to a London bank in name of Mr Steele, one of the bank directors, that was a mere temporary security. The defenders paid the money they had borrowed and took her back—again registered her in their own names, and ultimately sold her for their own behoof, and received the whole proceeds of the sale. I think the defenders cannot successfully maintain, as in a question with the foreign creditor who advanced necessaries in the ship's exigency, that they are not the owners and that the captain had no right to bind them. Admittedly, the captain, in the straits to which he was reduced, had power to bind somebody who in law must be held to be his owners or exercitors, and it seems to me that the defenders are the only parties who can bear that character. It was hardly maintained—I think it could not be maintained—that the captain had power to pledge the credit of Mr Steele, the London bank director, or to bind Mr Steele personally, merely because he at the time stood as registered owner. Steele never granted any mandate or power in favour of the captain. As little, I think, can it be maintained that the captain could bind the Southern Shipping Company merely because it was intended that they should ultimately get the vessel, although with that company the captain had no communication and from them he had received no powers. The captain's only constituents were the defenders; they only were his employers; they only were liable for his salary or wages; and from them alone did he take his only instructions. The defenders in their letter of 26th October 1866, addressed to Captain Graham, prescribe clearly Captain Graham's duty,—"Your duty is a very simple one, namely, to take out the vessel in as short a time as you can, and to deliver her on arrival to our friends, Messrs George Gray Russell and Co., of Dunedin, from whom you will take all further instructions." Nothing can more clearly shew that Captain Graham was the defenders' servant until he should deliver the vessel at Dunedin. I think, as shipmaster, and until he got to Dunedin and gave up his charge there, he had full power to bind the defenders as in law his owners or exercitors, and that he had power to bind no one else.

Supposing the case had stopped here, and that no bond had ever been granted, I think the defenders' liability would be clear. It is true that a captain cannot liquidate such a debt as this and bind his owners absolutely by granting a bill in their name. He cannot cut his owners out of the defence that the advances were unnecessary or unjustifiable. But this is not an action upon the defenders' bill, binding the defenders or bearing to bind the defenders as for a liquidated debt. It is an action for the sum contained in the captain's draft which the defenders refused to accept and have never accepted, and the defenders' liability for which sum is the question raised in this action. I think the defenders are liable, and that the moment they admitted the necessity and the application of the advance that moment they were bound to have accepted the captain's draft therefor.

Now, in my view, the only remaining question in the case is, does it make any difference on the defenders' liability that the captain, besides drawing on the defenders for what was really the defenders' just debt, granted in addition the bond No. 12/2 of process. I have come very clearly to be of opinion that the granting of this bond—let the nature of the bond be what it may—does not affect the liability which the defenders have otherwise incurred for the necessary, the indispensable, and the beneficial advances sued for.

In the first place, I have come to form, and ultimately without much difficulty, a pretty strong opinion that the bond in question is not in the legal and strict

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sense a bottomry bond at all. My reasons for this opinion I may mention in a very few words, for the decision of the case does not depend upon this point. I think the bond is not a bottomry bond (1) because it does not, either in words or by implication, bear to be so. It is expressed absolutely, without any contingency mentioned for a definite sum payable at a definite date, and it bears to bind the captain, his heirs, the steamer "Pareora," with apparel, &c., the freight of the existing voyage and (if the captain had power) the owners and agents of the vessel. I cannot gather from the bond any of the elements of proper bottomry. (2) So far from being made contingent on the voyage, the advance is made payable at a precise date (thirty days after sight of the bills), a date which might be before or which might be after the completion of the voyage, but which was no way dependent thereon. (3) No maritime risk is mentioned or can be inferred upon the occurrence of which the bond and bills should be void. This is essential to bottomry—it is the meaning of the very name. The only circumstance from which such risk can possibly be inferred is the clause by which the captain pledges the freight of the existing voyage, and of course if the voyage was not completed no such freight would be earned. But the failure of this special freight leaves all the rest of the bond untouched, and it seems to me far too strong a step to hold that because an unearned freight is pledged or attempted to be pledged the whole bond is made conditional on the completion of the voyage. (4) To me it is conclusive that no maritime interest or premium for risk is either stipulated for or promised. The lender is not even to get legal interest or simple interest at the lowest rate. He is to get no interest at all till the bills fall due, thirty days after sight, and this would or might be many months after the advance; and on payment of the bills at maturity without interest the bond is declared void. It is to me absolutely incredible that the lender should not only lend his money for a long time without interest, but should actually be willing, for nothing, to run the risk of the whole principal if the vessel should be lost,—a contingency by no means improbable, as appears from the proof. It is said the lenders had charged a commission, and this may explain why no interest was to run for a certain time, but I cannot possibly hold that if this vessel had gone to the bottom the British Consul at Surinam, and the present pursuer whose money he advanced, were to lose their whole debt although they got nothing whatever for running such a risk. A contract more unfair I cannot imagine, for it would virtually say—if the vessel arrives, the generous lender will get his own without either premium or interest, but if it does not arrive the simple-minded lender shall be held to have made a gratuitous present of the whole advance. For these and other reasons I cannot hold the bond to be a proper bottomry bond.

Then, if the bond be not a bottomry bond, what does it come to? It is simply an attempt by the master to impledge the ship for his owners' or exercitors' personal debt. It rather appears from the authorities that a master has no power to mortgage the ship otherwise than by bottomry, and if this be so then the attempted mortgage is bad; but this will not affect the personal obligation of the owners to repay the advances for repairs and necessaries which in the ship's emergency the captain was obliged to get. The case really may be brought to this: The bond in question is either a good bottomry bond, or it is nothing—nothing, I mean, having the force of a mortgage. If, contrary to my opinion, it should be held to be a good bottomry bond, then the defenders are liable under it as having taken and sold the vessel. On the other hand, if the bond is bad

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as a bottomry and bad as a mortgage, then it must be just laid aside as void or *pro non scripto*, and the defenders remain bound as the owners, exercitors, or mandants, bound by the act of their duly appointed captain, and bound just as they would have been if the bond in question had never been granted. It seems to me that this last is the sound and true view of the case, and upon this view I am for deciding in favour of the pursuers.

LORD ORMIDALE.—I concur with Lord Gifford, subject to a single observation on a passage towards the close of his opinion, in which, if I understood it aright, his Lordship seemed to hold that, whether the bond was good or bad, the defenders were liable. In regard to this view I wish to guard myself by saying that there is high authority to the effect that the owners of a ship, or the persons in the position of owners, in such a question as the present, cannot be personally liable, if the master has granted a valid bottomry bond; and I can very well understand that there may be good reasons for this proposition. But it is not necessary to go into them.

LORD JUSTICE-CLERK.—I should have been inclined to hold, on general principles of maritime law, that it being admitted that the repairs were necessary, and that the sum in question was duly expended, the creditor to whom the master granted this hypothecation, or bottomry bond, has a valid claim on the vessel on the completion of the voyage; and I should think it manifestly unjust, in that state of circumstances, to allow the owners, on any mere technicality, to retain and sell the vessel and leave the creditor unpaid. In one sense such a contract must be strictly construed—that is to say, it must clearly appear that the master, being in a foreign port, could not otherwise have obtained the money necessary to enable the vessel to proceed; but that is substantially admitted here. But, that being admitted or proved, the form or expression of the instrument ought to receive the most liberal construction, and technical objections are not to be favoured. Looking to the substance rather than the form of the transaction, I think that the master had power to bind the vessel in the event which happened, and that it is idle technicality to object that, in an event which has not occurred, and under which the bond would not have been valid or binding, liability was not specially excluded by the words of the obligation. Such, I think, were the principles on which the Admiralty Court in England used to proceed. Lord Stowell, in words which have been often quoted in such cases, thus expressed the rules of construction which prevailed in that Court:—"Here we don't take the bond *in toto*, as is done in other systems of law, and reject it as unsound on the whole if vicious in any part. But we separate the parts, reject the vicious, and respect the efficiency of those which are entitled to operate."[1]

This principle has been often applied in England, either by importing into the bond conditions which are not expressed, or restricting general words within limits more narrow than the sense which they do express. Thus, while holding that the creditor in a bottomry bond must take the risk of the voyage, I should have been prepared in this case to have given effect to the act of the master, so far as his power extended, while I rejected the generality of the words so far as they might reach farther. This view would be entirely in consistency with the grounds of judgment in the case of "The Nelson," to Lord Stowell's

[1] "The Nelson," July 2, 1823, 1 Hag. Ad. Rep. 176.

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opinion in which I have already referred, and in the case of Simonds v. Hodgson, 1832, 3 Barn. and Ad. 50, decided by Lord Tenterden, and often quoted with approval. Indeed, Sir John Strange, Master of the Rolls, went much further in Samsun v. Bragington, 1750, 1 Vesey, 442, and sustained an hypothecating deed which was not conditional on the arrival of the vessel; and on the authority of that judgment the law was laid down in Abbott on Shipping, and so remained down to and including the 8th edition, as follows:—"But if the person who thus advances money does not choose to take upon himself the risk of the ship's return, and will be content not to demand maritime interest, there seems to be no reason why the master should not pledge both the ship itself and the personal credit of the owner"—(8th ed., p. 156).

But the difficulty I feel in giving effect to what I believe to be the general principle of maritime law in deciding the present case arises from the comparatively recent cases in the Common Law Courts, that of Stainbank v. Fenning, May 30, 1831, 11 C. B., and Stainbank v. Shepard, 13 C. B.,[1] in which the Common Bench held that the creditor in an hypothecating bond which did not bear to be dependent on the arrival of the vessel had no insurable interest, and that Lord Tenterden's opinion, supposed to have been expressed on the authority of Samsun v. Bragington, was wrong. Chief-Justice Erle differed from that judgment, and it has been adversely criticised by Continental jurists. But, if it be sound, it places an impediment in my way which it is difficult to surmount. This would leave the only question, whether it be a condition expressed in this bond, or to be inferred from its words, that the vessel should arrive at her destination. The indications relied on are very slender, and I am glad to be relieved of the necessity of coming to a conclusion in regard to them.

The case is thus reduced to alternatives. If the hypothecation is good, as the defenders sold the vessel the pursuer prevails on that ground; if it is invalid, it was because it was not intended to make the hypothecation dependent on the maritime risk. This leaves the obligation incurred by the master as a simple and unlimited undertaking on behalf of his employers to repay the amount expended in repairing the vessel; and if the repairs were necessary, which is not disputed, and the defenders were the employers of the master, they must be liable. It is laid down by all the authorities that the element to be searched for in such cases is not the ownership on the register, or even the legal ownership, but who gives the mandate—who confers the authority? I entirely concur with Lord Gifford's remarks on this head. The defenders were in fact owners in every sense; for the right of Steele, the bank agent, was a mere incumbrance; and as the defenders had never parted with the possession, the right of the New Zealand company resembled that of creditors rather than owners. But it is enough that the master was employed by the defenders and was subject to their orders. I entirely concur in Lord Gifford's views on this head, and adopt them without reserve.

Lord Neaves was absent.

This interlocutor was pronounced:*—"Sustain the appeal, and find as

[1] Stainbank v. Shepard, Feb. 14, 1853, 13 Scott's C. B. Rep. 418, 22 L. J. (N. S.) Ex. 341.

* Signed November 16, 1875.

follows—(1) That the appellants (defenders in the Sheriff Court), as agents for the Southern Steam Navigation Company in New Zealand, ordered on commission in Britain the steamship 'Pareora,' and advanced considerable sums on her account, which have not been repaid; (2) that the appellants appointed Captain Graham to the command of the vessel, and that he continued throughout to be under the orders of the appellants; (3) that the vessel was registered in name of the appellants, but the title was transferred to Mr Steele, manager of the New Zealand Bank, for the purpose of securing payment of certain bills for the price of the vessel discounted with the bank; (4) that the 'Pareora,' on her voyage out to New Zealand, suffered damage, and put into Paramaribo to refit; (5) that Captain Graham granted to Mr D. C. Munro, British Consul at Surinam, for sums advanced to him as master, required by him to pay and expended in payment of accounts for necessary repairs of or supplies to the 'Pareora' at Paramaribo the bond No. 12/2 of process for £675, and also bills for the same amount, conform to the document No. 9/36 of process; (6) that after leaving Paramaribo the 'Pareora' got into more difficulties, and had to stop at Bahia; (7) that after the said steamship had lain some time in Bahia the crew were paid off, and the appellants sent out a person to take possession of the vessel, and the appellants, having retired the bills from the bank, the vessel was again registered in the name of the appellants; (8) that the appellants then sold the vessel, without prejudice to the rights of parties, and the proceeds of the sale, £4457, 18s. 2d., were received and held by the appellants, who paid all expenses at Bahia, and fall to be dealt with as a *surrogatum* for the vessel; (9) that the bill No. 7/1 of process, drawn by Captain Graham, was granted in favour of Messrs Miller Brothers and Company, of Paramaribo, who endorsed it to the respondents (pursuers in the Sheriff Court); (10) that at the date of these repairs the appellants were in possession and had control of the vessel, and were in the position of being employers of the master, and responsible for his legal contractions for the ship: Therefore, recall the interlocutors complained of, and of new repel the defences, and decern against the appellants (defenders) in terms of the conclusions of the libel: Find the respondents (pursuers) entitled to expenses in both Courts," &c.

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J. W. & J. MACKENZIE, W.S.—J. & R. D. ROSS, W.S.—Agents.

AUGUSTUS TOWILL AND COMPANY AND MANDATARY, Pursuers.—*D.-F. Watson—Gloag.*
THE BRITISH AGRICULTURAL ASSOCIATION (LIMITED), Defenders.—*Fraser—Black.*

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Towill & Co. v. The British Agricultural Association.

Sale—Principal and Agent—Usage of Trade—Proof—Parole.—Two brokers, acting respectively for the sellers and buyers of certain goods, having come to terms, the buyers' broker handed to the sellers' broker the following sale-note:—"Sold to (the buyers) . . . (the goods) . . . payment cash on delivery less 2½% in fourteen days as usual." This note, which was signed by the buyers' broker only, was sent by the sellers' broker to the sellers in a letter, in which he said, *inter alia*,—"Have sold . . . (the goods) . . . and herewith beg to hand said contract . . . Please transmit warrants and order for delivery, at same time confirming sale." On the same day the buyers' broker wrote to the buyers,—"We called on sellers' agents here and closed. . . . Contract we pass to-night through

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their friends here. On their confirmation of same, will then hand you counterpart." The sellers wrote in answer to their brokers' letter,—"We have your favour of yesterday with contract . . . which appears in order, with one exception. The payment clause should be cash in fourteen days (before delivery if required), less 2½% discount." A correspondence followed between the parties and their brokers, and finally the buyers refused to take the goods.

In an action at the instance of the sellers against the buyers for the price of the goods, the Lord Ordinary allowed the brokers to be examined as to whether the contract had been a concluded one between them or not. They both deponed that it was a concluded contract. The Lord Ordinary found that there was a concluded contract, and that the buyers were bound to fulfil it. On a reclaiming note, *held* (*rev.* judgment of Lord Young) (1) that the contract was one which fell to be construed by the Court, and that parole evidence had been improperly admitted; (2) that even had there been a concluded contract between the brokers, the sellers, by attempting to alter the "payment clause," were in breach, and that the buyers were therefore entitled to cancel the contract; but (3) on consideration of the sale-note and correspondence, that no concluded contract had been made, confirmation by the sellers having been a condition of the sale.

1st Division. Lord Young. B.

AUGUSTUS TOWILL AND COMPANY, merchants, Liverpool, and their mandatary, raised this action against the British Agricultural Association (Limited), whose offices were at Leith, for the sum of £2800 as the price of a cargo of between 350 and 400 tons of ancient bones which the pursuers alleged had been purchased from them by the defenders on 14th November 1873.

The alleged sale had, it was averred, been concluded between the brokers of the parties at Hull, the port at which the bones were warehoused. Sollitt, Hill, and Company acted as brokers for the pursuers, and John Harland and Company were brokers for the defenders. After some negotiations and correspondence* the brokers came to terms, and the defenders' brokers handed the pursuers' brokers a sale-note. This sale-note was as follows:—"Hull, 14th November 1873.—Sold to the British Agricultural Association (Limited), Leith, for account of Messrs Augustus Towill and Company, merchants, Liverpool, per Messrs Sollitt, Hill, and Company, Hull, about 350 to 400 tons (more or less) ancient bones, now laid in Bilton's and Winter's warehouses here at £6, 10s.—say six pounds ten shillings—per ton of 20 cwt., weighed and delivered free to craft here at the respective warehouses. Payment cash on delivery, less 2½% in 14 days as usual. Should buyers require three weeks to get them away to have this privilege, any dispute arising on this contract to be settled by arbitration as usual. JOHN HARLAND & Co."

Of even date with the sale-note the pursuers' brokers had telegraphed

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* The following were some of the letters which passed:—

1. Pursuers to their brokers.—"20th Oct. 1873.—We have your favour of Saturday, and in reply, as we are in treaty with other buyers for the bones per Jno. Robinson, we will not bind ourselves to accept £6, 10s.; but if we were offered that figure to clear the parcel we would entertain it."

2. Pursuers to their brokers.—"10th Nov. 1873.—We are not anxious sellers of our bones per John Robinson for they are going to be very dear this next spring. At the same time if we got a bid of £6, 10s. to clear the lot we should be disposed to sell."

3. Defenders to their brokers.—"Leith, 11th Nov. 1873.—Ancient bones. We expected you would have been able to get these for us at our limit, but we now authorise you to bid £6, 10s. per ton f. o. b. less 2½% and delivery as required up to the end of the year. This is a very full price, and we cannot improve on it."

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and written to the pursuers as follows:—"Your favour of the 13th inst. to hand, contents noted. This morning we wired you thus:

"'Have sold about three hundred and fifty tons ancient bones, *ex* John Robinson, at six pounds ten shillings per ton, less two and a half, and one per cent brokerage, delivery to be taken within a month,' craft being difficult to get, contract by post, which we confirm, and herewith beg to hand said contract. Messrs Harland and Co. being the parties with whom we were in treaty, but they, it seems, were only acting for another party we therefore got them to make out contract.

"Please transmit warrants, and order for delivery, at same time confirming sale, and oblige."

The defenders' brokers also wrote to their principals on the same day:—"We called upon the sellers' agents here, and closed at £6, 10s. per ton, less 2½% *ex* stores, herewith, 3 weeks to get them away, and wired you to that effect. We find that the owners are Messrs Augustus Towill and Co., Liverpool. Contract we pass to-night through their friends here. On their confirmation of same, will then hand you counterpart."

The pursuers wrote to their brokers on 15th November 1873:—"We have your favour of yesterday with contract for bones p. John Robinson, which appears in order, with one exception. The payment clause should be cash in 14 days (before delivery if required), less 2½% discount. We shall require some cash to account before we can give up warrants, which you will perhaps ask Messrs Harland and Co. to arrange, and then we will pass the warrants through our bankers, with order attached for, say, £2000."

Messrs Sollitt, Hill, and Company had an interview with Messrs John Harland and Company, and on 17th November wrote the pursuers:—"Your esteemed favour of the 15th inst. to hand, on receipt of which writer saw Messrs Harland and Co., and they will write their friends to-night, as requested, to the extent of £1500, they stating it might be the bones ran short of the weight calculated on, and then there is the 2½% to calculate as a deduction, so that £2000 would be too much like a payment in full before delivery. Will let you know the reply they receive from the north."

Harland and Company also wrote on the same day to the defenders:—"With respect to ancient bones, our friends stipulate that a certain amount must be paid in exchange for warrants. We expect they have got advances on them. We are writing them to-night."

To this the defenders replied by telegraph:—"Leith, 18th Nov. 1873.—Cannot agree to sellers' new stipulation ancient bones; will consider contract cancelled unless confirmed as originally made before four to-day."

This answer was communicated to the pursuers' brokers, and by them to the pursuers. A correspondence followed on the subject between the brokers and their principals on both sides.*

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* The following are the most important letters and telegrams which passed subsequent to the date of the sale-note:—

1. Defenders' brokers to the pursuers.—"Hull, 14th Nov. 1873.—Through our neighbours here, Messrs Sollitt, Hill, and Co., we have bought of you, as per contract handed them, for account of our friends, the British Agricultural Association (Limited), Leith, the about 350–400 tons of ancient bones now here."

2. Pursuers' brokers to the pursuers.—"18th Nov. 1873.—We wired you to-day as follows:—In consequence of a call from Messrs Harland and Co., who had received the telegram of which we wired copy embodied in ours as follows:—'Harland Company have heard from their principals. Cannot agree sellers' new stipulation ancient bones.—Will consider contract cancelled unless confirmed as

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In the condescendence annexed to the summons the pursuers thus described the contract:—"The pursuers sold to the defenders a quantity originally made before four to-day. They propose to hand us bills of lading for bones, when delivered to craft, until payment is made as per contract. Contract asked to be returned if not accepted,' which we confirm but are without reply thereto."

3. Defenders to their brokers.—"Leith, 19th Nov. 1873.—Yours of y'day received. We can only confirm ours of equal date with reference to the bone contract, and as we cannot wait your friends' convenience in making the changes they have indicated will consider the contract cancelled. We will, however, be pleased to hear any new proposal they have to make through you."

4. Pursuers to their brokers.—"19th Nov. 1873.—We have now before us your favour of y'day confirming your telegram recd. late last evening, and in reply we are rather surprised Messrs Harland and Co. should decline to make a payment to a/c. the bones per Jno. Robinson against the warrants. Their principals are well aware of the usage, and always act up to it; at the same time, we have no desire to be as strict as they would be, and will hand over the warrant on payment of £1500 to account, or let you have the warrant, you shipping the bones in our name and to our order, and the buyer to pay an approximate amount against each B/ lading. We cannot do fairer."

5. Defenders to their brokers.—"Leith, 20th Nov. 1873.—Yours of y'day, with contract for bones enclosed. We can only agree to allow same to stand until to-morrow, when we shall see our buyer, and if he then consents to take the bones at the price and terms therein stated we shall have no objections; but as far as we are concerned you understand we cancelled the contract owing to the peculiar position your sellers took up. In any case, the date of the contract would require to be as from that on which we confirmed it. We shall be very glad for your sakes that we can still carry thro' the transaction, but, as you are well aware, it is impossible to get parties to wait indefinitely, and for which your principals are to blame."

6. Defenders' brokers to the defenders.—"Hull, 20th Nov. 1873.—We have by the second post, 1.45 P.M., yours of y'day crossing ours of same date, which will fully reply thereto. As to cancelling the contract, that is out of the question. We enclose your copy of letter received from Messrs Towill through their agent here." (*Supra*, No. 4.)

7. Defenders to their brokers.—"Leith, 21st Nov. 1873.—With reference to yours of yesterday, covering copy letter from Messrs Towill and Co., we regret for your sakes you have had all this trouble in vain, and that you did not make sure of the terms previous to passing the contract. As it is, we now decline having anything further to do with the parcel. Had we known your principals before we would not have cared to have made any offer for it at all. We enclose contract cancelled."

8. Defenders to their brokers.—"Leith, 22d Nov. 1873.—We have yours of y'day crossing ours of equal date, which we now beg to confirm. We didn't consider it necessary to wire, especially as you did not request this. We have now supplied ourselves with bones, and, for the present, are not buyers. We are glad to hear, however, that your friends will gain 2s. 6d. per ton on our having cancelled the contract. Perhaps this has something to do with their attempt to improve upon the contract made. In future, when you offer us anything through these principals, we shall be glad that you apprise us first."

9. Defenders' brokers to the defenders.—"Hull, 22d Nov. 1873.—We have yours of y'day crossing ours of same date. We are somewhat surprised you did not wire us y'day that you declined the bones on the contract handed you, as well as the sellers. You could have claimed them in accordance therewith, so long as the sellers kept the contract we sent them; any other or after suggestions you really had nothing to do with. We have, however, informed their friends here, in accordance with your letter, that you decline the same."

10. Pursuers' brokers to the pursuers.—"22d Nov. 1873.—We herewith send

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of ancient bones then lying in the warehouses of Bilton and Winter, warehousemen, Hull, estimated and stated in the contract to amount to 350 or 400 tons (more or less), laid in said warehouses, at £6, 10s. per ton of 20 cwt., weighed and delivered free to craft at Hull. The contract stipulated for payment in cash after delivery, a discount of 2½ per cent being allowed on payment in cash within fourteen days after delivery. The contract provided that should the buyers require three weeks to get the bones away they should have that privilege. The contract, which is signed by the said John Harland and Company, and was delivered to the said Sollitt, Hill, and Company on behalf of the pursuers, is produced herewith. The defenders were thereby bound to take delivery of the said goods at the latest in three weeks after the date of the contract, that is, by the 5th December 1873, and they were thereby bound to pay the price within a fortnight thereafter, that is, by 19th December 1873."

The defenders relied upon their cancellation of the contract on 19th November (footnote, p. 120, No. 4).

The pursuers pleaded, *inter alia;*—(1) A contract for the sale and purchase of the goods set forth in the condescendence having been concluded between the pursuers and defenders the defenders are bound to implement it.

The defenders pleaded, *inter alia;*—(2) There never having been any concluded contract between the parties the defenders are entitled to be assoilzied from the conclusions of the action. (3) The defenders having, before the conclusion of any contract between the pursuers on the one hand and John Harland and Company on the other, intimated to Harland and Company that they would not conclude the contract, the defenders are not bound by any pretended consent to the contract given by Harland and Company on the defenders' behalf.

The Lord Ordinary allowed a proof, in the course of which the brokers of the parties and some mercantile men were examined as to the meaning and effect of the sale-note of 14th November. The brokers of both parties deponed that the contract was a concluded one on 14th November, and that they had power from their principals to enter into binding contracts; and the evidence of the mercantile men examined as to the usage of trade was to the effect that the sale-note made the contract a binding one according to the usage of trade.

On 19th March 1875 the Lord Ordinary pronounced this interlocutor: —"Finds that the defenders are bound to fulfil the contract of sale entered into on 14th November 1873 between the pursuers and defenders through their respective brokers, duly authorised to that effect, and of which the sold-note, No. 6 of process, subscribed by the broker for the defenders, is a memorandum or note made and subscribed by the broker for the defenders at the time of the sale, by taking delivery of the bones thereby sold, and paying the price thereof at the rate of £6, 10s. per ton, under deduction therefrom of 2½ per cent discount, with interest from the 19th December 1873: Finds that the said price amounts to £2173, 11s.: . . . Therefore decerns against the defenders for payment to the pur-

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you copy of letter handed us by Messrs Harland and Co., whose principals have cancelled contract for bones *ex* John Robinson.

"We had another inquiry the other day. May we now offer them to the other parties? Awaiting reply."

11. Pursuers to their brokers.—"24th Nov. 1873.—We have your favour of Saturday, and, in reply, please inform Messrs John Harland and Co. that we shall compel the British Agricultural Association to fulfil their contract with us for the John Robinson's bones. We always thought it took two to cancel a contract, once made."

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suers of the said sum of £2173, 11s., with interest thereon at the rate of 5 per cent per annum from the said 19th December 1873 until paid, ... the pursuers, on payment of the said sum, handing to the defenders the warrant for delivery of the said bones: Finds the pursuers entitled to expenses," &c.

The defenders reclaimed.

The cause was heard on 2d November 1875 before the First Division and Lord Rutherfurd Clark as Lord Probationer.*

Argued for the defenders;—

(1) The very terms of the letter written by the pursuers' brokers to them when forwarding the sale-note shewed that they did not think they

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* LORD PROBATIONER.—This is a case on a contract of sale. The pursuers allege that they entered into a contract of sale with the defenders on 14th November 1873, and they bring this action to recover the price of the articles sold. The defenders allege, on the contrary, that there was no contract, and further maintain that if there was a contract the pursuers are in breach of it. In that state of the record a proof was allowed, and we have now under consideration the evidence taken, which is partly documentary and partly parole.

The Lord Ordinary has decided (1) that there was a concluded contract, and (2) that there has been no breach of contract on the part of the pursuers entitling the defenders to resile.

The first question for consideration is whether there was a concluded contract or not. The alleged contract is one entered into, not between principals, but between brokers. These brokers were examined before the Lord Ordinary, and both agreed that on 14th November 1873 a concluded contract was entered into between them, by which the one sold and the other bought the ancient bones in question. Therefore it appears on their evidence that there was a concluded contract. The defenders, however, say that there was no concluded contract—(1) because there was no authority on the part of the sellers' brokers to sell, and (2) because any contract required confirmation by the principals before it was concluded. The question really comes to be whether the contract is so expressed as to require confirmation by principals before it became binding. Considering that both brokers state distinctly that the contract which they themselves made was a binding one, I am of opinion that a contract was concluded in terms of the bought and sold note.

The second question is whether the contract was broken by the pursuers as the defenders allege. Some difficulty arises here from the explanation of the contract given by the pursuers on record. I prefer, however, to consider this question apart from mistaken averments, and on the documents themselves.

The contract is for the delivery of a considerable parcel of bones lying in two different warehouses in Hull, and the manner of executing this concluded contract was either to ship the goods to the defenders, or to hand over the delivery warrants.

The wording of the contract is—(quoted *supra*, p. 118). Whatever may be the precise meaning of these words, about which there is some doubt, it seems to me that they must mean that cash was to be given as nearly as possible simultaneously with the delivery of the cargo itself, that is, delivery to be received as against cash. The question then is, how is this to be done in a contract of this kind, where it is a matter of usage which is stipulated by the presence in the contract of the words "as usual." The pursuers say any arrangement with respect to this relates not to the constitution but to the execution of the contract, and so they intimated that before they gave up the warrants they must have a payment of £2000. The defenders immediately took up this position, that they were entitled to delivery before they paid cash. It seems to me, however, that this letter, which appears to have been read as if it introduced a new stipulation into the contract, did not do so, and that the defenders were not entitled to resile from the contract. I am of opinion that the Lord Ordinary's interlocutor should be adhered to.

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had powers to complete a binding contract without confirmation. The pursuers had not to this day confirmed the contract as set forth in the sale-note, and there was therefore no contract in existence on which they could sue.

(2) Even if a contract had been concluded the pursuers had been the first to attempt to alter its terms, and the defenders were at once put into a position to withdraw.

(3) The Lord Ordinary had acted wrongly in allowing parole evidence, as the contract was quite simple and easily understood,[1] and therefore none of the parole evidence could be looked at.

Argued for the pursuers;—

The contract had been constituted in the usual manner, and was a binding one. The whole effect of the pursuers' letter of 15th November was to effect a slight and usual alteration in the execution of the contract; but that could in no way affect its constitution, it being already binding on both parties.

The use of the words "as usual" in the sale-note were intended to import the usage of trade into the contract, and therefore parole evidence as to such usage was quite competent, and in this case that evidence was conclusively in the pursuers' favour.

At advising,—

LORD PRESIDENT.—This is an action for the enforcement of a contract of sale said to have been completed on 14th November 1873, the commodity sold being about 350 tons of bones, and the pursuers being the sellers and the defenders the purchasers. The conclusions of the summons are for implement of the alleged contract of sale by payment to the pursuers of the sum of £2800 sterling, and taking delivery of the bones free on board at Hull, along with interest on the price from 19th December 1873 till payment.

The principal defence stated for the defenders is that the brokers who acted for them—Messrs John Harland and Company—were not duly authorised to complete this sale. In my opinion this defence is not well founded, for the correspondence clearly shews that they were duly authorised; but although they were so authorised the question may still remain, did they actually complete the sale? There remains also another defence: Supposing that the contract was completed, were not the pursuers themselves the first to commit a breach of it, and thus put the defenders in a position to resile?

The sale-note of 14th November 1873 was delivered to Sollitt, Hill, and Company, the brokers for the pursuers, by the defenders' brokers, on that day, and upon that day also Sollitt, Hill, and Company sent it to the pursuers. The terms of the letter in which they transmitted the sale-note appear to me very important. They are as follows:—"Herewith beg to hand said contract. Messrs Harland and Company being the parties with whom we were in treaty, but they, it seems, were only acting for another party, we therefore got them to make out a contract. Please transmit warrants and order for delivery, at same time confirming sale, and oblige." Now, at the same time and on the same day Harland and Company wrote their constituents, and they say:—"We called on the sellers' agents here, and closed at £6, 10s. per ton, less 2½ per cent *ex* stores, herewith, three weeks to get them away, and wired you to that effect. We find

[1] **Calder v. Aitchison**, June 21, 1831, 9 S. 777; Peter v. Terrol, Sept. 26, 1818, 2 Mur. 28; **Mackenzie** v. Dunlop, Dec. 7, 1853, 16 D. 129, 26 Scot. Jur. 64.

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that the owners are Messrs Augustus Towill and Company, Liverpool. Contract we pass to-night through their friends here. On their confirmation of the same we will hand you counterpart." Now, it seems to me both the brokers for the pursuers and the brokers for the defenders acted on the footing that, although they as brokers had completed the sale, it required confirmation by the sellers. That was quite natural. The purchasers' brokers having made the offer with the approval of their principals, did not need further confirmation by them, but the sellers were not on the spot, and the contract entered into by their brokers would require their confirmation unless it were perfectly clear that they had given very full authority to their brokers to enter into contracts. I think, on the whole, that it would be very difficult to say that this contract could be completed until confirmed by the sellers. But the matter becomes still more difficult when we come on to a subsequent stage of this transaction, viz., on 15th November, when the sellers wrote to their brokers—"We have your favour of yesterday, with contract for bones p. 'John Robinson,' which appears in order with one exception. The payment clause should be—Cash in 14 days (before delivery if required), less 2½ per cent discount. We shall require some cash to account before we can give up warrants, which you will perhaps ask Messrs Harland and Company to arrange, and then we will pass the warrants through our bankers, with orders attached for, say, £2000." Here there is quite a distinct objection raised to one of the clauses of the sale-note—the one which the writer calls "the payment clause;" and I will shortly notice what I consider the meaning of that objection, but at present I would merely observe that the sellers themselves, equally with their brokers and the purchasers' brokers, thought that the contract needed their confirmation, because if it were not so it was too late to state this objection. Instead, however, of departing from it when it is not acquiesced in, they stand out for their proposed alteration throughout the whole correspondence.

Let us now see what is the meaning of the proposed alteration, and what would be the effect of the change in the terms of the contract if it were agreed to. The sale-note says:—"Hull, 14th Nov. 1873.—Sold to the British Agricultural Association, &c. . . . about 350 or 400 tons (more or less) ancient bones, now laid in Bilton's and Winter's warehouses here, at £6, 10s.—say six pounds ten shillings per ton—of 20 cwt., weighed and delivered free to craft here at the respective warehouses." Then comes the payment clause—"Payment cash on delivery, less 2½ per cent in fourteen days as usual. Should buyers require three weeks to get them away, to have this privilege. Any dispute arising on this contract to be settled by arbitration as usual." There has been a good deal of controversy as to the meaning of this contract. The pursuers, however, have made a very distinct averment as to what they understood it to mean in the first article of their condescendence, where they say—"The pursuers sold to the defenders a quantity of ancient bones then lying in the warehouses of Bilton and Winter, warehousemen, Hull, estimated and stated in the contract to amount to 350 or 400 tons (more or less), laid in said warehouses, at £6, 10s. per ton of 20 cwt., weighed and delivered free to craft at Hull. The contract stipulated for payment in cash after delivery, a discount of 2½ per cent being allowed on payment of cash within fourteen days after delivery. The contract provided that should the buyers require three weeks to get the bones away, they should have that privilege. . . . The defenders were thereby bound to take delivery of the said goods at the latest in

three weeks after the date of the contract—that is, by 5th December 1873, and they were thereby bound to pay the price within a fortnight thereafter—that is, by 19th December 1873."

This is a very distinct statement as to the import of the contract, and it is very difficult to see how the pursuers, after making that statement on record, can be allowed to alter their view of the contract altogether, and say it was entirely erroneous, as they did in argument. If we take their own account on record, the letter of 15th November becomes very important, because the contract, as set forth on record, entitles the purchasers to take delivery of the whole subject, and not to pay, nor even grant a bill for the price, but within a fortnight after delivery they were for the first time to make payment of the price. I must say that is a very unusual contract, and very unfavourable for the sellers; but still, it is their own construction of it.

But what do they say in their letter of 15th November? They demand cash by 28th November, instead of 19th December, and that whether the goods have been delivered or not. It is impossible to conceive a greater difference than that which exists between the contract as construed by the pursuers on record and as altered by their letter of 15th November. The pursuers have also always stood upon their right to alter the terms of the contract before confirmation. It therefore appears to me that the contract was either never constituted, or that the pursuers committed a breach of it according to its true import as explained by themselves. But I am unwilling to rest our judgment upon the view of the contract stated by the pursuers on record, as that would appear a somewhat technical ground.

I am willing to read and construe the contract itself, and see whether the proposal of 15th November was not a material alteration on it. The contract as made is that the sellers sell to the purchasers a certain quantity of bones at a certain price, the fulfilment of the contract to extend over fourteen days, either by one delivery and one payment of cash, or several deliveries and several payments of cash as each delivery took place. The clause which follows seems to extend the period of fulfilment, if desired by the purchasers, to three weeks. That contract is quite easily read,—it contains no technical terms, there is no appeal whatever to usage of trade. "As usual" means just 2½ per cent discount, and fourteen days for delivery. They stipulated just the usual terms for delivery, and accordingly these words "as usual" appear again when it is stipulated that all disputes shall be "settled by arbitration 'as usual.'" The contract is therefore one for construction by the Court without the aid of experts or reference to usage of trade. I am of opinion that the construction I have put on this contract is the correct one.

What the pursuers say in their letter of 15th November is,—"The payment clause should be cash in fourteen days (before delivery if required), less 2½ per cent discount,"—that is to say, if the purchasers please to spread the delivery over three weeks they must still pay the full price in fourteen days. It is true this only makes a difference of a week, but the addition to a mercantile contract of this kind of stipulation, making cash payable a week sooner, is a very material alteration of the contract.

Whatever view is taken, therefore, of this case, whether (1) that the contract required confirmation, or (2) that it could be and was completed without confirmation, the result is the same. If the first view be taken, the contract was never completed; if the second, the pursuers were the first to commit a breach

No. 23. of it. I think we must recall the Lord Ordinary's interlocutor accordingly, and assoilzie the defenders.

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LORD DEAS.—I am so entirely of the opinion expressed by your Lordship that it is hardly necessary for me to add anything. I think the brokers had power to complete a contract without confirmation by their principals—that is quite usual—they becoming personally responsible to the parties with whom they contracted. But although they had power to have done so, I think that was not what they did, because, although the contract was made between the brokers without any express stipulation for confirmation, they obviously came to the conclusion that, in acting for these particular parties, confirmation should be required before the contract was held concluded. That being so, be the powers of brokers what they may, this contract was not concluded until it should be confirmed.

In the second place, I am of opinion the words "as usual," in the note of date 14th November 1873, are not a stipulation that the contract was to be regulated by the usage of trade, but are merely a statement that the time of payment and the discount proposed were those which were usual. Nevertheless, usage of trade might competently enough be proved if there was anything technical or peculiar in the terms of the contract.

I do not, however, think that this contract requires explanation, for I see nothing technical or peculiar in it which the parole evidence can be said to clear up. The opinions of the witnesses adduced are no better and of no more weight than those of any other intelligent parties, and leave us, as before, to judge for ourselves.

In the third place, I agree with your Lordship that whichever view be taken of the alleged contract, whether according to the natural reading of it or the reading which the pursuers themselves assign to it in the record, the change proposed on 15th November was a palpable and material change on its terms. It was ingeniously suggested that the stipulation in the letter of 17th November 1873, "that a certain amount must be paid in exchange for warrants," was not a change on the constitution of the contract, but a reasonable change in regard to its execution. But I cannot distinguish between the constitution and the mode of execution of such a contract. The mode of execution is a most important part of the contract itself, and it is really attempting a distinction without a difference to say that the stipulated variation was on the mode of execution and not on the constitution of the contract.

The defenders intimated that if the demand made in the letter of 17th November 1873 was not departed from they would hold the contract as cancelled. The demand was adhered to, and the defenders consequently intimated that they now held the contract as actually cancelled. The reply to this was not a withdrawal of the stipulation, but a proposal to modify it; and, looking to the nature of the subject-matter of the contract, I think the pursuers were no longer entitled to object to the cancellation of the contract.

In any view, therefore, I concur with your Lordship that the interlocutor should be recalled, and the defenders assoilzied.

LORD ARDMILLAN.—It cannot be otherwise than with some hesitation, and on deliberate consideration, that I differ from the Lord Ordinary and the Lord Probationer. But, after careful and repeated consideration, I have, as your

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Lordship has done, come to a different conclusion. I do not doubt that the brokers for the parties could have entered into a contract of sale binding on both the parties whom they represented. The question is, did they do so? Was the contract at once completed by their interchange of notes, so that no confirmation was required and no objection was allowable?

I do not think the pursuers can maintain that the contract was completed finally by the interchanged note of 14th November 1873. The conduct of the brokers and the parties does not support this plea. That was not the opinion of either of the brokers at the time, for both of them dealt with the contract as requiring confirmation. We have here a letter on the day of the note which is said to form the complete contract from the pursuers' brokers to the principal asking confirmation of the sale—(*supra*, p. 119). We have also a letter from the defenders' broker to them saying they awaited confirmation—(*supra*, p. 119). This seems conclusively to shew that, by the brokers, the note was not looked on as finally constituting and completing the contract. They considered that it required confirmation. But that is not all. On the 15th of November the pursuers, through their brokers, proposed to make a change on the conditions of the contract. That proves that they did not consider the contract to be then finally and conclusively settled and closed. This proposal for a change, and not an unimportant change, was made while the contract was awaiting confirmation, and made by the pursuers, who now allege that the contract had been so completed as to exclude alteration. Still farther, the defenders' brokers having telegraphed to the defenders, the following is the communication made by the defenders to them:—"Leith, 19th November 1873. Yours of y'day received. We can only confirm ours of equal date with reference to the bone contract, and as we cannot wait your friends' convenience in making the changes they have indicated will consider the contract cancelled. We will, however, be pleased to hear any new proposal they have to make through you."

Now, a person who proposes an alteration on a contract made by his broker, and before him for confirmation, cannot afterwards be permitted to plead that the contract was at that time final and completed, not requiring confirmation nor susceptible of alteration. Such a plea by such a party is not correct in point of procedure, nor equitable on principle.

I do not think that the plea of mercantile usage or custom of trade is here applicable, nor is it stated on the record. The words "as usual" do not let in proof of general custom as affecting the construction of the contract, or the validity of it as made by the brokers. I rather think the words apply to the terms of discount.

I do not permit my opinion to be affected by the statement—I think the inaccurate statement—of the contract made by the pursuers on record. But on the sale-note, the correspondence, the conduct of the parties, and the ascertained facts, I have arrived at the same conclusion as your Lordship, and I think that the interlocutor complained of should be recalled.

LORD MURE.—I have come to the same conclusion. As regards the powers of brokers to complete sales I have no doubt that in a large class of cases they can do so, but are understood to do so under implied authority to that effect, and that in such cases the bought and sale notes signed by them complete the bargain—Bell's Principles, sec. 89. The present, however, is not, in my opinion, one of those cases, because it is plain from the correspondence that both brokers

No. 23.

Nov. 12, 1875. Towill & Co. v. The British Agricultural Association.

dealt on the footing that their principals required to confirm. This is clear from the letter of 20th October 1873, in which the pursuers write to their brokers that they will not bind themselves to accept £6, 10s., "but if we were offered that figure we would entertain it." This letter was communicated to Harland and Company, the brokers for the defenders, and after some further correspondence between the brokers and their respective principals, the pursuers, on the 10th of November (*supra*, p. 118), again write to their brokers with instructions not to complete a sale, but to the effect that if they "got a bid of £6, 10s. to clear the lot we should be disposed to sell." This letter is then communicated to the defenders through their brokers, and on the 14th of November these brokers agree to take 350 tons of bones at £6, 10s., on certain stipulated terms, which are of the same date sent to the pursuers by their brokers, who write enclosing the sale-note and asking the pursuers to transmit warrants and delivery-orders, but requesting them at the same time to confirm the sale. Now, this is done after the contract had passed between the brokers, while Harland and Company, in their letter to their principals—the purchasers—say "on their (*i.e.* the pursuers') confirmation," a counterpart of the contract will be sent; thereby shewing plainly that neither of the brokers considered the bargain binding till confirmed by the pursuers. Instead, however, of confirming the sale the pursuers write on the 15th of November, and propose to alter the terms of the contract in material respects, but to this the defenders refuse to accede. It was in these circumstances that this dispute arose; and as I entirely concur in the construction put upon the contract by your Lordship in the chair, viz., that it was one for payment on delivery, I am of opinion that the defenders were warranted in refusing to agree to the alterations stipulated for by the pursuers, and are entitled to be assoilzied from the conclusions of the action.

THE COURT pronounced this interlocutor:—"Recall the interlocutor, assoilzie the defenders from the conclusions of the summons, and decern: Find the pursuers liable in expenses, and remit to the Auditor to tax the amount of said expenses, and report."

GEORGE BURN, W.S.—D. CURROR, S.S.C.—Agents.

No. 24.

Nov. 12, 1875. Kirk v. Kirk.

WILLIAM KIRK, Pursuer.—*R. V. Campbell.*
JANET B. DRYSDALE OR KIRK, Defender.—*Mair—Hunter.*
WILLIAM CARMICHAEL AND OTHERS, Co-Defenders.

Process—Divorce—Expenses.—It is a question for the discretion of the Court whether a wife who has unsuccessfully defended an action of divorce should be allowed her expenses in the Inner-House, and if she has reclaimed without probable grounds of success they will be refused.

Expenses—Divorce—Co-defenders.—The expenses of a husband who was successful in an action of divorce against his wife were allowed against three co-defenders, who had lodged defences but made no further appearance, conjunctly and severally, till the order for proof, and thereafter in the proportion of one-third against each.

2D DIVISION. Ld. Craighill. I.

WILLIAM KIRK, weaver, Dunfermline, obtained decree of divorce against his wife for adultery with three co-defenders.

The Lord Ordinary's finding as to expenses was as follows:—"Finds the co-defenders . . . . . conjunctly and severally liable in that part of the expenses referable to the raising of the action, and to the intervening procedure between that and the allowance of proof; and finds each of the

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Nov. 12, 1875.
Kirk v. Kirk.

co-defenders separately liable in one-third of the remaining expenses of process, including therein the expense of precognitions."

The case was clearly proved, and the wife having reclaimed the Court adhered without calling on counsel for the pursuer.

Counsel for the defender moved for decree for her expenses against the pursuer in the Inner-House. It was conceded that the Lord Ordinary ought to have granted decree in her favour for the expenses in the Outer-House. The authorities undernoted were referred to.[1]

LORD ORMIDALE.—I should regret much if it were to be held by the Court as a settled matter that a wife, defender in an action of divorce, is in all circumstances entitled, at the expense of her husband, to reclaim against an adverse judgment of the Lord Ordinary. If that were so, she would on the same principle be justified in going to the Court of last resort at the expense of her husband; and the consequence would frequently be utter ruin, in a pecuniary point of view, to the unfortunate husband.

But I am not aware that any such principle has been established. On the contrary, the just and reasonable rule appears to me to be that the question how far the successful husband, pursuer in an action of divorce, is to be made liable for the expenses incurred by his wife in resisting the action is always one for the Court in the fair exercise of its discretion to determine according to circumstances. And an observation to this effect seems to have fallen from the Lord President, in the case which was referred to in the debate, of Donald v. Donald.

In the present case we were unanimously of opinion when deciding its merits that the adultery of the wife, extending over a period of several months, with three different co-defenders, had been proved beyond all manner of doubt, and so clear did this appear that we refused the wife's reclaiming note against the judgment of the Lord Ordinary, which was adverse to her, without requiring to hear the husband's counsel. For my own part, therefore, I cannot think that this is a case for allowing expenses against the husband subsequent to the Lord Ordinary's judgment, and that to determine otherwise would be unjust, if not absolutely cruel, to him.

LORD GIFFORD concurred.

LORD JUSTICE-CLERK.—I am of the same opinion. I think the principle is that as long as a wife has a probable ground of defence she may defend herself to the end at her husband's expense; and cases may be imagined in which she would be entitled to go to the House of Lords. But it is quite different where she has no probable ground of defence, as was the case with the defender here. To allow expenses against the husband in such cases would only have the effect of encouraging the advisers of a woman to persevere in proceedings in which their client has no real interest.

LORD NEAVES was absent.

The Court considered what decree should be pronounced with regard

[1] Donald v. Donald, March 30, 1863, 1 Macph. 741, 35 Scot. Jur. 434; Pitt v. Pitt, June 8, 1861, 24 D. 1444, 33 Scot. Jur. 528; Andrews v. Andrews, Feb. 7, 1873, 11 Macph. 401, 45 Scot. Jur. 269; Gow v. Gow, Feb. 21, 1855, 17 D. 477.

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to expenses against the co-defenders who had lodged defences but made no further appearance.

THIS interlocutor was pronounced:—"Find the reclaimer entitled to expenses against the respondent up to the date of the interlocutor of the Lord Ordinary: *Quoad ultra* refuse her motion for expenses: Find the co-respondents each liable in one-third of the additional expenses incurred by the respondent since the date of the Lord Ordinary's interlocutor," &c.

MILLAR, ALLARDICE, ROBSON, & INNES, W.S.—ROBERT MENZIES, S.S.C.—Agents.

No. 25.
Nov. 13, 1875.
Jackson v. M'Kechnie.

THOMAS JACKSON, Petitioner.—*Brown—Balfour.*
ARCHIBALD M'KECHNIE, Respondent.—*D.-F. Watson.*

Bankrupt—Trustee—Bankruptcy (Scotland) Act, 1856 (19 *and* 20 *Vict. c.* 79), *sec.* 103—*Reparation.*—An undischarged bankrupt recovered in an action a sum of damages for slander uttered subsequent to his sequestration. *Held* that under the 103d section of the Bankruptcy Act the sum vested in the trustee in the sequestration.

2D DIVISION.
Ld. Curriehill.
I.

THE estates of Archibald M'Kechnie, shipowner, Glasgow, were sequestrated in 1870, and in 1873 the trustee was discharged. In 1875 the bankrupt, being still undischarged, raised an action of damages for slander against a firm of distillers, in whose employment he had been as a traveller, and obtained a verdict for £400. The slander was uttered in 1873, after the discharge of the trustee. At the instance of the creditors the former trustee in the sequestration, Mr Jackson, was re-appointed, and he presented this petition under the 103d section of the Bankruptcy (Scotland) Act, 1856,[1] to have it declared that the sum of £400 vested in him at the date of the verdict. The money had not yet been paid.

The bankrupt appeared, and objected.

The Lord Ordinary pronounced this interlocutor:—"Declares all right and interest in the sum of £400 sterling or thereby mentioned in the petition, to which the said Archibald M'Kechnie has become entitled under the verdict of a jury returned and applied as set forth in the petition, to be vested in the petitioner as trustee on the sequestrated estates of the said Archibald M'Kechnie, as at the date when the said verdict was applied, in terms of the 'Bankruptcy (Scotland) Act, 1856,' and decerns: Finds no expenses due to or by either party." *

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[1] 19 and 20 Vict. c. 79, sec. 103—"That if any estate, wherever situated, shall, after the date of the sequestration, and before the bankrupt has obtained his discharge, be acquired by him, or descend or revert or come to him, the same shall, *ipso jure*, fall under the sequestration, and the full right or interest accruing thereon to the bankrupt shall be held as transferred to and vested in the trustee, as at the date of the acquisition thereof or succession for the purposes of this Act; and the trustee shall, on coming to the knowledge of the fact, present a petition setting forth the circumstances to the Lord Ordinary. . . . ."

* "NOTE.—The petitioner claims the money as being estate acquired or coming to the bankrupt after the date of the sequestration and before his discharge. The bankrupt, on the other hand, maintains that as the money has been awarded to him as *solatium* for defamation, his claim therefor against the defenders of the action was so entirely personal to himself as to exclude all claim upon the fund at the instance of the creditors of the bankrupt. And he relies in support of his contention partly upon a passing observation regarding actions of damages for defamation at the instance of a bankrupt under sequestration

co-defenders separately liable in one-third of the remaining expenses of process, including therein the expense of precognitions."

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Nov. 12, 1875. Kirk v. Kirk.

The case was clearly proved, and the wife having reclaimed the Court adhered without calling on counsel for the pursuer.

Counsel for the defender moved for decree for her expenses against the pursuer in the Inner-House. It was conceded that the Lord Ordinary ought to have granted decree in her favour for the expenses in the Outer-House. The authorities undernoted were referred to.[1]

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But I am not aware that any such principle has been established. On the contrary, the just and reasonable rule appears to me to be that the question how far the successful husband, pursuer in an action of divorce, is to be made liable for the expenses incurred by his wife in resisting the action is always one for the Court in the fair exercise of its discretion to determine according to circumstances. And an observation to this effect seems to have fallen from the Lord President, in the case which was referred to in the debate, of Donald v. Donald.

In the present case we were unanimously of opinion when deciding its merits that the adultery of the wife, extending over a period of several months, with three different co-defenders, had been proved beyond all manner of doubt, and so clear did this appear that we refused the wife's reclaiming note against the judgment of the Lord Ordinary, which was adverse to her, without requiring to hear the husband's counsel. For my own part, therefore, I cannot think that this is a case for allowing expenses against the husband subsequent to the Lord Ordinary's judgment, and that to determine otherwise would be unjust, if not absolutely cruel, to him.

LORD GIFFORD concurred.

LORD JUSTICE-CLERK.—I am of the same opinion. I think the principle is that as long as a wife has a probable ground of defence she may defend herself to the end at her husband's expense; and cases may be imagined in which she would be entitled to go to the House of Lords. But it is quite different where she has no probable ground of defence, as was the case with the defender here. To allow expenses against the husband in such cases would only have the effect of encouraging the advisers of a woman to persevere in proceedings in which their client has no real interest.

LORD NEAVES was absent.

The Court considered what decree should be pronounced with regard

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to expenses against the co-defenders who had lodged defences but made no further appearance.

THIS interlocutor was pronounced:—"Find the reclaimer entitled to expenses against the respondent up to the date of the interlocutor of the Lord Ordinary: *Quoad ultra* refuse her motion for expenses: Find the co-respondents each liable in one-third of the additional expenses incurred by the respondent since the date of the Lord Ordinary's interlocutor," &c.

MILLAR, ALLARDICE, ROBSON, & INNES, W.S.—ROBERT MENZIES, S.S.C.—Agents.

No. 25.
Nov. 18, 1875.
Jackson v. M'Kechnie.

THOMAS JACKSON, Petitioner.—*Brown—Balfour.*
ARCHIBALD M'KECHNIE, Respondent.—*D.-F. Watson.*

Bankrupt—Trustee—Bankruptcy (Scotland) Act, 1856 (19 *and* 20 *Vict. c.* 79), *sec.* 103—*Reparation.*—An undischarged bankrupt recovered in an action a sum of damages for slander uttered subsequent to his sequestration. *Held* that under the 103d section of the Bankruptcy Act the sum vested in the trustee in the sequestration.

2D DIVISION.
Ld. Curriehill.
I.

THE estates of Archibald M'Kechnie, shipowner, Glasgow, were sequestrated in 1870, and in 1873 the trustee was discharged. In 1875 the bankrupt, being still undischarged, raised an action of damages for slander against a firm of distillers, in whose employment he had been as a traveller, and obtained a verdict for £400. The slander was uttered in 1873, after the discharge of the trustee. At the instance of the creditors the former trustee in the sequestration, Mr Jackson, was re-appointed, and he presented this petition under the 103d section of the Bankruptcy (Scotland) Act, 1856,[1] to have it declared that the sum of £400 vested in him at the date of the verdict. The money had not yet been paid.

The bankrupt appeared, and objected.

The Lord Ordinary pronounced this interlocutor:—"Declares all right and interest in the sum of £400 sterling or thereby mentioned in the petition, to which the said Archibald M'Kechnie has become entitled under the verdict of a jury returned and applied as set forth in the petition, to be vested in the petitioner as trustee on the sequestrated estates of the said Archibald M'Kechnie, as at the date when the said verdict was applied, in terms of the 'Bankruptcy (Scotland) Act, 1856,' and decerns: Finds no expenses due to or by either party." *

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[1] 19 and 20 Vict. c. 79, sec. 103—"That if any estate, wherever situated, shall, after the date of the sequestration, and before the bankrupt has obtained his discharge, be acquired by him, or descend or revert or come to him, the same shall, *ipso jure*, fall under the sequestration, and the full right or interest accruing thereon to the bankrupt shall be held as transferred to and vested in the trustee, as at the date of the acquisition thereof or succession for the purposes of this Act; and the trustee shall, on coming to the knowledge of the fact, present a petition setting forth the circumstances to the Lord Ordinary. . . . ."

* "NOTE.—The petitioner claims the money as being estate acquired or coming to the bankrupt after the date of the sequestration and before his discharge. The bankrupt, on the other hand, maintains that as the money has been awarded to him as *solatium* for defamation, his claim therefor against the defenders of the action was so entirely personal to himself as to exclude all claim upon the fund at the instance of the creditors of the bankrupt. And he relies in support of his contention partly upon a passing observation regarding actions of damages for defamation at the instance of a bankrupt under sequestration

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The bankrupt reclaimed, and argued;—The distinctive feature of this case was that the claim arose subsequent to the sequestration. Therefore the bankrupt, in desiring to retain this money, did not seek to diminish the estate which had passed to the creditors. The decision in Thom v. Bridges and M'Queen founded on by the Lord Ordinary turned on the fact that there was injury to the real estate. Here there was

made by the Lord Justice-Clerk (Hope) in deciding the case of Thom v. Bridges and M'Queen, March 11, 1857, 19 D. 721, but chiefly upon certain English cases in which it seems to have been held that the assignee in bankruptcy is not entitled to institute in his own name an action for recovery of damages for injury to the character of the bankrupt—See Beckham v. Drake, 26th July 1847, 2 H. L. Ca. p. 579, and Rogers v. Spence, July 20, 1846, 12 Cl. and Fin. 700. The principle, however, upon which all these cases was decided appears to be this, that as personal actions of the kind in question frequently involve matters of great delicacy, affecting the feelings, comfort, and reputation, not only of the bankrupt, but of his relatives and connections, it should be left very much to the bankrupt's own discretion whether any action should be raised for the vindication of his character. But that reason ceases to operate as soon as the bankrupt exercises that discretion by voluntarily raising the action, and still more where by insisting in the action until he obtains a verdict for damages he shews his determination to make the whole matter public. It appears to me that a bankrupt who raises such an action before obtaining his discharge does so in the knowledge, if not with the expectation, that in the event of his obtaining a verdict clearing his character, and awarding substantial damages, the pecuniary part of the award would be claimed by his creditors. I am unable to see on what intelligible principle money which has been awarded to a bankrupt by the verdict of a jury—no matter on what grounds—and for which he is in a position to charge the defenders against whom he has obtained the verdict, to make immediate payment, should not be regarded as estate acquired by or coming to him within the sense and meaning of the statute.

"It was, indeed, admitted at the bar by the counsel for the bankrupt that the money in the present case must be regarded as if it had been already actually paid to the bankrupt, and had been deposited in bank. But while making that admission he maintained that the Court is entitled and bound to inquire from what source the money has come, and to refuse to make the vesting order if, as in the present case, the money is ascertained to have been acquired as *solatium* for an injury so purely personal to the bankrupt as defamation. I can see no ground whatever for affirming that contention. The statute declares that the whole estate acquired by the bankrupt before his discharge shall be transferred to and vested in the trustee as at the date of acquisition. No part of the estate acquired is excepted, and acquisition by the bankrupt is declared to be acquisition for his creditors; and on that principle the case of Thom v. Bridges and M'Queen was decided. And farther, even assuming that the judgments in the English cases referred to would be followed as precedents in precisely similar cases in this country, I am of opinion, for the reasons already stated, that they are not applicable to cases in which an illiquid personal claim of damages, depending for its enforcement upon the bankrupt's voluntary exercise of a discretionary power, has been liquidated and converted into money, and recovered by the bankrupt in an action voluntarily raised by himself in the exercise of his discretion. In all such cases the money which he recovers must be regarded as estate acquired by or coming to him within the meaning of the statute. It may be his misfortune that he has not obtained his discharge, either in consequence of his own tardiness in applying for it, or from his inability to comply with the statutory requisites; but the facts that he is still an undischarged bankrupt, and that he has since his sequestration acquired the sum of £400, appear to me to make the claim of the petitioner for a transference of that sum to himself as trustee irresistible. I am therefore of opinion that the prayer of the petition should be granted. I do not think that this is a case for awarding expenses against the bankrupt."

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none. The injury was entirely personal. It depended on the feelings of the bankrupt, and the trustee would have had no title to pursue an action of damages. This was clearly decided in England by the cases referred to by the Lord Ordinary under a bankruptcy statute substantially the same as our own, and the question was one which should be decided on general principles common to both countries. Assuming the trustee to have a right to the money he must first compensate the bankrupt for the trouble and expense he had incurred in vindicating the claim.

The petitioner argued;—1. It is not necessary to inquire whether the trustee would have had a title to pursue the action of damages. The money having been recovered is clearly "estate" within the meaning of the 103d section. The effect of that section as to *acquirenda* is exactly the same as that of the 102d section, which deals with property belonging to the bankrupt at the date of the sequestration. The expression there is "the moveable estate and effects of the bankrupt, wherever situated, so far as attachable for debt, to the same effect as if actual delivery or possession had been obtained or intimation made at that date." It could not be denied that this was moveable estate attachable by creditors. In the same way the 29th section provided that the award of sequestration is "of the estates which then belong or shall thereafter belong to the debtor before the date of the discharge."

But, 2, this was a claim which the trustee might have insisted in. Two remedies were open to a person injured in his character—(1) He might have brought an action concluding for a palinode or retractation. Possibly that was an action of so personal a character that it could not be taken up by his trustee in bankruptcy. But (2) he might sue for damages, and that claim was competent to his trustee or his executor. That was explained in Auld v. Shairp,[1] in which all the authorities were reviewed. It is only right that it should be so, because everything that is estate is justly due to creditors until the bankrupt is discharged. It is true that the English authorities are the other way on the question of the title to sue, but that is owing to a difference in the law.

At advising,—

LORD JUSTICE-CLERK.—The question raised in this case has never, so far as I know, been expressly decided. The respondent, an undischarged bankrupt under sequestration, brought an action of damages for defamation, after the trustee in his sequestration was discharged, and at a time when no proceedings were being taken in the sequestration. The slander was uttered subsequent to the date of the sequestration. In that action he obtained decree for £400. The money has not yet been paid. The creditors re-appointed the trustee, evidently for the purpose of making this fund available to them, and the trustee now applies for a vesting order to enable him to obtain payment of this sum for behoof of the creditors.

We have had an able argument upon two questions—1. How far the trustee acquired right by virtue of the sequestration to the bankrupt's claim for reparation; 2. Whether, at all events, the title of the trustee does not carry for behoof of the creditors this sum of money which the bankrupt has recovered. On the first question the argument for the bankrupt was that a claim for reparation for injury to character is so personal in its nature that it does not pass to the executors of the injured party, or, at all events, to his trustee in bankruptcy. I do not think it is essential to the present case to decide whether that argument is sound

[1] Dec. 16, 1874, *ante*, vol. ii. 191

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or not. I am not prepared to say that the trustee in a sequestration would have a right to pursue such a claim as this. I can quite well conceive, at all events, that there may be demands so personal in their character that they would not pass to the trustee. Examples may be easily suggested. But that is not the question here. The bankrupt has no such claim. His claim has been satisfied; and the only matter in dispute is simply a sum of £400.

It will not, in my opinion, affect the result, although we were to assume that the claim, in satisfaction of which that sum is due, was not transmissible by virtue of the Bankrupt Statute. To take an illustration from another branch of the law: In the case of Cochrane v. Bogle[1] we have an example of a right so personal that it could not be made the subject of diligence by creditors. The question arose before the recent legislation on entails, and was, whether the creditors of an heir of entail possessing under an entail which did not effectually prohibit sale could adjudge the faculty or power of sale which was competent to the heir. It was ruled that it was personal, and not transmissible; but if the lands had been sold there could have been no doubt that the creditors would have been entitled to attach the proceeds. So in the recent case of Auld v. Shairp some doubt was entertained whether the executrix had a right to take up a claim arising out of slander, and to raise an action on it after the death of her husband who had been defamed. But there could have been no doubt that if Dr Auld had raised the action, and obtained decree before his death, his widow and executrix would have been entitled to uplift the money. Or, again, suppose in this case the debtor were unable to pay, and adjudication were led of his real estate, and M'Kechnie had made up a title to it, would there be anything special in the position of that property, owing to the fact that it was acquired by enforcement of a personal claim of damages, which would protect it from the diligence of creditors? I think not. In short, I think the personal element vanishes when the claim is satisfied, and we are only dealing with a sum of money which necessarily passes to the trustee under the 103d section of the Bankruptcy Act.

There is another point, on which it is not necessary to enter. I can imagine circumstances under which the creditors in a sequestration might be held to have abandoned such a claim to the bankrupt, so that they would afterwards be excluded, if anything was recovered, on the ground of implied assignation. But here there are no materials for such a plea.

I think, however, that M'Kechnie is entitled to be kept *indemnis*, and that he may be entitled to some compensation for his time and trouble. I propose, therefore, that we should sustain the title of the trustee, and appoint M'Kechnie to lodge in process a note of his demands.

LORD ORMIDALE and LORD GIFFORD concurred.

LORD NEAVES was absent.

THIS interlocutor was pronounced:—"Before answer, allow the reclaimer to lodge in process a statement of any claim he may have for time, trouble, and expense in connection with the action of damages for slander at his instance against Messrs W. and J. Mutter."

RONALD, RITCHIE, & ELLIS, W.S.—JOHN WRIGHT & JOHNSTON, L.A.—Agents.

[1] March 2, 1849, 11 D. 908, 21 Scot. Jur. 319, H. L. March 25, 1850, 7 Bell, 65, 22 Scot. Jur. 403.

No. 26.

Nov. 17, 1875.
Ross, Skolfield, & Co. v. State Line Steamship Co.

ROSS, SKOLFIELD, AND COMPANY, Pursuers.—*D.-F. Watson—Guthrie Smith—J. J. Reid.*
THE STATE LINE STEAMSHIP COMPANY (LIMITED), Defenders.—*Asher—Jameson.*

Agent and Principal—Joint Stock Company—Powers of Manager.—The principal agent or manager of a joint stock shipping company, to whom was committed the whole management of the company's trading business at home and abroad, and who guaranteed the freight earned by the company's ships, but whose appointment did not confer an express power of drawing or accepting bills on behalf of the company, appointed a sub-agent at a port to attend to the company's business there, and, among other duties, to collect the freights payable at the port. It was the practice of the manager to draw bills upon the sub-agent in anticipation of freight to be earned by the company's ships. The bills, after being accepted by the sub-agent, were discounted by the manager, and retired at maturity by the sub-agent out of freight collected in the interval. The amount was debited to the company in accounts rendered by the sub-agent to the manager. The bills were not entered in the books kept for the company by the manager in such a way as to shew the true nature of the transaction, but this could have been discovered from the accounts rendered by the sub-agent to the manager, which were placed before the auditor of the company.

The manager ceased to hold that office while two of the bills were current, and shortly after became bankrupt. The company having refused to allow the sub-agent credit for the amount of the bills, he sued the company for the amount. *Held* that the manager had not authority from the company to receive and discharge payments in anticipation of freight; that the pursuer had failed to prove by the books or otherwise that the directors were aware or ought to have been aware of the course of dealing; or that in fact the proceeds of the bills had been received by the company; and that the pursuer had therefore failed to establish liability against the company.

Question, how far the books kept for the company by the manager were evidence against the company in a question with the sub-agent.

2D DIVISION. Lord Young.

THE State Line Steamship Company (Limited) was established for the conveyance of goods and passengers between the United Kingdom and North America. They had two lines of steamers, one of which plied between the Clyde and New York, and the other between the Mersey and New Orleans. The registered office of the company was in Glasgow.

Under the powers conferred by the articles of association* of the company, the directors, in October 1872, appointed Lewis T. Merrow and Company, merchants, Glasgow, to be the principal agents or managers of the company's trading business. The terms of the appointment, which was in writing, were as follows:—"First, Messrs Lewis T. Merrow and

* The portions of the articles of association of the State Line Company bearing upon the authority of the managers were as follows:—

"Art. 63. The business of the company shall be managed by the directors. . . . .

"Art. 64. The directors shall have power to appoint such office-bearers, including a manager or managers, as may appear to them necessary for the proper conducting and management of the business of the company. . . . . They shall also have full authority to grant a procuration to any properly qualified person, empowering him, in name and on behalf of the company, to draw, accept, and endorse bills, and to draw and endorse cheques in connection with the business of the company.

"Art. 66. The directors may, from time to time, borrow for the purposes of the company such sum or sums of money as they may think proper, so that no more than £100,000 be owing at any one time over and above such sum and sums of money as may have been borrowed with the sanction of a general meeting."

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Company are hereby appointed the principal agents or managers of the company's trading business and affairs, both at home and abroad, the whole of which shall be under their management, they being bound, however, to carry out any instructions which the directors of the company may at any time see fit to give in the conduct of the business.

"Second, The managers shall be bound to devote their whole time and attention to the company's business, and on no account shall they be entitled or allowed to engage in other business, or to undertake other employment of any kind whatever which can interfere with or be detrimental to the company.

"Third, The managers shall be entitled to a commission at the rate of ten per cent on the gross freights, passage-money, or other earnings of the ships of the company, the managers paying all expenses incident to the management of the business of the company or its affairs, including the maintenance of the different agencies both at home and abroad, and travelling and advertising expenses, and guaranteeing the due payment of all freights, passage-money, or other earnings.

"Fourth, The managers shall provide themselves with suitable offices in Glasgow, and it shall be imperative on them to keep a proper set of books, shewing the whole of their transactions, and all sums received or disbursed by them; which books shall be open at all times to the inspection of the directors of the company, or any party employed by them to examine the same, and shall form the property of the company. The directors shall be entitled to make such provision for the control of the finances of the company as they see fit."

Merrow and Company appointed Ross, Skolfield, and Company, shipping agents, Liverpool, to act as sub-agents for the State Line Company at Liverpool, but the State Line Company were not parties to the appointment. It was the duty of Ross, Skolfield, and Company to take charge of the company's steamers on their arrival, to attend to their loading and unloading, to collect freight payable at Liverpool and remit it to Glasgow, to pay for ships' stores and other disbursements, and generally to attend to the business of the company at Liverpool. For each voyage they rendered an account to Merrow and Company.

Merrow and Company were shareholders to a large extent in the State Line Company. In order to avoid calls upon the shares it was their object to carry on the business of the company as much as possible without applying to the directors for money. With this view, from the month of April 1873, they were in the habit of drawing bills upon Ross, Skolfield, and Company, in anticipation of the homeward freight of the company's steamers. The bills were accepted by Ross, Skolfield, and Company, and thereafter discounted by Merrow and Company, and as each bill fell due it was retired by Ross, Skolfield, and Company out of State Line freights collected by them in the interval, and the amount debited to the State Line Company in the accounts rendered by Ross, Skolfield, and Company to Merrow and Company. Prior to 1st October 1874 there were twenty-one such bills, amounting to nearly £50,000, of which £13,800 was drawn against the freight of the "Alabama," one of the company's steamships.

On 30th September 1874 Merrow and Company intimated to Ross, Skolfield, and Company the arrival at New Orleans of the "Alabama," and advised them of their intention of drawing upon them for £4000 against freight by the "Alabama." Accordingly, on 1st October 1874, Merrow and Company sent two bills for £2000 each to the pursuers for acceptance. They were accepted on the following day, and returned to Merrow and Company. The bills were as follows:—"Glasgow, 1st October 1874. £2000, 0s. 0d. stg. Sixty days after sight pay to our

No. 26. order the sum of two thousand pounds sterling on a/c of freight per s.s. 'State of Alabama.' LEWIS T. MERROW & Co. To Messrs Ross, Skolfield, and Co., 9 Chapel Street, Liverpool."

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On 19th October 1874 Merrow and Co. ceased to be managers for the State Line Company, and, accordingly, Ross, Skolfield, and Company's appointment as sub-agents fell also. On 5th December 1874 the estates of Merrow and Company were sequestrated.

The two bills above mentioned were retired by Ross, Skolfield, and Company at maturity on 4th December 1874. The homeward freight of the "Alabama" was uplifted by Ross, Skolfield, and Company under a special agreement with the State Line Company, but the latter repudiated liability for the bills, and refused to allow Ross, Skolfield, and Company credit for their amount.

Under these circumstances Ross, Skolfield, and Company raised an action against the State Line Company concluding for payment "of the sum of £3731, 19s. 6d. sterling, being the amount contained in two bills, each for the sum of £2000 sterling, dated the 1st day of October 1874, and drawn by Lewis T. Merrow and Company, the defenders' managers in Glasgow, upon the pursuers, and accepted by them, under deduction of the sum of £268, 0s. 6d. sterling standing at the credit of the defenders in the pursuers' books, with interest on the said sum of £3731, 19s. 6d. at the rate of 5 per centum per annum from the 4th day of December 1874 until payment."

The pursuers averred in regard to the bills in question;—(Cond 5) "These bills passed through the books of the defenders, were discounted by them, and the proceeds were applied to the purposes of the company."

They pleaded;—1. The pursuers are entitled to decree as concluded for, in respect that the bills sued on were drawn by the defenders' managers in the execution of their business, and with their authority, and that the said bills were and are the bills of the defenders. 2. The pursuers are entitled to decree, in respect that (1) the said bills were drawn in pursuance of the course of dealing above condescended on; (2) that the actings of their managers in drawing bills in their own name were homologated and adopted by the defenders; and (3) that the proceeds of the discount of the said bills were applied to the purposes of the defenders.

The defenders denied liability, in respect, as they alleged, that the bills sued on were not granted with their authority, or on their behalf, and that the proceeds were not received by them.

The Lord Ordinary having allowed a proof, a minute was put in for the parties (No. 18 of process);—"The pursuers moved for leave to amend the summons by striking out the words following, namely:—'being the amount contained in two bills each for the sum of £2000 sterling, dated the 1st day of October 1874, and drawn by Lewis T. Merrow and Company, the defenders' managers in Glasgow, upon the pursuers, and accepted by them, under deduction of the sum of £268, 0s. 6d. sterling standing at the credit of the defenders in the pursuers' books.'

"And the parties consent that the Lord Ordinary and the Court shall have power to determine in this action the question whether or not the bills which are mentioned in article 5 of condescendence were drawn by Lewis T. Merrow and Company with the authority or on behalf of the defenders; and according to the determination of this matter the pursuers shall have credit for the said bills in accounting with the defenders."

The result of the proof was shortly as follows:—Neither the articles of association of the State Line Company nor the written appointment of Merrow and Company as managers conferred any express authority upon

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the managers to draw or accept bills for the company, or to discharge prepayments of freight for the company.

It appeared that the directors of the company were not in fact aware that Merrow and Company were in the habit of drawing bills in anticipation of freight. The proceeds of such bills were entered as cash receipts in the books kept by Merrow and Company for the State Line Company. The true nature of the transactions was not apparent upon the face of the books, though this might have been discovered from the statement of each voyage rendered by Ross, Skolfield, and Company to Merrow and Company. Only one audit of the company's books had taken place, viz., in December 1873 for the year ending 2d October 1873. Upon that occasion the voyage statements were placed before the auditor. The auditor's evidence on this point was as follows:—"I had to ask for the voyage statements to audit the account-current which I got from the secretary, and Merrow and Company supplied me with voyage accounts for that purpose. These enabled me to audit the account-current and the balance-sheet. (Q.) Did you require to have recourse to any of the books kept by Merrow and Company? (A.) Not necessarily, had the accounts been fully instructed by vouchers. I only required them as corroborative evidence. I had no occasion to examine the accounts between Merrow and Company and their sub-agents."

It was impossible to ascertain from the documents put in evidence whether or not the State Line Company were *lucrati* by the proceeds of the two bills in question. The proceeds were lodged in bank in the name of Merrow and Company, who about that time made disbursements for the State Line Company. On the other hand, Merrow and Company were largely indebted to the State Line Company for unpaid calls upon the shares held by them.

The Lord Ordinary pronounced this interlocutor:—"Having heard counsel for the parties, and considered the record, proof, and productions, along with the joint minute, No. 18 of process, sustains the amendments now made by the pursuers in terms of the minute, No. 18 of process: Finds that the two bills mentioned in the 5th article of the condescendence were not drawn by Messrs Lewis T. Merrow and Company with the authority or on behalf of the defenders: Therefore assoilzies the defenders from the conclusions of the summons, and decerns: Finds the pursuers liable in expenses," &c.*

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* "OPINION.—I was desirous that the parties in this case should come to some arrangement, if possible, because my judgment is very much against my inclination. I am of opinion, upon the evidence, that it has not been proved that these bills were drawn with the authority and on behalf of the defenders. In the management of a company the authority to draw or accept bills is not an authority to be implied, it is not usually possessed, and it requires to be conferred. It does not arise from the office. Now, Mr Merrow himself, who gave very candid evidence, acknowledged that there was no authority conferred upon him. It is said that in pursuit of an effort, in which they ultimately failed, to carry on the business of the State Line Company without applying to the directors for money, Merrow and Company drew and accepted bills; but there was no authority to do so. It is further said that there was no secret about it; that is to say, that the bills were entered in the books which were kept for the company's business by himself and his partner as managers, but Mr Merrow could not say that they were aware of the fact, and he certainly had never mentioned it to them. Two of the directors were called, one of whom was actually examined, and the other dismissed without examination, being held as concurring, and they were corroborated by the secretary, that they were totally ignorant of such a thing. I cannot therefore hold that there was authority;

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The pursuers reclaimed.

Argued for them*;—(1) The powers of Merrow and Company were not to be measured by those of an ordinary agent. They were by the terms of their appointment responsible for the payment of the freight. They were not exceeding their powers in drawing to account of freight, which was only a mode of getting in the money which under their appointment they were bound to do, and the pursuers were, in paying to them, only doing what they were bound to do, viz., remitting the freight. Had they done so in cash that would have discharged them, and so should this mode of remittance. (2) Even if Merrow and Company were acting in excess of their powers the defenders must be held to have homologated the course of dealing followed by their managers. It did not matter whether the directors were personally cognisant of the matter or not. The books kept by the managers were the books of the company. The books and vouchers, and, in particular, the statements of voyages sent by the pursuers, were patent to the directors and their auditor, and a proper investigation would have shewn that Merrow and Company were drawing bills in anticipation of freight. (3) The defenders had in

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and even had there been authority to draw bills or to accept bills, in the one case for money due to the company, and in the other for money due by the company, I should not by any means have held that that imported authority to anticipate freights. I cannot take the view that was urged by Mr Smith that the managers were quite at liberty to take as much prepayment of freights to be earned hereafter as any agent in Liverpool or elsewhere was willing to give him. It is a serious matter to pledge the earnings of the company's ships for the future, and put the money into the hands of the managers. That is a trust which it is for every company to determine for itself whether it will repose in the managers or not. It does not affect the question that the managers did so, and that the directors, by a scrutiny of their books, might have ascertained it,—I mean the books kept by them as managers of the company,—because the information recorded in those books is the managers' information, and not necessarily the knowledge of their employers, unless it was their duty, which I cannot hold it was, to make a searching examination of the books in order to see whether there was not evidence of some irregularity, which they had had no reason whatever to suspect. Therefore, though for all purposes I regard these as the books of the company itself, as much so as the books of any company kept by the manager and under his superintendence, I do not hold that the directors are to be held as sanctioning this practice, which the managers had addicted themselves to, of drawing bills, not only for money due, but also in anticipation of money to be earned. Therefore, though firmly believing that the bills were accepted, and the money paid, in the honest belief entertained by the pursuers that the money was for the accommodation of the State Line Company, the managers having power to take advances on account of the company,—while thoroughly believing that that was their state of mind, and that their case is a hard one, I cannot, upon the evidence, arrive at the conclusion that the practice was sanctioned by the company so as to bind them; and my judgment will be to that effect, and assoilzieing the defenders from the conclusions of the present action, with expenses."

* The parties differed as to the purport of the second clause of the joint minute, No. 18 (*supra*, p. 136). The defenders maintained that its effect was to narrow the question to the authority of Merrow and Company to draw the bills in question on behalf of the defenders, and stated that if this had not been their understanding they would have led further evidence upon other branches of the case. The pursuers maintained that they were entitled to prevail if they could establish the indebtedness of the defenders upon any of the grounds pleaded on record. The case was debated upon the more general footing, the defenders reserving their right to found upon the joint minute in case of an appeal to the House of Lords.

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effect got the benefit of the proceeds of the bills in question in the shape of stores. The evidence on this point was not perhaps so clear as might be desired, but unless the defenders could shew that Merrow and Company were in possession of other funds belonging to the company when the bills were discounted it followed that the disbursements by Merrow and Company for the defenders must have been made from the bills in question.[1]

For the defenders the undernoted authorities were cited.[2]

At advising,—

LORD JUSTICE-CLERK.—As originally framed this action was laid upon two bills of exchange. When the case came to be tried by the Lord Ordinary the reference to the bills in the summons was struck out, and it became an action simply for payment of money. The question tried before the Lord Ordinary was whether or not the bills mentioned in article 5 of the condescendence were drawn by Merrow and Company with the authority or on behalf of the defenders; and from the language of the joint minute I should not have gathered that any other question was in the contemplation of the parties who signed it. But the real question is, whether Merrow and Company could anticipate an expected asset of the State Line Company in the shape of freight and give a receipt for it. If they could do so, it is of no moment how payment was made, whether by a draft on the agents, accepted by them, or by a remit of money.

The affirmative of this question can only be maintained on the grounds, first, that it was within the province of Merrow and Company to anticipate freight from the nature of their employment; secondly, if that be not sufficient, that it was warranted by the course of dealing sanctioned by the State Line Company; and thirdly, if neither of these grounds avail, that it was the fact that the money was applied to company purposes, and therefore that the company received substantially payment of the freight.

On the first of these questions, viz., whether Merrow and Company had right to anticipate freight, I am very clearly of opinion that in the case of an ordinary agent no such powers can exist. This was nothing but borrowing money on the security of expected freight from the person into whose hands the freight would come; and that is a power which an ordinary agent does not possess. But it was maintained for the pursuers, and to some extent not without soundness, that Merrow and Company were not ordinary agents, and that the manager of a joint stock company, who has the whole charge of a business, who is not only entitled to manage, to the exclusion of any other member of the company, but is also liable for the fund to be realised in the course of his administration, does not stand in the same position as an ordinary agent. In this case Merrow and Company were appointed managers in the widest possible terms. They were to transact the whole trading business of the company. The shareholders, who were not necessarily men of business at all, were not to manage the business,—not even the directors, unless they chose to interfere. The managers were to

[1] *Authorities as to Powers of Managers.*—Turnbull v. M'Kie, Feb. 26, 1822, 1 S. 353 (N. Ed. 331); *In re* Land Credit Company of Ireland, *ex parte* Overend, Gurney, and Co., April 30, 1869, L. R. 4 Chan. App. 460; *In re* London and Mediterranean Bank, *ex parte* Birmingham Banking Company, July 2, 1868, L. R. 3 Chan. App. 651.

[2] North British Bank v. Ayrshire Iron Co., June 29, 1853, 15 D. 782, 25 Scot. Jur. 466; Smith's Mercantile Law, p. 127.

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appoint agents, and to guarantee the freight. Merrow and Company were thus responsible for the whole profits, and I am not inclined to say that they were not entitled to regulate to a very large extent the manner in which the funds were to come into their hands. I can conceive cases in which it would be very beneficial to the company that agents so appointed should be entitled in some degree to regulate payment of freight before it became due. But there is one element in this appointment which must not be overlooked, and which is patent on the face of it, that the position of Merrow and Company was temporary. If their powers of management ceased before the freight became an asset of the company at all the expected security necessarily fell, and reduced the whole transaction to a money advance on the acceptance of the Liverpool agents without any security. On the first matter, then, I hold their bills to be nothing more than receipts for prepayment of freight, and I think it was not within the powers of Merrow and Company to bind the expected freight.

The next question is, whether anything in the course of dealing sanctioned by the company had the effect of enlarging the powers of Merrow and Company in this particular; and this raises the question, how far the books kept by Merrow and Company are evidence for the pursuers. If the books did disclose such a course of dealing, I should be of opinion that, although Merrow and Company did not comply with the conditions of their appointment in keeping proper books—as these were the only books kept, and that in the knowledge of the company itself, and seeing that they were audited by the company's auditor, who was certainly bound not merely to go over the calculations and figures, but to report the whole state of the company's affairs and examine the vouchers, and seeing also that the auditor had access to these books, and did examine the accounts relating to the steamers,—I should be of opinion that the books were perfectly good evidence as they stand to bring home knowledge to the directors of what they contain, provided they did contain evidence of a course of dealing of this kind, especially as the question arises not with Merrow and Company, but with a third party. I think that third party is entitled to hold the books of Merrow and Company to be the books of the company to every effect. If there is any defect in these books that was the fault of the company. I went along entirely with the argument for the pursuers, that whatever might be said in a question between Merrow and Company and the State Line Company it is out of the question for the directors of the State Line Company to say that Merrow and Company did not keep the accounts in the way in which they instructed them.

But then comes the question, what did the books indicate? They contain no evidence of the usage which is alleged. I should say that Merrow and Company did not consider that they were dealing on behalf of the company in the drafts which they made, but apparently the reverse, for the entries of the proceeds of the bills are reported not as the result of the prepayment of freight, but of cash payments by Merrow and Company. It is the fact that in some twenty instances in the course of the company's business such bills were drawn, but they were not so entered as to disclose their true character. You can perhaps find it out if you examine very minutely, but in order to establish implied authority for a course of dealing it is necessary to have something much more distinct.

The third question is one on which I have more difficulty, viz., whether this money was truly applied to the purposes of the company. I should not consider it absolutely conclusive that Merrow and Company were indebted to the

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State Line Company at the time when the bills were discounted, for if it was clearly apparent that, although in debt to the company, Merrow and Company had no other funds to apply to a purpose for which the State Line Company were responsible, I am not prepared to say that their being indebted to the company would be conclusive against the pursuers' contention. My difficulty is rather to find any materials on which that result can be arrived at. We do not know whether the debt due to the company arose on shares alone, which were held by Merrow and Company, or on the company's business. The whole matter is left in perfect darkness. At the date when these bills were discounted there were payments made by Merrow and Company on behalf of the company, but I am not able to say that these payments were made from funds provided by the bills. The payments were made out of a general account, and the money was paid into that general account, and that is all that can be said.

On these grounds I concur in the result at which the Lord Ordinary has arrived.

LORD ORMIDALE.—This is just a case of borrowing money by Merrow and Company, by drawing and accepting bills. The question, then, comes to be whether Merrow and Company, the managers of the State Line Company, had the power of so borrowing money. I doubt whether even the directors themselves had, under the articles of association, power to borrow money in such a way. I rather think they had not. Every presumption is against the idea that the board conferred such a power on their managers, and certainly I cannot find anywhere in the proof evidence of a direct authority. When we look at the proof we find two of the directors concur in saying that Merrow and Company could get, and did get, money from the board whenever they needed it. It has been, however, argued that there was an implied authority. Of that also I am unable to find any evidence. The only witness who speaks to this is Mr Duncan, the auditor, who examined and checked the books of the company, but it does not appear to me to have been part of his duty, beyond the matter of figures, to say whether the business of the company was being properly conducted or not.

The point—indeed the only one—upon which I felt some difficulty was as to whether the State Line Company were to be taken as bound by the books of Merrow and Company. As between Merrow and Company and the State Line Company these books are not evidence at all, and the question is how far they are so in a question with Merrow and Company's sub-agents. I do not think they are. I am not able to distinguish Merrow and Company from the pursuers, who are just the hands of Merrow and Company in carrying out their arrangements.

As regards the proceeds of the bills, I am unable to find that the company were *lucrati;* and I agree with your Lordship in the chair in holding that there is a total absence of evidence that the pursuers' moneys were applied for the benefit of the State Line Company.

LORD GIFFORD.—I have come to the same result, and to a large extent upon the same grounds. The action as originally laid was in the form of an action by the acceptor of two bills to recover the amount contained in them against the defenders' limited company, who, it is said, were represented by the drawer. An amendment of the summons has, however, now been made, by which all re-

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ference to bills is excluded from the conclusions, and the action now reads simply as a petitory action for a sum of money. If, upon any ground disclosed on record, the pursuers can establish their claim against the defenders for the sum sued for, or any part of it, it will be a good action. A difficulty has, however, been created by the second part of the joint minute, which appears to be an agreement by the parties to narrow the question to the authority of L. T. Merrow and Company, as managers, to draw the bills on behalf of the defenders. It was stated, however, for the pursuers that this was not their intention. I am not unwilling to consider the question between the parties in its general aspect, and on all the grounds embraced on record, although I cannot quite get over the difficulty caused by a party asking a judgment on one issue as the issue in the cause, and then discarding that issue and raising another.

The question is substantially whether the pursuers, who were sub-agents under Merrow and Company for the State Line Steamship Company, are entitled to recover from the limited company advances which they made to the principal agents. Laying aside the mere form of the action and the form in which the bills were drawn, the real question comes to this—Had Merrow and Company power to borrow for the defenders, and power to bind the defenders to repay the loan? I scarcely think it makes any real distinction that Merrow and Company borrowed from the sub-agent and not from a stranger or third party. No doubt the borrowing was made in anticipation of freight to be earned. The freight was looked to as the means of repaying the loan, but the transaction was really £4000 lent by the pursuers, the sub-agents, to Merrow and Company as principal agents. The question is the same as if the pursuers had handed the sum in cash to Merrow and Company, and said that they would keep it out of freight, which, as sub-agents, they expected to collect and receive. But, then, this expectation was not realised, for, before the freights became due, Merrow and Company were displaced from the agency, and consequently the pursuers, as sub-agents, were also displaced, and the defenders uplifted their own freight, and hence the present action. Had, then, Merrow and Company power to contract a simple loan, binding the defenders for repayment, or had they power to impledge freight not yet due? If they had power to do either, the pursuers must prevail.

Merrow and Company were the principal agents or managers of the defenders' trading business. I am disposed to think that the appointment was within the articles of association, which gives power to the directors to appoint a manager or managers. Undoubtedly their appointment involved very large powers. But did it include a power to borrow, or a power to impledge unearned freights, so as to bind the State Line Company? The general rule is that a manager has not power to borrow. Such power, when it is meant to be given, must always be specially or expressly conferred, and will very rarely be implied or presumed, and it is not included in the idea of management of such a business as the State Steamship Company. Nor is a power to pledge his principal's property easily presumed in the appointment of a manager. Perhaps, it may be said, *a fortiori*, that if the manager has not power to borrow on the personal security of the limited company, still less has he power to impledge the freight, the ships, or other property of his employers. The case is quite different from an advance upon goods consigned for sale. In that case the consignor is proprietor of the goods, and can do what he likes with them. Of course, he may pledge his own goods to the consignee who gives him an advance thereon. If,

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indeed, a manager advances money for behoof of his principal, and in course of his management he becomes their creditor on account, he will have a right of action against that principal, whether the money advanced came out of his own pocket or was borrowed. The difficulty only arises when the money borrowed by the agent or manager is not applied for the principal's use, so that the principal is not *lucratus*.

I have come to be clearly of opinion that Merrow and Company had no power to borrow so as to bind the State Steamship Company, unless the money borrowed was applied for the company's use in the ordinary course of management. If, on their general account, no balance was due to Merrow and Company, and this turned out to be the case, then it is clear Merrow and Company could not sue their principals for the sums in question, no part of which sums had been applied for the principal's behoof.

Now, Merrow and Company, not having any right of action for this sum, have the sub-agents any right of action? If I am right in holding that the terms of their appointment did not confer upon Merrow and Company power to borrow, have their written powers been increased by the course of dealing between them and the defenders? It is sought to establish this, in the first place, by general evidence, and secondly, by Merrow and Company's books. In order to give Merrow and Company larger powers than those contained in their written appointment the claim to larger powers must be brought home to the knowledge of the defenders. An agent cannot enlarge his powers merely by exceeding them, for however long a time. Homologation is the foundation of this part of the pursuers' case, knowledge is essential to homologation, and this knowledge and this homologation must be very clearly proved, in order to override and extend the terms of a written appointment. I think that the pursuers have failed to shew that the State Line Company or their directors knew that Merrow and Company were borrowing money for them.

As to Merrow and Company's books, even if these had shewn far more clearly than they do that they were getting advances from the sub-agents, I should hesitate to affirm that the pursuers are entitled to found upon these books in a question with the defenders. No doubt the defenders had a right to look at these books, but that was a check in favour of the defenders. I do not think that if a principal has a right to look at his agent's books, but does not avail himself of that right, the agent can say, "You ought to have looked at my books, and therefore you must be held as authorising all that you might have discovered there." Although, for certain purposes, the agent's books are the books of the principal, the agent can never found upon them against the principal. Were the pursuers, then, in the position of third parties, or were they mere sub-agents of Merrow and Company? I think they were sub-agents, and not entitled to the privilege of third parties to found on Merrow and Company's books in their favour. Merrow and Company could never give the sub-agents larger powers than they had themselves. Nor, in a question between the pursuers and the defenders does it matter what view Merrow and Company took of their powers. It is not a question of good faith; it is a question what the powers of Merrow and Company actually were. Nor will it do for the pursuers to say that they took it for granted that Merrow and Company had such powers.

Upon the question of power to borrow I therefore come to the result that Merrow and Company and their sub-agents, the pursuers, could only claim what was actually applied for behoof of the defenders; and if Merrow and Company

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applied the advance to their own purposes, the pursuers have no claim against the defenders.

But it is said that the sums were applied for behoof of the State Line Company. If it were clearly made out that the advance had gone into the pockets of the State Line Company, it would be difficult to resist the pursuers' claim. But, in the first place, Merrow and Company's books do not establish this. These books have a column for the steamers, and another headed "private." While one of the bills is entered in the steamer column in pencil the proceeds are in both cases put into the private column. Viewing these books as the books of the State Line Company, it is only the steamer column which represents their books. The private column is, in no possible sense, the books of the State Line Company, but are the books of Merrow and Company as individuals; and, as such, these books shew that Merrow and Company, as individuals, received the whole proceeds of the bills. If the money has gone into the pocket of Merrow and Company, the pursuers must shew that it came out of the pocket of Merrow and Company; and the only way to shew that is to shew that Merrow and Company made advances to the State Line Company. But, instead of that, Merrow and Company were greatly indebted to the State Line Company. I do not know that we can distinguish between a debt on business transactions and a debt arising from unpaid calls. If the State Line Company had been asked to repay advances made by Merrow and Company, they would have been entitled to say that a larger sum was due to them by Merrow and Company in the form of unpaid calls. But really we are left very much in the dark. It is not proved that Merrow and Company had no funds of the defenders in their hands when they drew the bills. If they had such funds, they were bound to have applied them in the first instance.

I do not think, however, that the books of the agent can be read in favour of the sub-agent in a question with the principal.

On the short ground that this is an action against the State Line Company for a loan obtained by their agent, and that the agent had no power to borrow, and that it has not been shewn that the sum borrowed was applied for the benefit of the principal, the opposite appearing to be the case, I am of opinion that the defenders should be assoilzied.

LORD NEAVES was absent.

THIS interlocutor was pronounced:—"Find that the sums sued for do not constitute any debt or obligation against the defenders: *Quoad ultra* adhere to the interlocutor complained of, and find the reclaimers liable in additional expenses," &c.

GIBSON-CRAIG, DALZIEL, & BRODIES, W.S.—WEBSTER & WILL, S.S.C.—Agents.

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ANDREW GIBSON, Suspender.—*Balfour—M'Kechnie.*
ANDREW ADAMS AND ANOTHER, Respondents.—*Asher.*

Proof—Writ or Oath—Suspension—Removing—Verbal Lease.—The proprietor of a house and garden in a town obtained a Sheriff Court decree ordaining the tenant to remove at the Whitsunday removing term 1875, being the expiry of seven months for which he alleged the premises had been let.

In a suspension brought by the tenant he alleged—1. a verbal agreement for a lease of five years followed by possession and *rei interventus;* and 2. an interim agreement for a yearly tenancy. *Held* that the suspender could only

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prove the averment as to a five years' lease by writ or oath, but that the averment as to a yearly tenancy could be proved *prout de jure*, and the landlord, in respect of his averments as to a seven months' tenancy, appointed to lead in the proof.

THIS was a suspension of a decree of removing, obtained in the Sheriff Court of Aberdeenshire by Andrew Adams and his wife, as proprietors of a cottage and garden at Ruthrieston, against Andrew Gibson, the occupant thereof. The Sheriff Court summons, which bore date 23d March 1875, concluded that the defender be decerned to remove from "the dwelling-house of Woodbine Cottage, steading, offices, garden ground, and other premises . . . . occupied by him as tenant thereof under the pursuers, and that at the 4th day of June next 1875" (the Whitsunday removing term in Aberdeen), "at which date defenders' right to occupy said subjects expires." The proprietors averred that they were heritable proprietors of Woodbine Cottage and garden, having purchased the same from a Mr Duthie in the beginning of March 1875, with the intention of occupying them on 4th June of that year. They stated that Mr Duthie had told them that the subjects were let to the defender from the end of October 1874 till 4th June 1875, and that, upon the sale being completed, Mr Duthie had informed the defender that he must leave at that date.

The defender stated that he was tenant of the subjects under a verbal lease for five years from 4th December 1874, which lease had been followed by possession, and *rei interventus*, in so far as he had improved and planted the garden, at considerable expense to himself, with the approval of Mr Duthie, the lessor.

The pursuers pleaded, *inter alia*;—(2) To entitle the defender to retain possession of the subjects after the 4th June next, under his alleged lease of five years, he is bound to constitute his lease by written evidence. (3) The defender's averments relative to his expenditure in connection with the garden, made with the view of founding a plea of *rei interventus*, are irrelevant in the present action; and, in any view, the plea of *rei interventus* is untenable, as the defender's operations in the garden were carried out after he had received notice to quit. (4) The defender is not entitled to a proof of alleged *rei interventus* having reference to a verbal lease for more than one year. (5) In any view the defender, supposing *rei interventus* had taken place, could prove the alleged verbal lease only by the oath of the granter.

The defender pleaded;—(1) The said lease is, in the circumstances, at least effectual for one year from said term of entry.

On 13th May 1875 the Sheriff-substitute (Comrie Thomson) granted decree of removing as concluded for; and on 27th May the Sheriff (Guthrie Smith) adhered to his Substitute's interlocutor.

Gibson, the defender, then, on 2d June, lodged this note of suspension of the decree of removing. The note was passed on caution. In the statement of facts annexed to the note he averred, as he had formerly done in the Sheriff Court, that he had a verbal lease for five years from Duthie, but added (Stat. 2), "In the meantime, and until the said lease for five years was formally completed, the complainer understood and believed, and in point of fact it was the case, that the said subjects were let to him, and he was to occupy and possess the same for at least the period of one year from and after the said 4th of December 1874." The respondents in their answers repeated the statement that Gibson was allowed to occupy the subjects from the end of October 1874 until 4th June 1875. They also explained that the averment of a lease for one year was now made for the first time. The suspender further averred that he had ex-

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pended money in sowing and preparing the garden in the spring of 1875 to the knowledge of Duthie and the respondents, and if he were removed as at 4th June he would not reap the crop he had sown

On 15th October the Lord Ordinary pronounced this interlocutor:—"Having heard counsel for the parties, allows them a proof of their respective averments so far as not admitted, the respondents to lead in the proof."

The respondents reclaimed, and argued;—(1) On competency of new statement as to one year's lease. It was not competent for a defender in an action of removing, which requires the greatest despatch, to cause delay by stating new and material averments and pleas in a suspension in this Court. The object of allowing statements of fact and pleas in law in a suspension of a removing was to promote despatch, and not to afford ground for additional delay. (2) The new averment being incompetent, all that remained to be considered was the original avernment of a verbal lease for five years, followed by *rei interventus*. It was settled law that a verbal lease for five years could only be proved by writ or oath of the lessor; and only after the lease was so set up could there be a proof *prout de jure* of *rei interventus*.[1] An avermènt of a verbal lease for any period over a year could not be allowed to go to proof as if it contained an averment of a verbal lease for one year only.[2] The proof here must therefore be restricted to one by writ or oath.

Argued for the suspender;—The defender in an action of removing could only bring the decree under review by means of a suspension,[3] and a record had to be made up in such suspensions.[4] The object of this procedure was that the case might be clearly stated and fully put before the Court. There could, therefore, be no doubt that the additional statement was competent.

The pursuers of the removing themselves alleged in their summons that the defender was a tenant, and that for a period over a half year, which certainly raised a presumption that the defender had some title. The very nature of the subjects, comprising as they did a large garden, precluded the idea of a six months' tenancy, and that during the winter months. If the pursuers could turn out the defender at Whitsunday, they could have done so at any time. Once a person was in possession of such subjects as these on a just title he was entitled to retain possession till the natural termination. Parties to a tenancy such as this could neither of them act capriciously.[5]

All verbal leases were good for one year at least.[6]

At advising—

LORD PRESIDENT.—This is a suspension of a decree of removing pronounced by the Sheriff-substitute of Aberdeenshire, and confirmed by the Sheriff-principal. It bears, as we gather from the note of suspension, to decern and ordain the complainer to flit and remove himself, in the ordinary terms, from certain subjects occupied by him "as tenant thereof under the pursuers, and that at the 4th day of June next, 1875, at which date the defender's right to occupy said subjects expires." We are informed that the 4th of June is the Whitsunday term in

[1] Walker v. Flint, Feb. 20, 1863, 1 Macph. 417, 35 Scot. Jur. 253.

[2] Fowlie v. M'Lean, Jan. 18, 1868, 6 Macph. 254, 40 Scot. Jur. 141; Gowans v. Carstairs, July 18, 1862, 24 D. 1382, 34 Scot. Jur. 700.

[3] 6 Geo. IV. cap. 120 (Judicature Act, 1825), sec. 44.

[4] 1 and 2 Vict. cap. 86, sec. 4.

[5] Buchanan v. Baird, Dec. 15, 1773, M. 8478.

[6] A v. B, June 26, 1791, M. 15,181; Lady Craiglockhart v. Burton, Feb. 10, 1711, 4 Br. Sup. 830; Hunter on Landlord and Tenant, vol. i. 351.

Aberdeen, and the respondents, who are the owners of the subjects, and pursuers of the removing, say that the terms of the complainer's occupation were that he was to occupy the subjects in question from the end of October 1874 until 4th June 1875, when he was bound to remove. This is a very peculiar period of occupancy—it is not yearly nor even half yearly. It is a half year's term *plus* a broken period of another term. The allegation, however, is that he was tenant of the subjects for that period. The complainer, on the other hand, contends that when he entered on the occupation of these subjects in the end of 1874 the respondents' author promised to give him a five years' lease from and after December 4, 1874, but that in the meantime, until that lease was made out, he was to be tenant, and to occupy the subjects for at least a year from and after 4th December 1874. We have thus two distinct averments—(1) that there was an agreement to give him a five years' lease, and (2) that until that was done he was to hold on a yearly tenancy.

The Lord Ordinary has not distinguished between these averments, but has allowed the parties a proof of their averments generally. We cannot allow that, because it is in violation of the settled rule of law that verbal leases for more than one year can only be proved by writ or oath of the party. So we must alter the interlocutor to the effect of restricting the mode of proof of the five years' lease to writ or oath.

As regards the proof of a lease for one year, I am rather inclined to adhere to the Lord Ordinary's arrangement that the respondents are to lead. A very peculiar period of tenancy is averred by them, which involves some sort of special agreement between the parties; and where persons aver such peculiar agreements they are not to be taken for granted, but fall to be proved. I think, therefore, that the respondents should lead in the proof.

LORD DEAS.—This interlocutor *ex facie* allows a proof by parole of the averment of a verbal lease for five years. I can have no doubt that we must recall that interlocutor. Your Lordships are all well aware that, by a series of decisions, a verbal agreement for a lease of more than one year's duration can only be proved by writ or oath. If the bargain be so proved, then, but not till then, *rei interventus* may be proved by parole to make the bargain effectual.

There is here, however, a separate averment of a lease for one year, and that averment it is competent to prove by parole. It is true that the defender's statements in the inferior Court record are exceedingly vague, but so also are those of the pursuers; and I think, therefore, it is only fair to take into view the defender's explanation in the record in this Court (Stat. 2), which is, in substance, that the subjects were, by a separate and distinguishable bargain, let to him for one year until a lease for five years could be formally entered into. It certainly seems more probable, *prima facie*, that the lease was for a year than that it was for the period averred by the pursuers—viz., from the end of October to 4th June. The lease was one of a cottage and garden. A garden requires to be stocked, and the person who stocks it naturally expects to reap the fruits. The period of endurance averred by the pursuers is unusual, unless it be sanctioned by some local usage, and I therefore agree with your Lordship and the Lord Ordinary that they ought to lead in the proof.

LORD ARDMILLAN and LORD MURE concurred.

THE COURT pronounced this interlocutor:—"Having heard counsel

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on the reclaiming note for Andrew Adams and Margaret Adams against Lord Young's interlocutor of 15th October 1875, recall the said interlocutor: Find that the averment of the complainer,—that Robert Duthie, when proprietor of the subjects now belonging to the respondents, promised and agreed to give the complainer a lease of the said subjects for five years from 4th December 1874, —can be proved only by writing or by the oath of party: *Quoad ultra* allow the parties a proof of their averments *prout de jure*, the respondents to lead in the proof, and the proof to proceed before Lord Deas on a day to be afterwards fixed by his Lordship, reserving all questions of expenses."

THOMAS CARMICHAEL, S.S.C—ALEXANDER MORISON, S.S.C.—Agents.

No. 28.

Nov. 20, 1875.
Stafford v. M'Laurin.

JANET M'LAURIN OR STAFFORD, AND HUSBAND, Petitioners.—*Balfour—J. P. B. Robertson.*
AGNES FERGUSON OR M'LAURIN, &c., Respondents.—*D.-F. Watson—Asher.*

Arrestment on Dependence—Expenses.—Arrestment is not competent on the dependence of an action of reduction in which the only pecuniary conclusion is for the expenses of process.

1ST DIVISION. Lord Shand. B.

THIS petition for recall of arrestments was presented by Mrs Janet M'Laurin or Stafford, residing in Surrey, and her husband, under sec. 20 of 1 and 2 Vict. c. 114 (Personal Diligence Act, 1838), on the ground that the arrestments were incompetent and oppressive.

The arrestments complained of had been used on the dependence of an action by Mrs Agnes Ferguson or M'Laurin and others against the petitioners and others, concluding for reduction of certain deeds, and for payment of £100, "or such other sum as our Lords shall modify as the expenses of process to follow hereon."

The Lord Ordinary pronounced this interlocutor:—"Recalls the arrestments complained of, except to the extent of £100 sterling, and decerns, reserving the question of expenses."

The petitioners reclaimed, and argued;—Arrestments could only be used on the dependence of an action which concluded for payment of money under section 16 of the Personal Diligence Act, 1838. Arrestment was not a proper diligence to secure a debt which was future or contingent. Until the action was decided against the defender it was not certain that he would be found liable in expenses. The claim for expenses was not the subject-matter of the action. But even if the expenses should be held to be the subject-matter of the action they were a future debt. The reason why arrestments were held to cover interest and expenses in actions of debt was that they grew out of the debt. The practice in the Bill-Chamber had been to refuse to issue diligence on a summons which did not conclude for a sum of money.[1]

Argued for the respondents;—The conclusion for expenses was a claim

[1] Ross v. Renton, Feb. 26, 1712, M. 690; 2 Bell's Com. (5th ed.) 67; May v. Malcolm, June 7, 1825, 4 S. 76; Telford's Executor v. Blackwood, Feb. 3, 1866, 4 Macph. 369, 38 Scot. Jur. 186; Personal Diligence Act, 1838, 1 and 2 Vict. c. 114, secs. 16 and 17; Dove v. Henderson, Jan. 11, 1865, 3 Macph. 339, 37 Scot. Jur. 161; Shand's Practice, 226; Wilkie v. Tweedale, Feb. 25, 1815, F.C.

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for a sum of money. claim for expenses. At advising,—

The principal debt was in the same position as the They both depended on the success of the action.[1]

LORD PRESIDENT.—This is a petition for recall of arrestments, and the Lord Ordinary has so far granted the prayer and has loosed the arrestments except to the limited extent of £100. The petitioners have reclaimed against the Lord Ordinary's interlocutor, and contend that the arrestments should be recalled *in toto*, on the ground that they are wholly incompetent. The question involved is one of some importance and of general application, but I confess that I entertain no doubt of the way in which it is to be solved. The action on the dependence of which the arrestments were used is one of reduction, and of nothing else. It concludes for the reduction of certain documents, and for payment of £100, or of whatever other sum shall be modified as the expenses of the process. It was conceded in the argument that, but for this last conclusion for expenses, the arrestments would be incompetent. The question before us therefore is reduced to this point, Whether in an action on the dependence of which otherwise arrestments could not be used, they are nevertheless made competent by the fact of the conclusion for expenses? I am of opinion that they are not. I think that the case of Weir v. Otto, 8 Macph. 1070, is directly in point, and that the present case goes no further. I am quite unable to see any distinction between the two diligences of inhibition and arrestment on the dependence of an action.

But there are various other authorities which have been referred to, and which are of great importance, because in these cases it was undoubtedly taken for granted that such a diligence as has been used here would have been incompetent. For example, there is the case of Telford's Executor v. Blackwood, 4 Macph. 369, in which the petitioner prayed for recall of arrestments used upon the dependence of an action of count, reckoning, and payment. This action concluded for payment by the defenders to the pursuers of the amount that should appear to be due to them, while the pursuers at the same time expressed willingness to pay to the defenders whatever balance, if any, might be found after the count and reckoning to be due by them. With great difficulty the Second Division, when I sat there, held that the arrestment was competent, upon the ground that the conclusion was for payment of a sum of money apart altogether from the separate conclusion for a sum in name of expenses. If the conclusion for expenses had been considered to warrant the arrestment we should have had no reason to consider the other point. That and a variety of other decisions are not direct authorities, but go greatly to aid the inference we draw from the case of Weir v. Otto.

The only difficulty which has been suggested arises from the consideration that arrestment covers the expenses of process, and in like manner the interest which may accrue on the principal sum from the date of citation. From this it is argued that in its original use it was intended that it should so secure the expenses, and did have this effect. But I think it was a good answer which was made to this argument that expenses and interest are future debts not due at

[1] 33 Geo. III. c. 74, sec. 3; 54 Geo. III. c. 137, sec. 2; Thomson v. Butters, March 10, 1798, M. 1224; Wight v. Wight, May 20, 1822, 1 Sh. 424; Macdonald v. Wingate, Feb. 2, 1825, 3 Sh. 494; Ritchie v. M'Lachlan, May 27, 1870, 8 Macph. 815, 42 Scot. Jur. 477; Weir v. Otto, July 19, 1870, 8 Macph. 1070, 42 Scot. Jur. 628; 31 and 32 Vict. c. 100 (Court of Session Act, 1868), sec. 18.

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the date of the arrestment on the dependence, and therefore not covered by it. They only afterwards become a part of the debt, as incidents of and outgrowths from it, and are recoverable under the ultimate process of furthcoming. That is a good explanation of the difficulty.

The argument used upon both sides upon the words of the statute 1 and 2 Vict. cap. 114, secs 16 and 17, is not of much avail. The words of these sections give authority to insert in the summons a warrant of arrestment, and describe the summons on the dependence of which, after the insertion of a warrant, effectual arrestment may proceed, as a summons "concluding for payment of money." It is contended, on the one side, that this can only be an action of debt concluding for payment of a sum of money; on the other, that a summons in which the only conclusion for payment is for expenses is in strict language within the section of the Act. But the determination of the construction of these words of the statute brings us back to what we have already been considering. This statute must refer to summonses which conclude for payment of a principal sum of money.

It has neither been established by practice nor by decision that this arrestment is good, and the appeal to the Act of Parliament is equally unavailing. I cannot assent to the view of the Lord Ordinary, and I am of opinion that the arrestment must be recalled *in toto*.

Lord Deas.—I concur with your Lordship. All the authorities go in the direction pointed out. But apart from authority, I should have arrived at the same result. Diligence by arrestment or inhibition on the dependence of an action is an extraordinary remedy, and is not to be extended further than it has been sanctioned by usage. Now, there is no instance of the remedy having been allowed on the dependence of an action containing no pecuniary conclusions except the conclusion for expenses. All the authorities go the other way. If a different view were taken it would follow that arrestment on the dependence would be competent in all kinds of actions; for, except by mere omission, expenses are habitually concluded for. It has been held that the omission of a conclusion for expenses is not fatal to a claim for expenses, because these are incidental merely, and not part of the subject-matter of the action. I agree with your Lordship that when expenses are awarded the arrestment will be held to cover expenses and interest, but that is because these are incidents which then accrue to the principal sum concluded for, just as an arrestment of a cow has been held to cover its calf subsequently calved.

As to the statute 1 and 2 Vict. c. 114, sec. 16, I should say that it does not apply to a summons whose only pecuniary conclusion is for expenses. It would require something more explicit to make it so apply, and I do not think it was so intended.

Lord Ardmillan.—Even if this question were entirely open, and now to be decided on principle, I should be of opinion that in a case of this kind, which is simply an action of reduction, where there is no petitory conclusion for payment of money, arrestment on the dependence is not competent.

Arrestments in security on the dependence of an action is an extraordinary remedy,—an equitable and appropriate remedy,—but not, I think, to be extended beyond the limits which have been sanctioned by law, and recognised by practice.

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I do not think the case turns on the statute of 1 and 2 Vict. c. 114. The competency of using arrestments does not depend on that statute, though the procedure in arrestments was regulated by it. I agree with your Lordship in the chair in regard to this Act. I have no doubt that where there is a petitory conclusion for money an arrestment on the dependence will be available to the pursuer to cover expenses.

When competently used as regards the leading petitory conclusion it will be effectual to secure the expenses. This result is, I think, right on principle, the expenses, as it were, growing during the procedure, and attaching to the debt concluded for; and it is according to practice.

But on this summons there is no allegation of a present debt, no conclusion for a present payment, no ground for the extraordinary diligence of arrestment on the dependence.

The point has been decided in regard to inhibition in the case of Dove v. Henderson, 11th January 1865, and in the case of Weir v. Otto, 19th July 1870. Both judgments—one in each Division—were unanimous. In the first of these cases the opinion of Lord Curriehill, and in the last the opinion of Lord Justice-Clerk Moncreiff, are conclusive; and the law has been so assumed in other cases, and so far as I have been able to ascertain the use of either inhibition or arrestment to secure expenses only, where there is no petitory conclusion in the summons, is unknown in practice. No precedent for it has been adduced.

On principle, the able argument of Mr Balfour was to my mind quite satisfactory. In point of authority, the only decisions truly in point are adverse to the competency; for, as regards this question, I am unable to perceive any sound distinction between inhibition and arrestment. And to sustain this arrestment would be against usage and without precedent, contrary, as I believe, to the understanding and practice of the legal profession.

Lord Mure.—I am entirely of the same opinion. I have only to add that, although at first I had some doubt as to the effect of the words "concluding for payment of money" in the 16th section of the Act 1 and 2 Vict. c. 114, I have come to be of opinion that these words do not warrant an arrestment such as that here in question. For it was, I conceive, incompetent, at the date of that Act, according to the law of arrestment, as then understood and administered, to arrest on the dependence of an action in which the only pecuniary conclusion was that for expenses. I am satified that these words cannot be held to have operated a change in the law, and that the provisions of that 16th section were only intended to introduce, with reference to the then existing rules of law applicable to arrestment, the simple process of inserting a warrant of arrestment in the summons, instead of obliging a party to have recourse to the separate and more expensive proceeding of using letters of arrestment on the dependence.

The Court pronounced this interlocutor:—"Alter the said interlocutor: Recall the arrestments complained of *simpliciter*, and decern: Find the petitioner entitled to expenses, and remit," &c.

Thomas White, S.S.C.—Hamilton, Kinnear, & Beatson, W.S.—Agents.

No. 29.

Nov. 23, 1875.
Magistrates of Leith v. Lennon.

THE MAGISTRATES AND TOWN-COUNCIL OF LEITH, Complainers.—*Kinnear—Harper.*
MRS ELEANOR BOYLAN OR LENNON, Respondent.—*Brown.*

Process—Reclaiming Note—Statute 48 *Geo. III. c.* 151, *sec.* 16.—Where the days for reclaiming against a Lord Ordinary's interlocutor had expired, without a reclaiming note being lodged, the party moved the Lord Ordinary for leave to reclaim under the Act of 1808, sec. 16. The Lord Ordinary pronounced an interlocutor refusing the motion, against which the party reclaimed. *Held*, in the circumstances, that the Lord Ordinary had exercised a sound discretion in refusing leave to reclaim.

But *question*, whether it was competent to bring the Lord Ordinary's judgment in the matter under review.

Bill-Chamber. 2D DIVISION. Ld. Curriehill. Lord Rutherfurd Clark. I.

THIS was a note of suspension and interdict brought in the Bill-Chamber by the Magistrates of Leith against Mrs Lennon, residing in South Fort Street, Leith, to prevent her building upon the wall between her property and the public park at North Leith.

The respondent, along with her answers, lodged a note to the Lord Ordinary on the Bills, No. 10 of process, in which she stated "that the operations complained of on the mutual wall in question were finally completed on Friday the 15th of October 1875; that the note of suspension and interdict for the complainers was not presented until Monday the 18th October; and that the respondent has not since said 15th October interfered with the condition of said wall, and has no intention of doing so; and undertakes to make no alterations on the wall without judicial authority or the consent of the complainers."

The statements in this note were not admitted by the complainers.

The Lord Ordinary (Curriehill), on 26th October, pronounced this interlocutor:—"In respect that the respondent states in the minute No. 10 of process that the operations sought to be interdicted were completed before the note was presented, and that she has no intention of interfering further with the wall in question, and now judicially undertakes in said minute that she will make no alteration on the said wall without judicial authority, or the consent of the complainers, refuses the note: Finds the complainers liable in expenses; modifies the same to £8, 8s. sterling," &c.

Against this interlocutor the complainers instructed their agent to present a reclaiming note.

The fourteen days within which such reclaiming note required to be boxed (A. S. 24th Dec. 1838, sec. 5) expired on 9th November without the complainers' agent having presented his note.

The complainers thereafter moved the Lord Ordinary on the Bills (Rutherfurd Clark), in terms of the Act 48 Geo. III. c. 151, sec. 16,* for leave to reclaim, and at the same time lodged a minute in which they stated "that of this date (26th October 1875), Lord Curriehill, Ordinary, officiating in the Bill-Chamber, was pleased to pronounce an interlocutor refusing the note of suspension and interdict. That the complainers were advised to reclaim against the said interlocutor, but the reclaiming days

* "The Administration of Justice and Appeals Act, 1808," 48 Geo. III. c. 151, sec. 16, provides that "if the reclaiming or representing days against an interlocutor of a Lord Ordinary shall, from mistake or inadvertancy, have expired, it shall be competent, with the leave of the Lord Ordinary, to submit the said interlocutor, by petition, to the review of the Division to which the said Lord Ordinary belongs; but declaring always that in the event of such petition being presented the petitioners shall be subjected in the payment of the expenses previously incurred in the process by the other party."

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were allowed to expire through mistake or inadvertency in the following circumstances, viz. :—Prior to the pronouncing of the interlocutor the usual statutory notice for the election of town-councillors had been issued, and no meeting of the council was held till after the election. The election took place on the 2d November 1875, and the first meeting of the council thereafter was held on Friday the 5th November. The interlocutor was submitted to this meeting, when instructions were given to reclaim. The papers were immediately prepared for the printer, and put in his hands on Saturday 6th November. On the evening of the 8th a proof of the print and the manuscript papers were sent for delivery to the agent at the town-clerk's office, but instead of being delivered there were left at the police office, where they were not discovered till the afternoon of Tuesday the 9th November, on which day the days allowed for reclaiming expired."

The Lord Ordinary (Rutherfurd Clark), on 13th November, pronounced an interlocutor refusing the complainers' motion for leave to reclaim.

Against this interlocutor the complainers presented a reclaiming note.

The respondent objected to the competency, and argued;—The leave of the Lord Ordinary was essential under the 16th section of the Act of 1808 to enable a party to come to the Inner-House after allowing the proper reclaiming days to expire. He was the sole judge of whether he ought to grant or refuse leave, and there could be no review of his decision on that point by the Inner-House.[1] (2) Even if review was competent the Lord Ordinary was right, and his interlocutor should be adhered to.

Argued for the complainers;—(1) The reclaiming note was competent.[2] It brought under review a final interlocutor of the Lord Ordinary, and one with which one of the parties to the case was dissatisfied, and of which therefore they were entitled to apply to the Inner-House for review—(6 Geo. IV. c. 120, sec. 18). (2) The Lord Ordinary had gone wrong in refusing leave; he had taken too strict a reading of the statute.

LORD ORMIDALE.—This is one of a class of cases which seldom present themselves for the consideration of the Court. There is nothing, I think, more essential in the administration of justice than that litigants should be able to know when their contentions have come or may be brought to a termination. To secure this very desirable object the time within which parties may reclaim from the Outer-House to the Inner-House, or may appeal from the Court of Session to the House of Lords, is regulated by statute, and the principle of the statutory provisions on the subject obviously is that parties are not to be entitled to hang up a litigation beyond certain limits as regards time. An extraordinary remedy, however, is provided, where, in certain circumstances, and from certain causes, the limited period for reclaiming from the Lord Ordinary to the Inner-House has been allowed to elapse. By the Act 48 Geo. III. c. 151, sec. 16, it is made competent to submit a Lord Ordinary's interlocutor to review after the lapse of the reclaiming days, but that only where the days have been allowed to expire "from mistake or inadvertancy," and on condition that the leave of the Lord Ordinary to reclaim has been obtained. Had the question been a new one, I

[1] Babington v. Babington's Trustees, Feb. 20, 1841, 3 D. 611, 13 Scot. Jur. 62; Forbes v. Trail, June 17, 1843, 5 D. 1212.

[2] Waterston v. Kirkpatrick, Feb. 27, 1852, 14 D. 546, 24 Scot. Jur. 252; Plock and Logan v. Wallace, Dec. 16, 1841, 4 D. 271, 14 Scot. Jur. 107; Bennet v. Pyper, Feb. 19, 1833, 11 S. 414, 5 Scot. Jur. 245; Arnot v. Thomson, Feb. 4, 1826, 4 S. 427; Officers of State v. Alexander, June 29, 1864, 2 Macph. 1294, 36 Scot. Jur. 646.

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should have entertained little or no doubt that the leave of the Lord Ordinary was not only intended to be indispensable, but that his reason for refusing such leave was not reviewable. But it appears that cases have occurred in which the Court have assumed that they were entitled to review the Lord Ordinary's decision in granting or refusing leave. Without formally determining that question, or holding that it must or must not be determined, I shall follow the course taken by the Court in some of the cases referred to, and consider whether the Lord Ordinary in the present case was well or ill founded in his refusal to give leave to reclaim. If he was right in refusing to give leave to reclaim that will be of itself sufficient to enable us to dispose of the case.

Now, without going very particularly into the circumstances stated by the reclaimers both in their minute and from the bar, I think it manifest that they and their agent must have had the question of reclaiming repeatedly and anxiously under consideration before and about the time when the reclaiming days expired. The Lord Ordinary's interlocutor was pronounced on 26th October. Owing to the change in the municipality, caused by the elections of 2d November, it is said to have been necessary to postpone presenting the reclaiming note till the new Council came into office. The reclaimers and their agent must therefore have had the question of reclaiming before them both prior to 2d November and afterwards on 5th November when the matter was submitted to the new council, and their authority to reclaim obtained. On the following day, Saturday 6th November, the papers were sent to the printer. It is hardly possible therefore to imagine a case in which his duties with regard to reclaiming could have been more fully and constantly brought under the attention of the agent for the reclaimers. But it is said that on the 8th November, the day before the reclaiming note required to be lodged, a proof of the print was sent to the agent, by the printer, for revisal, but being delivered at the wrong place, it was not received by the agent or revised by him. Now, the agent must have known very well what the boxing hours on the 9th of November were, and when he found that the proofs had not been sent for revisal, and still more when he found the prints had not been timeously delivered to him for boxing, he should have instantly sent to the printer to inquire about them. This, however, he did not do. The result was that he did not get the prints till the evening. But even then, when he did get them, I quite concur with the Lord Ordinary in thinking that he ought to have resorted to the expedient, well known to practitioners, of sending the reclaiming note to the house of the clerk, who would doubtless have received and marked the paper, though after office hours. All this was left undone, and, as now alleged, "from mistake or inadvertency." I cannot, however, hold that a mere statement that there was mistake or inadvertence is sufficient to warrant the Lord Ordinary in granting leave to reclaim, or the Court now in saying that he was wrong in refusing leave. I rather think that the failure to reclaim in the present case arose from carelessness and inattention; and being of this opinion, I think the Lord Ordinary was quite right in refusing leave to reclaim, and that his interlocutor ought to be adhered to.

I think it right to add, in fairness to the reclaimers' agent, that in nothing I have said is it to be understood that I intend to cast any reflection upon him. It is impossible to suppose that he, or any agent in his position, can attend personally to the details in connection with the lodging and boxing of reclaiming notes. That, and such like matters, must frequently, if not always, be com-

mitted to clerks or others, by and through whom blunders may unavoidably sometimes occur. It says a great deal indeed for the regularity with which Court business is generally conducted that such cases as the present very rarely present themselves.

LORD GIFFORD.—If this case had raised the general question whether a party was to lose a valuable right through his reclaiming note being lodged too late, and the party shewed us that he had duly instructed his agent, and that the non-lodging of his note had arisen from the carelessness, ignorance, or fault of his agent, or of the agent's clerk or apprentice, I should be most unwilling to hold that the party was without relief. I think the statute was intended to give a remedy to the client not only against accidents but against the negligence or ignorance of his agent or his agent's clerk, wherever the client can say that he has done everything that he personally could duly and timeously to reclaim. The party suffers sufficiently in having to pay the whole previous expenses, though of course he has his relief against his agent. Therefore had the case raised the general question I would not, merely because of the gross fault of the agent, deprive the party of the right of review, and thus perhaps preclude and foreclose the most important and momentous patrimonial interests. The real question in such cases is, did the party intend to acquiesce, or did he hesitate about reclaiming? If he did so he cannot be restored against it, for it is of the utmost importance that litigation should take a definite end. But the specialties of the present case relieve us of this general question.

The point which the Magistrates of Leith wish to be allowed now to raise is a mere possessory question. There is no pretence that they will be cut out of their rights, or prevented from trying any question of right. The only question is, whether they are to be entitled to a summary instead of an ordinary remedy. In the course of the litigation between them and Mrs Lennon she has lodged a minute, which the Lord Ordinary has thought fit to make the foundation of a possessory judgment in her favour. There is no room to say that the magistrates intended to acquiesce. But their reclaiming note was not in time. They then come to the Lord Ordinary for leave to reclaim against the interlocutor as one which has become final by mistake. The remedy is an extraordinary one. It is for the discretion of the Lord Ordinary and of the Court whether it is to be applied or not. And, viewing it as a question of discretion, I agree that the Lord Ordinary has come to a sound decision.

LORD JUSTICE-CLERK.—There are two questions here, first, whether the Lord Ordinary is sole judge on the point whether leave to reclaim should be given, and second, whether, supposing he is not sole judge, the judgment he has come to is right.

On the first point, I am of opinion that he is the sole judge. Where by statute the leave of a special judge or Court is required, no other authority is admissible to supply the want of that leave. For instance, where our leave is necessary to enable a party to appeal to the House of Lords, and we have thought fit to refuse such leave, is it to be supposed that the House of Lords would listen to a representation from the party that we were not warranted in refusing him leave to appeal. I think, therefore, that the Lord Ordinary was the sole judge whose leave could make this reclaiming note now competent, and that it is incompetent without it.

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As, however, a different view appears to have been entertained by the Court in previous cases I shall not put my judgment on that ground. For I am further of opinion that there has been nothing stated to bring the case under the Act of 1808. Specific days are fixed by statute within which the steps required in order to reclaim must be taken. Where an equitable remedy is sought against the strictness of legal forms it must be supported on equitable grounds. I do not say that if the reclaimer were in danger of losing a valuable right, that very fact might not form an equitable consideration to induce the Court to relieve him of the excessive penalty of his negligence. But we have no such case here. The judgment sought to be reclaimed against is only a possessory judgment. The party is not precluded from resorting to a declarator of his right. There does not seem in this case to have been any mistake or inadvertence. The cause of the reclaiming note not being lodged was mere carelessness or negligence, which is not what the statute contemplates. In these circumstances the party cannot be allowed to plead the negligence of his advisers, even if he himself deliberately intended to reclaim, and instructed his adviser accordingly.

Lord Neaves was absent.

This interlocutor was pronounced:—"Having heard counsel on the reclaiming note for the complainers against Lord Rutherfurd Clark's interlocutor of 13th November 1875, refuse the reclaiming note, and adhere to the said interlocutor: Find the complainers liable in additional expenses," &c.

W. H. Couper, L.A.—William Paterson, L.A.—Agents.

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William Alexander, Pursuer.—*J. G. Smith—Strachan.*
Alexander Butchart, Defender.—*D.-F. Watson—Wallace.*

Nov. 24, 1875. Alexander v. Butchart.

Property—Servitude—Shop Sign—Implied Grant.—A proprietor of a tenement of houses consisting of a shop story and three upper stories above the shop, when in the personal occupation of the shop story, erected wooden panels above the window and door of the shop to receive his name and sign, which panels extended beyond the middle of the joists of the floor separating the shop story from the one above it. These panels were afterwards used for the same purpose by successive tenants of the shop. In 1870 the whole subjects were exposed for sale by public roup. The tenant of the shop purchased the shop story and took a disposition of the subject "as presently occupied" by himself. The upper stories were purchased by another person In an action of declarator and interdict at the instance of the latter against the purchaser of the shop story, *held* that there was no ground for sustaining an implied grant to the defender of the right to use the panels beyond the middle of the joists, as he had failed to instruct that it was reasonably necessary for the enjoyment of the shop.

Opinion (*per* Lord Gifford) that if a thing is to be made a burden upon property, without entering the titles it must be capable of being brought under one of the known servitudes.

2d Division. Ld. Craighill. I.

In and prior to 1851 William Sime was proprietor of a tenement at the corner of Overgate and Barrack Street, Dundee, consisting of a shop story, and three upper stories and attics. The shop story he occupied himself as a stationer, and continued to do so till 1860.

In 1851 Sime made certain alterations on the front of the buildings, and *inter alia* enlarged the shop window upwards, and constructed two

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panels one over the window, and the other over the door, for the purpose of displaying his sign. These panels extended about nine inches above the middle of the joists of the floor separating the shop story from the one above.

In 1860 Sime let the shop story to Peter Hean junior, and again in 1863 to John Strathearn junior, and in 1869 his trustees let it to Alexander Butchart.

All these tenants, including the defender, during the period of their tenancies occupied the above-mentioned panels with their names and signs.

In 1870 the whole property was exposed for sale by Sime's trustees by public roup. Alexander Butchart, who was still tenant of the shop story, then purchased it and received a disposition dated 13th and recorded 16th May 1870, of "all and whole that shop and back-shop, No. 57 Overgate, Dundee, as presently occupied by the said Alexander Butchart," &c.

William Alexander purchased the remainder of the property, being the three upper flats and attics. His disposition was dated 8th and registered 11th July 1870.

On 20th January 1875 he raised this action against Alexander Butchart, to have it declared "that the centre of the joists is the boundary line dividing the shop No. 57 Overgate, Dundee, belonging to the defender, from the tenement above said shop belonging to pursuer, ... and that the defender is not entitled to paint or place his sign or other inscription on the panels above the window and door of said shop, or on any part thereof which is above the said boundary line," and to have the defender's sign removed, and for interdict.

The defender admitted that the panels upon which his sign was placed extended partly above the middle line of the joists which divided his shop from the flat above belonging to the pursuer, and that his name was displayed on the panels.

The defender pleaded;—(1) The right to use the said sign having been conveyed to the defender as part and pertinent of his shop the pursuer is not entitled to decree. (2) The defender having right to the said sign as part and pertinent of his property the action should be dismissed, with expenses.

A photograph of the front of the premises was produced, and further probation was renounced.

The Lord Ordinary, on 17th June 1875, pronounced this interlocutor:—Repels the defences, and decerns and declares; as also decerns and ordains, and interdicts, prohibits, and discharges, in terms of the conclusions of the summons: Finds the defender liable in expenses," &c.*

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* "NOTE.— . . . . A right of property in the wall higher up than the line of separation is not claimed by the defender, but he claims 'the right to use the said sign;' and the ground on which this right is asserted is, that, as alleged, it was 'conveyed to the defender as part and pertinent of his shop.' There is confessedly no express conveyance of the right, and as the right had not existed for the prescriptive period, it was not an accessory of such a kind as could have passed with the property, unless there was a conveyance, express or implied. The defender accordingly contends that, though there was not an express, there was an implied conveyance of the right; and several cases, particularly those of Preston's Trustees, 22 D. p. 66, and Cochrane v. Ewart, 4 Macq. p. 117, were referred to in support of his contention. The Lord Ordinary accepts the doctrine to be deduced from these authorities, but he is unable to see that the present case is one to which it can be applied. The use of the signboard in dispute is not a necessary or a natural convenience of the shop belonging to the defender. Assuming that every shop must have a sign, there is no reason, other than the caprice of the person by whom it is put up, why the sign should be so large as

No. 30. The defender reclaimed.[1]

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LORD ORMIDALE.—In this case the pursuer seeks to have is declared (1) that the centre of the joists is the boundary line between the shop belonging to the defender and the tenement above said shop belonging to himself, the pursuer. About that there is no dispute. And (2) that the defender "is not entitled to paint or place his sign or other inscription on the panels above the window and door of said shop, or on any part thereof, which is above the said boundary line." It is here that the question between the parties arises.

The defence to the action proceeds on the assumption that the defender is entitled to the use, to some extent at least, of what is the property of the pursuer. He claims to go beyond the boundary line to a certain extent. His object in doing so is intelligible enough. The only question is, has he the right.

The defender does not found on express grant, neither does he found on acquiescence. In truth there could be no room for the latter plea, for, prior to 1870, the two properties belonged to a common owner. The defender rests his case entirely on implied grant, to be found, he says, in the terms of the titles, and in the circumstance that his sign required to be placed where it is for the comfortable enjoyment of the property he has acquired in the shop below. And in support of this contention he has cited the case of Cochrane v. Ewart, as decided in the House of Lords.

Now, it is a little singular that this being the substantial plea on which the defender founds, he yet has renounced probation without any facts having been either admitted or disclosed to shew that the having his sign in the particular place in question was necessary for the comfortable enjoyment of his shop. He does not even make in the record any averment to that effect. He might have established it by proof, and would have been allowed an opportunity if he had desired it of doing so on a very general averment, but he has made no such averment at all.

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to encroach upon contiguous property. Here the dispute is only as to the size of the letters composing the sign. They may be reduced, and if they be so, the encroachment complained of by the pursuer will be avoided. The circumstance that the letters were so large as to pass beyond the boundary line was nothing but an accident, and its occurrence the Lord Ordinary thinks neither proves or even suggests that there was conveyed to the defender the right to use his neighbour's wall as if it were his own property, as part or pertinent of the premises conveyed to the defender. A disposition by implication may be sustained where the thing claimed is a necessary or natural appurtenance; but even where the claim is sustained it will be so only with hesitation, because parties are always able by their contracts to include not inferentially, but explicitly, everything which is to be conveyed. The judgment of Lord Chancellor Westbury in the case of Suffield v. Brown, 33 L. J. (Chancery), p. 249, in which prior cases were reviewed, is, as the Lord Ordinary thinks, an instructive decision. Of course it is not binding here as an authority. The views, however, on which it proceeded seem to the Lord Ordinary to be shaped by no peculiar system, but, on the contrary, to be such as should be recognised in a case like the present, whatever be the country in which the judgment is to be pronounced."

[1] *Authorities referred to.*—Preston's Trustees v. Preston, March 7, 1844, 22 D. 366, 16 Scot. Jur. 433; Cochrane v. Ewart, March 25, 1861, 23 D. (H. of L.) 3, 4 Macq. 117, 33 Scot. Jur. 435; Gow's Trustees v. Mealls, May 28, 1875, *ante*, vol. ii., p. 729; Suffield v. Brown, 33 Law Journ., Chan. 249; Munro v. Jervey, Nov. 23, 1821, 1 S. 161; Buchan v. Carmichael, Nov. 25, 1823, 2 S. 526; Dickson v. Morton, Nov. 25, 1824, 3 S. 310; Bell's Prin. sec. 979.

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We have therefore to determine on the papers before us as they now stand whether the right claimed has been established. The defender appeals to the general understanding that a sign is a necessary adjunct to a shop. I admit that in the general case a sign is a necessary adjunct to a shop; but I should require a great deal more to satisfy me that it is not an adjunct which must be confined to the property of which the shop is a part. Looking at the photograph which has been laid before us, I am not satisfied that the defender cannot perfectly well place his sign on his own property with equal advantage as on his neighbour's. And I am the more disposed to think that he ought to be content with doing so, because by encroaching upon his neighbour's property he deprives his neighbour of the opportunity of using his property for what may be necessary, in his view, for the comfortable enjoyment of it. In these circumstances the principle of decision in Cochrane v. Ewart appears to me to be inapplicable.

The only other point that I need notice is the contention of the defender that the implied grant on which he founds can be spelt out of the terms of his disposition, which bears that the property is disponed "as presently occupied" by the defender himself, he having been previously tenant of the shop. But I cannot come to the conclusion that the expression "as previously occupied" was intended to carry such a right as is here claimed, or to do more than merely denote the subject sold.

For the reasons I have now explained, I have no difficulty or hesitation in adhering to the Lord Ordinary's interlocutor.

LORD GIFFORD.—The first question is what right was conferred by Sime's trustees on the purchaser of the shop story. Did they give him a right to have or to keep his sign or name-board partly projecting upon or over the wall of the flat above? I do not think that they did, and if this had been intended it should have been expressed in the disposition. In like manner, as between Sime's trustees, had they remained proprietors of the shop story, and the pursuer, as the purchaser of the upper stories, I think such a right as the defender contends for here could not have been held to have been reserved.

But we are dealing with parties who are both singular successors of Sime's trustees. In point of fact there is very little difference in the dates of their respective titles. The subjects were in the market at the same time. They were bought at nearly the same time. And it is a mere accident that the defender's title to the shop story was first granted and first registered. It was quite well known at and before the sale that the subjects were to be separated, and if the defender looked upon the use of these panels as a sign-board as in any way necessary to the beneficial occupation of the part of the tenement which he was buying he was bound to have asked an express conveyance of the right, and to have had it made plain that that privilege was conferred upon him. This he did not do, but he now says that he relied on continuing to enjoy it as an incident or pertinent of his property, or, as he puts it in argument, he considered it as implied in the grant and conveyance to him.

It is true, indeed, that when certain rights are necessary for the fair and reasonable enjoyment of a subject, and are actually possessed with the subject sold, over other subjects belonging to the seller, they will be held as conveyed, and may be effectual against the seller and his successors although they do not enter the records. In all these cases, however, the purchaser of the burdened

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subject is held to be put on his guard by the actual exercise of the right claimed, which I think is almost always of the nature of a known servitude. But I do not think that the purchaser of the upper flats can be held to be, as opposed to the purchaser of the shop story, in that position. How could he discover the existence of any such right as that claimed by the defenders. Though he examined the front of the tenement, and saw the sign there, still on referring to the defender's disposition he would find no reference thereto, and he was entitled to trust to the conveyances just given to the defender and offered to himself, and finding no such right in favour of the defender, either conveyed or reserved, he was entitled to conclude that no such right existed. The defender, on the other hand, was bound to know that there might be many uses which the common proprietor was making of his property which must come to an end when the subjects came to be separated, and that the use which he himself had been enjoying was just one of them which he must take his chance of being allowed to continue, if he did not buy the whole property or get a special grant of the right in his conveyance.

But, further, I am of opinion that the right claimed here does not come up to the definition of a right necessary for the reasonable enjoyment of the subjects. It is quite clear that the defender can do without it without much difficulty. There are several ways in which he can display his name and sign without encroaching upon his neighbour's wall above him.

I am even disposed to go a little further, and say that by the law of Scotland, if a thing is to be made a burden upon property which does not enter the titles it must be capable of being brought under one or other of the known servitudes. Where such is not the case it can only be effectual if it enters the infeftment, or so far as there is a personal contract between the parties.

But I prefer to confine my judgment to the first point, namely, that there is no ground here for holding that there was an implied grant to the defender.

Lord Rutherfurd Clark.—There is no question of property here. The defender claims a right of servitude over part of the pursuer's property for the purpose of displaying his sign. It is not maintained that the alleged servitude has been made the subject of express grant; but it is said that there is an implied grant. The reason urged is this, that prior to the division of the property the wall, as the defender now claims to use it, was used for the purpose of displaying the sign of the occupant of the shop, and that this use of the wall is necessary for the comfortable enjoyment of the shop. There is neither averment nor proof to that effect, and I cannot draw the inference.

It is a question whether, supposing there were an agreement for a servitude of the kind, the burden would pass against a singular successor without entering the title. I doubt it very much; but on this point I do not express an opinion.

The Lord Justice-Clerk and Lord Neaves were absent.

The Court adhered.

David Milne, S.S.C.—Henry Buchan, S.S.C.—Agents.

CATHARINE THOM AND OTHERS, Pursuers.—*Balfour—Wallace.*
DANIEL MACBETH AND OTHERS, Defenders.—*D.-F. Watson—M'Laren.*

No. 31.

Nov. 26, 1875.
Thom, *et al.* v. Macbeth, *et al.*

Property, pro indiviso—Division and Sale.—In an action of division and sale of a heritable property, *held* that, though not physically incapable of division, the estate was incapable of division with due regard to the rights and interests of parties, inasmuch as division would reduce for the time the market value of each party's share, and that a *pro indiviso* proprietor was therefore entitled to insist on a sale of the whole estate and division of the price.

Observed (*per cur.*) that in the case of sale of a *pro indiviso* property under the orders of the Court a power to the *pro indiviso* proprietors to bid at the sale might be reserved in the articles of roup.

Observed (*per* Lord Justice-Clerk) that a *pro indiviso* proprietor was not bound to run the risk of the market, but was entitled to have his present interest realised.

2D DIVISION. Lord Young. R.

THE pursuers of this action of declarator, division, and sale, Miss Catharine Thom and Mrs Eliza Thom or Annan, daughters of the late Robert Thom of Ascog, Bute, were each proprietors of five-twentieth parts *pro indiviso* of the estate of Ascog.

The defender, Daniel Macbeth, was proprietor in his own right of two-twentieth parts *pro indiviso*, and, as sole surviving trustee under the trust-settlement of the late Robert Thom, of the remaining eight-twentieth parts *pro indiviso* of the estate of Ascog. The last-mentioned eight-twentieth parts *pro indiviso* of the estate were held by the defender in trust, four-twentieth parts for the pursuer, Miss Catharine Thom, in life-rent and her children in fee, and the remaining four-twentieth parts for the pursuer, Mrs Eliza Thom or Annan, in liferent and her children in fee. The estate of Ascog was held by the *pro indiviso* proprietors subject to certain heritable debts with which it was burdened in the hands of the late Robert Thom of Ascog. The several *pro indiviso* shares above mentioned were also held subject to certain burdens by way of annuity and otherwise imposed upon them respectively.

The pursuers set forth on record that they were very desirous that the estate should be sold, and that they should receive payment of the shares of the price to which they were absolutely entitled, or, failing a sale, that the estate should be divided so that they might enter into several possession of the shares to which they had right; that it was highly expedient, for the just interests of all concerned, that the estate should be sold, and the numerous burdens upon it satisfied and provided for out of the price; that the estate was incapable of being divided according to the shares and just interests of the several parties having interest therein; and that it was incapable of being divided at all without very great loss and depreciation of value.

The pursuers pleaded;—(2) The said lands and estate being incapable of division, according to the just rights and interests of parties, or at least being incapable of division without great loss and depreciation of value, the pursuers are entitled to have decree of sale, as also decree relative to the disposal of the price as concluded for.

The defender, Daniel Macbeth, resisted the action, on the ground that it was for the interest of all parties that the estate of Ascog should be retained as a whole, it being an improving estate, in the immediate neighbourhood of Rothesay, well adapted for feuing, and yearly increasing in value, both from feu-duties and otherwise, to a large extent.

He further denied that the estate was incapable of being divided, and opposed a sale on the ground that, looking to the nature of the estate, if it was not to be retained as a whole, it was much more for his interest,

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as an individual, and for the interest of the trust-estate which he represented, that it should be divided, than that it should be sold at that time.

The defenders pleaded;—(2) In any view the pursuers are not entitled to insist on the said estate being sold as concluded for.

After finding that the pursuers were entitled to insist in the action, the Lord Ordinary (Mackenzie), on 31st May 1873, pronounced this interlocutor:—"Having heard the counsel for the parties, and considered the closed record, before answer remits to Mr Hugh Kirkwood, Killermont, by Maryhill, to inspect all and whole the three pound land of Over and Nether Ascog, . . . and to report whether the said lands can, with due regard to the rights and interests of the parties specified in the conclusions of the summons, be divided between the said parties in the proportions therein specified, or whether the said lands and others cannot with such due regard to their rights and interests be divided between the said parties, and that a sale thereof is necessary;" and in the event of his being of opinion that a division could be so made, to report the scheme of division which he would suggest; and in the event of his being of opinion that a division could not be so made, to report the upset price and any conditions of sale which should appear expedient to him.

Mr Kirkwood reported that he was "clearly of opinion that it would be highly injudicious to attempt a division of the estate, and that such a course would be against the interest of all the parties concerned;" that he looked upon it "as an estate incapable of division in the proportions referred to without great depreciation of value; and as portions of the estate have a present and prospective feuing value, it would (looking at the value to be put upon these as more or less speculative) be next to impossible to make a fair and just allocation;" that he was further of opinion "that the estate would sell readily as a whole, and bring a higher price if exposed in one lot than it would do were it put up for sale in several lots." Having made a valuation of the estate as a whole, he suggested £37,000 as the upset price.

The defender put in a note of objections to Mr Kirkwood's report, "in respect that a sale is not necessary, and that the lands described in the summons can be divided between the parties." He maintained, and offered to prove, that a division was quite practicable, and suggested a scheme of division as one among others which might be adopted. The *cumulo* valuation of the several parts into which he proposed to divide the estate amounted, according to his valuation, to £33,000. The difference between the two valuations was, however, mainly accounted for by the different values put on the feuing portion of the estate.

The Lord Ordinary, on 16th January 1874, remitted to Mr Kirkwood to reconsider his report and the note of objections for Mr Macbeth. Mr Kirkwood reported that he adhered to his opinion "that it would be highly injudicious to attempt a division of the estate, and next to impossible to make a fair and just allocation."

Thereafter the Lord Ordinary (Young), on 9th June 1874, pronounced this interlocutor:—"Finds and declares that it is proper and necessary that the lands and estate of Ascog . . . should be sold, and the price thereof divided among the parties having right thereto, and decerns: Appoints the cause to be put to the roll for further procedure, with a view to the sale of the said lands and others by public roup," &c.*

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* "NOTE— . . . Upon this additional report being lodged Mr Macbeth maintained that Mr Kirkwood was wrong in the opinion which he had expressed, and moved that he should be allowed a proof at large that a sale was

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Mr Macbeth reclaimed, and argued;—Mr Kirkwood's opinion and report were founded mainly on this, that a larger price would be got for the estate if exposed as a whole than if exposed in lots, and he therefore arrived at the result that division would entail a pecuniary loss upon each separate party. Admitting that there would be pecuniary loss to any of the parties who at once sold their allotments, a sale would involve still greater loss to those parties who were desirous of retaining the estate as a whole. It was an improving estate, capable of a great enhancement of value by development. Present sale would be at a sacrifice of much of the prospective value. As therefore a present sale, either as a whole or in lots, would be prejudicial to the interests of all parties, the pursuers, if they refused any longer to remain *in communione*, were not entitled, in order to save themselves from a loss, which would be of their own causing, to inflict a still greater loss upon the defender. Of the two alternatives the defender was entitled to choose the least prejudicial to himself, and insist upon a division in order that he might at least retain and benefit by the development of his own share of the estate, rather than submit to a present sale of the whole. His legal right was to hold that property in severalty which he had been holding *pro indiviso*. The interests of the pursuers were not to rule the question. They were insisting on a change, and if there was to be any loss it must fall on them. It was only where a property held *pro indiviso* was physically incapable of division, as a house, manufactory, &c., that a party could insist for sale.[1] There was no such case here. The estate consisted of arable ground, feuing ground, and ground already feued, and a scheme of division could easily be arranged, as he was prepared to prove.

Argued for the pursuers;—The meaning of the term "impossible" or "incapable" of division in the decisions founded on was not physically impossible or incapable of division, but impossible or incapable of division having due regard to the just rights and interests of all concerned. In that view, Mr Kirkwood's report was conclusive that it was impossible to divide the estate without sacrificing a portion of its value. The defender was not now entitled to ask a proof.[2]

LORD JUSTICE-CLERK.—The only question is whether the estate can be reasonably divided in such a manner as to protect the just interests of all concerned.

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neither necessary nor proper, and that the estate could be fairly divided among those having right thereto, with a due regard to their rights and interests.

"The Lord Ordinary has refused to give effect to this motion of Mr Macbeth, because he considers that Mr Macbeth having acquiesced in the remit to Mr Kirkwood, and having not only followed out and taken part in the proceedings under that remit before Mr Kirkwood, but also having objected to his first report, and having acquiesced in and taken part in the proceedings before Mr Kirkwood under the second remit, is in the same position as if he had actually consented to each of these remits, and is bound by Mr Kirkwood's reports—(Dixon v. Monkland Canal Company, H. of L. 1 W. and S. 636; Wilson v. Struthers, 15 Sh. 523, 9 Scot. Jur. 268; Brown v. Love, 4 D. 386, 14 Scot. Jur. 141). These reports are, in the opinion of the Lord Ordinary, conclusive as to the impropriety of a division, and as to the propriety and necessity of sale. And therefore he has given decree to that effect."

[1] Stair, iv. 3, 12; 1 Bell Com. (M'Laren's ed.) 62; Anderson v. Anderson, March 11, 1857, 19 D. 700; Brock v. Hamilton, Jan. 27, 1852, 19 D. 701, note; Bryden v. Gibson, Feb. 4, 1837, 15 S. 486; Craig v. Fleming, March 14, 1863, 1 Macph. 612, 35 Scot. Jur. 367.

[2] Dixon v. Monkland Canal Company, and other cases quoted in Lord Ordinary's note.

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Lord Mackenzie having found that the pursuers had a title to insist in the action against the present reclaimer, after hearing parties and considering the record, before answer remitted to Mr Hugh Kirkwood to report whether the estate could, "with due regard to the rights and interests of the parties," be divided, or whether a sale thereof was necessary. The ability and accuracy of Mr Kirkwood are not challenged. The result of his report on the above remit is, that a division of the estate is impossible with due regard to the rights and interests of those concerned. The contention between the parties is as to whether there must be a specific division of the estate, or whether the party who is not bound and does not desire to remain in communion is entitled to insist on a sale and division of the price. Now, the deduction which I draw from the judgment of Lord Rutherfurd in the case of Brock is that when division is not reasonably practicable without sacrificing to an appreciable extent the interests of some or of all of the parties the only resort is a sale and division of the price.

I can quite well conceive that a division here would be prejudicial, and that to retain the estate together might be advantageous. But the proprietors who wish to realise are not bound to run the risk of the market. They are entitled to have their present interest realised. They want money, and a division of the estate would be clearly a pecuniary loss to them at present, to which the defender has no right to subject them. They are therefore entitled to insist for a sale.

But there is a remedy for the defender. The pursuers want to realise their interests. Mr Macbeth wants to keep the estate together, and take the risk and the benefit of its development.

There can be no difficulty in inserting a clause in the articles of roup reserving power to any who are interested to bid at the sale. I should think that quite reasonable. As to the effect of such a clause on Mr Macbeth's position I give no opinion.

Lord Ormidale.—I am of the same opinion. Two questions are raised by Mr Macbeth. The first regards the competency of the action, the second has reference to the expediency of the course adopted by the Lord Ordinary.

As to the competency of the action I can entertain no doubt. It is impossible, I think, to maintain, either on principle or authority, that a sale is not a competent remedy for joint proprietors to resort to, if they do not desire to remain in union. The second question, which relates to the mode in which the union is to be dissolved, may, according to circumstances, be attended with more or less difficulty. Ought the joint or common property to be divided, or ought it to be sold, and the realised price divided, is the practical question we have to determine in the present case. It was contended on the authorities that where division was physically possible there must be division. That is not, however, the conclusion which I arrive at on a consideration of the cases of Brock, and Anderson, and Craig v. Fleming. The expressions, "impossible" or "impracticable," as used in these cases, clearly mean impossible or impracticable having a due regard to the just rights of all the co-proprietors. If in this case it is impossible to divide without sacrificing a considerable portion of the value of the property then there ought to be a sale. Now, here, in the opinion of Mr Kirkwood, to whom, without objection on the part of the defender, a remit was made to examine and report, a division would entail a sacrifice of £4000 or thereby. It is not, in my opinion, reasonable that the pursuers should be subjected to their share of that loss merely to gratify what I cannot help characterising as the

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speculative and sentimental views of the defender. On the contrary, I think the pursuers are entitled to insist on a sale, a division being impossible or impracticable in the sense in which these expressions must be understood in such questions as the present. If Mr Macbeth really thinks it a desirable thing for him that the property should be preserved entire he may have an opportunity of purchasing it for himself at the sale.

LORD GIFFORD.—If I were selecting words in which to frame a remit in this case, in reference to the question whether the subjects should be specifically divided, or whether they should be sold, I do not think that I could find any more apt words to express my view of what that remit should be than those used by Lord Mackenzie,—"Whether the said lands can, with due regard to the rights and interests of the parties specified in the conclusions of the summons, be divided," &c. Physically, almost everything, every subject, whether heritable or moveable, is divisible, if all considerations of expense of division and of deterioration or possible destruction of the value of the subject are to be disregarded. For example, it is physically possible to divide even a mansion-house, and to convert it into two or more dwellings. But considerations of expediency, of expense, and of deterioration cannot be left out of view, and in most cases it is just upon these considerations that the question depends whether a subject shall be specifically divided, or whether it shall be sold, and the price distributed.

Now, this question is in general, and certainly, in a case like the present, far better decided upon a remit to a person of skill and experience than by allowing the parties a general proof, and therefore the remit was quite properly made to Mr Kirkwood. I think that all parties are bound by that remit; but whether they are so or not, the remit is just the remit which the Court would now make. Very properly the Lord Ordinary made his remit before answer.

On Mr Kirkwood's report I agree in the result at which Mr Kirkwood has arrived. There seems to be the strongest expediency that the estate should not be broken up into parts, and as far as the Court can judge a better price will be realised for the whole as a whole than if the estate were divided in any way into lots.

Indeed, it rather appears that, apart from the risk or certainty of deterioration, it would be next to impossible to adjust the specific interests of the parties here without bringing the property or the lots to the test of the market value.

I am further of opinion that at the public sale each *pro indiviso* proprietor should be allowed to offer, and, if the highest offerer, to purchase. Indeed, I am disposed to think that this is the right of each *pro indiviso* proprietor, and this must be specially provided for in the articles of roup. This will exclude every allegation of possible hardship to any of the co-proprietors. I would wish to add, however, that as Mr Macbeth has a trust or fiduciary character, as well as his individual interest, it may be doubtful how far he has power, as trustee, to purchase for the beneficiaries, or to apply trust-funds for that purpose. Possibly, if he attempts to buy as trustee, he will do so at his own risk; if loss results from such a purchase, the loss will be the loss of the trustee; if there be gain, it will accrue to the beneficiaries. But this is rather a question between Mr Macbeth and those for whom he is trustee, which at present I desire to keep open.

LORD NEAVES was absent.

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THIS interlocutor was pronounced :—"Adhere to the interlocutor complained of, and remit the case to the Lord Ordinary to proceed with the same: Find the reclaimers liable in expenses since the date of the interlocutor complained of, and remit to the Auditor to tax," &c.

GIBSON-CRAIG, DALZIEL, & BRODIES, W.S.—J. & A. PEDDIE, W.S.—Agents.

No. 32.

Nov. 27, 1875.
Clark v. Hamilton and Lee.

JOHN B. CLARK, Complainer.—*J. C. Smith.*
HAMILTON AND LEE, Respondents.—*Trayner.*

Diligence—Charge—Competency of second charge—Suspension.—A suspension of a charge was brought on the ground of irregularity in the messenger's execution. The chargers pleaded that the suspension was incompetent without a reduction of the messenger's execution. Thereafter the chargers, by letter, abandoned the charge, but insisted in the plea of incompetency in the suspension, and craved that the note should be refused, with expenses. The Court refused the suspension in so far as regarded the grounds and warrants of the charge, and, *quoad ultra*, sisted procedure pending an action of reduction of the messenger's execution at the instance of the suspender. The chargers then gave a second charge upon the same grounds and warrants. In a second suspension *held* (*dub.* Lord Justice-Clerk) that the first charge having been abandoned as a charge, and being only insisted in so far as the question of expenses in the first suspension was concerned, the second charge was competent.

Bill-Chamber. 2D DIVISION. Lord Rutherfurd Clark. R.

IN April 1875 John B. Clark, having been imprisoned on a charge given him at the instance of Messrs Hamilton and Lee, presented a note of suspension and liberation.

The ground of suspension was that the messenger's execution of charge bore a manifestly wrong and impossible date, viz., 1st December 1875.

The respondents took the objection that it was incompetent to challenge a messenger's execution except in a reduction.

The complainer was liberated by the order of the respondents, and the note was subsequently passed.

On 29th April 1875 the agents for the respondents wrote to the agent for the suspender as follows :—"We have to intimate to you that, while denying your client's allegations in regard to the charge given him, our clients are not disposed to have a litigation on the subject, and therefore they pass from and abandon the charge complained of, and all that has followed upon it. But they maintain their plea against the competency of the suspension, and will crave that the note be refused, with expenses."

The suspender refused to abandon the suspension, which was accordingly proceeded with in ordinary form.

On 5th June, the chargers insisting in their objection above stated, the Court pronounced this interlocutor :—"In respect the suspender proposes to bring an action of reduction, sists further procedure *in hoc statu*."

Thereafter, while the reduction was pending, the Court, on 19th October 1875, on the motion of the respondents, pronounced this interlocutor :—"In respect there is no relevant statement on the record affecting the grounds and warrants of the charge libelled, refuse the suspension in so far as regards the grounds and warrants of the charge: *Quoad ultra* continues the cause."

The respondents on 21st October 1875 gave the complainer, Clark, a second charge proceeding upon the same grounds and warrants as the first.

Of this second charge the complainer brought a second suspension, on the ground that the first charge had not been set aside by the Court or otherwise finally disposed of, and that the suspension was still depending.

The note was presented without caution or consignation.

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The complainer pleaded;—(1) The chargers having previously given a charge for the same debt on the same grounds, and the validity of that charge being now the question in a process in dependence before the Court, the giving of a second charge was oppressive, and is incompetent. (2) *Lis alibi pendens.* (3) In respect of the dependence of the previous suspension, and the proceedings therein, it was and is incompetent for the chargers to proceed further with their diligence.

The Lord Ordinary refused the note.

The complainer reclaimed.[1]

LORD ORMIDALE.—This case has got into a position of apparent embarrassment. It is stated that the Lord Ordinary has found in the reduction of the messenger's execution that the first charge was invalid. His interlocutor, however, is still to be submitted to review. In the meantime, we are pressed for judgment in this suspension of a second charge, which proceeds upon the same warrants as did the first. But these warrants stand unimpeached; and the Court have expressly found, by a previous interlocutor, that the first suspension was not intended to affect the warrants of the charge at all. It has farther to be kept in view that prior to giving the new charge the respondents had unqualifiedly withdrawn and passed from the first, except in so far as it might be founded on and referred to in determining the matter of expenses of the first suspension.

I am of opinion that in these circumstances the second charge was and is quite competent, and that there is no good reason why it should be suspended. The cases cited in support of the opposite view appear all to have turned on the plea of *lis alibi pendens*, but here, where the first charge was distinctly withdrawn as a charge before the second was given, there is no room for the plea of *lis alibi pendens*. I cannot help thinking, therefore, that it would be very like a frustration or needless obstruction of justice were we now to pass this note of suspension, especially as it is offered without caution. The fact that the complainer is, as was stated by his counsel, unable to find caution, is a reason of itself why the chargers should lose no time in taking what steps they can to recover their debt.

I am very clearly of opinion that the Lord Ordinary's interlocutor should be adhered to.

LORD GIFFORD.—The complainer's objection here is that there is a previous charge still insisted in to a certain extent, that is, to the effect of deciding the question of expenses, and he maintains that so long as this question of expenses is not finally decided no new charge can be given. I do not think that this objection is well founded. The objection is very technical, for the first charge itself has been abandoned unconditionally. Nothing whatever can now follow upon it, and it cannot be said that there are two inconsistent charges, the validity of both of which is maintained. It can only be said that the question

[1] Before the reclaiming note came before the Inner-House, the Lord Ordinary (Young) had pronounced an interlocutor in the reduction of the messenger's execution of the first charge giving decree of reduction in favour of the pursuer. It was intimated that a reclaiming note against his judgment was in course of being presented.

Authorities cited—Wilkie v. Yeaman, Jan. 24, 1828, 6 S. 421; M'Aulay v. Brown, Feb. 16, 1833, 11 S. 411, 5 Scot. Jur. 249; Beattie v. Stodart, March 9, 1838, 16 S. 906, 10 Scot. Jur. 347; M'Lennan v. Dewar and Orr, Dec. 23, 1843, 6 D. 353; Aitken v. Dick, July 7, 1863, 1 Macph. 1038, 35 Scot. Jur. 596.

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of expenses in the first suspension still remains to be decided. I think it would be far too technical to hold that merely because the question of expenses in the first suspension has not been finally disposed of therefore a second charge cannot proceed. The first suspension stands refused so far as regards the grounds and warrants of the charge, in respect that no relevant ground affecting them had been stated, and after that, and the voluntary withdrawal of the charge by the chargers, I can see no objection to the second charge.

I can, indeed, imagine a case where there would be real *lis alibi pendens*, when the question raised under the first suspension, and undecided, would come up again as an objection to the second charge. In such a case an abandonment of the first charge, without the first suspension being disposed of, might not warrant a second charge. But that is not the case we have before us. The question who shall pay expenses in the first suspension has really no bearing whatever on the question whether the complainer is or is not bound to pay his admitted and constituted debt.

LORD JUSTICE-CLERK.—The original charge in this case was challenged on the ground that the messenger's execution bore to be dated on a day which had not then and has not even yet arrived. After hearing parties on that question we allowed the suspension to stand over till a reduction was brought calling the messenger. It was unfortunate that we should have been compelled to take that course when the charge itself was not to be insisted in. But as the matter of expenses remained to be decided we had no alternative.

We have now another charge on the same warrant, and another suspension of this second charge on the ground that the first suspension is still undisposed of. Matters are certainly not in a satisfactory position. My doubt is whether a charge can be said to be abandoned so long as it is insisted in to any effect whatever. The respondents refuse to pay the expenses of the first suspension though they have abandoned the charge as a charge. The suspension is therefore still in Court, and the charge insisted in to the effect of opposing decree for expenses.

I have great doubt upon the authorities whether it is competent to give a new charge while a suspension of a former charge on the same grounds and warrants is still undisposed of, but there has been too much procedure already in this matter, and I am prepared to acquiesce in the view of your Lordships.

LORD NEAVES was absent.

THIS interlocutor was pronounced :—"In respect the suspender does not offer caution, refuse the reclaiming note, and adhere to the interlocutor complained of: Find the suspender liable in additional expenses," &c.

JOHN MACMILLAN, S.S.C.—D. & W. SHIRESS, S.S.C.—Agents.

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THE NORTH BRITITH RAILWAY COMPANY, Suspenders.—*D.-F. Watson—Balfour—Strachan.*

DAVID SALMOND LINDSAY, Respondent.—*Fraser—J. P. B. Robertson.*

Railway—Lease—Right of Tenant to Compensation—Possession.—Notice by a railway company of their intention to take under their statutory powers a portion of a farm was served upon the agents of the proprietor about one o'clock on the day on which the landlord signed a lease of the farm (previously signed

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by the tenant), with entry at the ensuing term. There was no evidence as to the hour at which the landlord signed the lease. *Held* that a claim by the tenant against the railway company for compensation for loss of tenant's profits was excluded, upon the ground that he had failed to prove that there was a completed personal contract of lease between him and his landlord at the time when the notice to take was served, and that it was therefore unnecessary to determine whether possession under the lease was necessary to entitle the tenant to compensation.

Assignatus utitur jure auctoris.—Observations (*per* the Lord Justice-Clerk) on the doctrine of *tantum et tale* and the nature of the right acquired by a company taking lands under statutory powers.

2D DIVISION. Ld. Curriehill. I.

MR D. S. LINDSAY was tenant of the farm of Wormit in Fife under a lease for nineteen years from Martinmas 1873, entered into between him and the proprietor, the late Mr Wedderburn of Wedderburn and Birkhill, bearing to be subscribed by Mr Lindsay on 10th and by Mr Wedderburn on 12th July 1873.

On 12th July 1873 the North British Railway Company served a notice upon Mr Wedderburn's agents, Messrs Kerr and Macfarlane, Dundee, of their intention to take, for the purposes of their railway, 16·388 acres of the farm of Wormit.

On 1st August 1873 the railway company, whose compulsory powers expired on that day, served a similar notice upon Mr Lindsay, but under protest that they did not recognise any claim on the part of Mr Lindsay to compensation.

The company took possession of the said 16·388 acres on 3d October 1873, and Mr Lindsay entered upon possession of the remainder of the farm at the term of Martinmas 1873.

On 20th January 1875 Mr Lindsay served a notice upon the company claiming compensation as tenant of the farm in respect of being deprived of the crops on the ground taken by the company, and subsequently signified his desire to have his claim settled by arbitration, and named an arbiter to act on his behalf.

The company nominated an arbiter, but under a protest in similar terms to that contained in their original notice to Lindsay, and upon the 3d February 1875 they presented this note of suspension and interdict against Lindsay and the arbiters to stay proceedings in the arbitration.

The complainers averred that Lindsay's lease was not executed by the landlord and delivered when their notice to take was served upon the landlord's agents, and they alleged further, that, assuming the lease to have been executed and delivered before that date, both Lindsay and the landlord were aware, prior to the execution of the lease, that the complainers required, and were ready to take the land, and they averred that the landlord's agents, Messrs Kerr and Macfarlane, had purposely delayed answering a letter from the complainers' solicitor, Mr Adam Johnstone, dated 7th July 1873, asking them if they would accept service of the notice to take on behalf of the landlord, to enable Lindsay to rear up a claim to compensation by getting his lease executed before the notice was served.

They pleaded;—1. The complainers are entitled to have suspension and interdict as craved, in respect that the respondent, Mr Lindsay, had not, and has not, any right or interest entitling him to compensation in connection with the land in question, either under the Lands Clauses Consolidation (Scotland) Act, or otherwise—(1) he not having been the tenant in possession of the said lands either at the time when the complainers' notice to take the same was served, or at the time when the complainers entered into possession; and (2) his lease not having been

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executed by the landlord and delivered when the complainers' notice to take was served. 2. *Separatim*, Assuming the said lease to have been executed and delivered when the complainers' notice was served, the respondent, Mr Lindsay, is not entitled to compensation, in respect that both he and the landlord were aware, prior to the execution of the lease, that the complainers required and were ready to take the said land, and that the delay in answering Mr Johnstone's said letter of 7th July was *in mala fide*, to enable the said respondent to rear up a claim by getting his lease executed before the complainers' notice should be served.

Mr Lindsay denied the averments of the complainers, and pleaded, *inter alia*;—2. The complainers having taken the specified portions of the said farm, the respondent, in virtue of the said lease, has right to compensation as claimed from the complainers, and he is entitled to proceed to arbitration in terms of the statutes. 3. There having been, at and prior to the notice of the complainers' intention to take the ground, a concluded contract for a lease of the said farm for a full rent in favour of the respondent, he is entitled to insist in his claim for compensation.

The Lord Ordinary passed the note of suspension and interdict, and allowed a proof, from which the following facts appeared:—

The North British Railway Company were by the Tay Bridge and Railways Act, 1870, authorised to construct a bridge across the Tay with connecting railways, the southern end of the bridge being on the farm of Wormit, of which the late John Blair was then tenant under a lease for nineteen years from Martinmas 1863.

In May 1871 the company served upon Mr Wedderburn as proprietor, and Mr Blair as tenant, notices of their intention to take 1·540 acres of the farm. They afterwards entered into possession of the land, and settled the tenant's claim to compensation, but as more land was expected to be taken, the settlement of the proprietor's claim was by arrangement postponed in order that the whole claims might be settled together.

Mr Blair died in 1872, and his trustees, although desirous of renouncing the lease, were informed by the landlord that no renunciation would be accepted unless and until a suitable incoming tenant could be found. The trustees accordingly executed provisionally a renunciation of the lease to take effect at Martinmas 1872, if then accepted by the landlord, or at any subsequent date at which the same should be accepted.

The farm was thereafter repeatedly advertised to be let, but great difficulty was experienced in getting a suitable tenant. Among the offerers were Mr Lindsay, and a Mr Stewart, and during the months of May and June 1873 negotiations were being carried on with both by Messrs Kerr and Macfarlane, the landlord's agents.

It was known that the North British Railway would probably take some part of the land, for which they had obtained statutory powers, but it was uncertain how much would be taken, or at what date the land would be required. A circular addressed by Messrs Kerr and Macfarlane to offerers for the farm contained the following conditions:—"3. There is land required by the same railway company for the line leading from the bridge to Leuchars, passing to the westward of the farm steading. The tenant will be entitled for this land to the full damages claimable from the company—that is, for the value of land taken, and for severance or sectional damages to all the fields passed through. . . . . 9. Until the lease be adjusted and signed there will be no binding agreement between the landlord and any offerer."

On 30th June 1873 Mr John Macfarlane, one of the partners of Kerr and Macfarlane, wrote to Mr Wedderburn that he hoped to be able to write the next day of a concluded arrangement with Lindsay.

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About that date a lease was adjusted with Mr Lindsay, extended, and sent to him for signature on 2d July 1873. Mr Lindsay, however, took some objections to the lease as extended, and, in particular, he objected that it contained no reservation of right to him to claim compensation from the railway company, in the event of their taking part of the farm, although Mr Macfarlane assured him that such a clause was unnecessary. After considerable negotiation Mr Macfarlane agreed to a declaration being added at the beginning of the testing-clause to the effect "that as respects any land which may hereafter be taken for the line of railway from Wormit to Leuchars the tenant shall be entitled to make claim against the company for whatever compensation the law may entitle him as tenant of the land."

The lease was then signed by Lindsay on 10th July, and was on the same day sent to Birkhill for execution by Mr Wedderburn, accompanied by the following letter:—"Dundee 10th July 1873.—Dear Mr Wedderburn,—It is only to day that I am in a position to write as to Wormit. We have had much trouble and anxiety in connection with it. We differed with Stewart on some details. He was bearing, or seeking to bear, too hard upon us, and we communicated with Lindsay, and the lease which is sent herewith is the result. You will see that he is to pay £345, and is to get £300 of repairs, which is an improvement on his old terms, and better than Stewart was latterly proposing. All the details of the lease have been as carefully as possible prepared, and the general terms are the best we could arrange. It will be good to have the lease signed at once, and I hope you will see nothing in it to delay this being done. . . . I remain, &c., JOHN MACFARLANE."

The lease was signed by Mr Wedderburn at Birkhill on the 12th July (Saturday). No evidence was led by either party in regard to the hour at which it was signed. Mr Wedderburn returned the lease, with a letter dated 12th July, to Messrs Kerr and Macfarlane, who received the same on Monday, 14th July.

Meanwhile, on 7th July 1873, Mr Johnstone, the company's solicitor, wrote to Messrs Kerr and Macfarlane, intimating his intention to serve the notice for the 16·388 acres in question, and asking them whether they desired the notices for the proprietor to be sent to them or to Birkhill. The letter was received in Dundee on 8th July.

On 10th July the company served the requisite notice on Blair's trustees as tenants in possession of the farm.

No answer was received from Messrs Kerr and Macfarlane to Mr Johnstone's letter of 7th July up to the evening of the 11th, and Mr Alexander Law, the clerk entrusted with the duty of serving the notices, resolved to go to Fife the following day and serve the notices at Birkhill. On his way to the train on the morning of the 12th he received a letter from Messrs Kerr and Macfarlane to Mr Johnstone, dated 11th July, intimating "that they would be happy to hold as served any notice for Mr Wedderburn." Law proceeded to Dundee, and reached Messrs Kerr and Macfarlane's office about one o'clock.

Law's evidence as to what passed was as follows:—"On arriving in Dundee I immediately went to Kerr and Macfarlane's office, saw Mr Macfarlane, and handed the notice to him. Mr Macfarlane asked if I had served a notice for the same extent of land on Blair's trustees. I said we had. 'Because,' he said, 'they have renounced their lease in favour of the landlord,' which was to take place at Martinmas first. He also said he had relet the farm to a new tenant for nineteen years from Martinmas. I said to him, I presumed he had reserved from the lease the remaining land required for the railway. He said he had not, and that he would

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not obtain a suitable tenant with such a reservation, and that he must let the farm as a whole, and allow the tenant to treat with the company. I told him I did not think the railway company would recognise the claim of the new tenant, but that I would consult with Mr Johnstone. He then said—'If you don't recognise this new tenant we will get Blair's trustees to assign what remained of Blair's lease to the new tenant.' That was the first time I had been made aware of any change in the tenancy, for up to that time I understood that Blair's trustees were the tenants, and had dealt with them as such."

Neither Mr Law nor Mr Macfarlane were specially asked whether the latter gave the information as to the new lease before or after the notice was put into his hand.*

Law reported the conversation to Mr Johnstone, who acted upon it by serving notice upon Lindsay as tenant, as before-mentioned, under protest.

The notice for Mr Wedderburn was not formally accepted by Messrs Kerr and Macfarlane on 12th July, but they sent a written acceptance of service to Mr Johnstone on 15th July 1873 in reply to a letter from him asking them to do so, dated 13th July.

The Lord Ordinary pronounced this interlocutor:—"Repels the reasons of suspension: Recalls the interim interdict: Refuses the suspension, and decerns: Finds the complainers liable in expenses," &c.†

* The statement of the complainers upon record, which was admitted by the respondent, was—(Cond. 6) "The company accordingly served upon Messrs Kerr and Macfarlane at their office in Dundee, on the following day (July 12, 1873), a notice, addressed to Mr Wedderburn, of the company's intention to purchase and take 16 acres and 388 decimal parts of an acre of land forming parts of the said farm. When the said notice was so delivered the person who delivered it on behalf of the company was informed by Messrs Kerr and Macfarlane that Mr John Blair's trustees (Mr Blair having died sometime in the autumn of 1872) had executed a renunciation of their rights under the lease above-mentioned to and in favour of Mr Wedderburn, the proprietor, to take effect at the term of Martinmas 1873, and that the farm had been relet for nineteen years from that term to Mr David Salmond Lindsay."

† Note.—(After a narrative of the facts)—"The first plea in law for the complainers raises a novel and important question under the Lands Clauses Consolidation Act. In the first branch of that plea the complainers maintain that the arbitration should not be allowed to go on, in respect that Mr Lindsay had not and has not any right or interest entitling him to compensation, 'he not having been the tenant in possession of the said lands, either at the time when the complainers' notice to take the same was served, or at the time when the complainers entered into possession.' If the complainers had been voluntary purchasers who had bought the property after the date of the lease, but before the tenant entered into possession, the general rule under which such a lease is held not to be binding upon a singular successor might have been applicable. But it has never yet been decided, and apparently the question has never yet been raised, whether a public company, taking land compulsorily under their own private Act and the provisions of the Lands Clauses Consolidation Act, is in the same position with regard to leases as a voluntary purchaser. Mr Deas, in his valuable treatise on the Law of Railways, says, 'It is thought that to entitle a tenant to compensation possession must have taken place upon the lease before the date of the company's notice.' With great deference, however, to an opinion so justly entitled to weight as that of Mr Deas, I am inclined to think that it is not quite clear that under the clauses of the statutes which deal with lands subject to leases (secs. 112 to 115), possession is required as a title to compensation in the case of a tenant for a term of years unexpired, or in the case of any tenant, except one for a year or less. In the view, however, which I take of the facts of the case it is not necessary to decide this question, because the general rule as to the necessity of possession does not hold in the case of a

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Argued for them;—(1) Service upon the landlord of the notice to take

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singular successor who, at the time of his purchase, is made aware of the existence of a lease which, though executed, has not been followed by possession—(Richards v. Lindsay, M. 15,217). Now, in the present case, the complainers were made aware, at or before the time when the notices were served—*i.e.*, when the contract of sale was concluded between them and the proprietor—that the old lease had been renounced, and that the farm had been let on a new nineteen years' lease to the present respondent. The first branch, therefore, of the complainers' first plea in law is untenable, and must be repelled.

"The second branch of that plea is to the effect that the respondent's claim for compensation is bad, because the lease had not been executed by the landlord, and delivered when the notices were served. The evidence shews that the lease was executed by the tenant on the 10th and by the landlord on the 12th July, on which day the notices were served, and that both parties considered it a binding lease. It does not appear to have been executed in duplicate; and, as is generally the case, the deed remained in the hands of the landlord or his agents for behoof of both parties. This plea also is, in my opinion, untenable, and must be repelled.

"It is necessary now to notice the second plea in law for the complainers, to the effect that they were prevented from serving the notices before the execution of the lease through the *mala fides* of the proprietor's agents. In the record, throughout the proof, and at the debate, the complainers maintained strenuously that Messrs Kerr and Macfarlane acted *in mala fide* in reference to the notices, inasmuch as, having been informed by Mr Johnstone's letter of 7th July that the complainers were about to serve the notices for the land required by them from Mr Wedderburn, whereby the company would become the purchasers of the land, these agents, in bad faith, delayed answering that letter, for the purpose and with the effect of having the new lease to Lindsay completed and executed before the notices could be served, and of enabling Lindsay to make a claim for tenant's profits to which he would not otherwise have been entitled. This plea, of course, assumes that the completion of the lease before the notices would entitle Lindsay to make such a claim without possession having followed upon the lease. Now, it may be that Messrs Kerr and Macfarlane, seeing that the company, after two years' delay, were now proceeding in earnest with the notices, may have pressed on the completion of the lease, but I do not see that they can be charged with bad faith to the company in doing so. It may have been uncourteous in them to delay answering Mr Johnstone's letter of the 7th July, but I do not think it was dishonest. The matter of the lease had long been the subject of negotiation with Lindsay, and Mr Wedderburn was in bad health at the time, and it was desirable to have the farm let to a suitable tenant, so as to relieve Blair's trustees from farther connection with the farm: And the lease would have been signed on 2d July, several days before the date of Mr Johnstone's letter, had not the tenant unexpectedly raised some objection to the terms of the document.

"But even if the landlord's agents had improperly taken advantage of the delay which they thus caused in the service of the notices, I do not see how Mr Lindsay, the tenant, can be thereby affected. Messrs Kerr and Macfarlane were not his agents. He knew nothing about the contemplated service of the notices; he was not taking any advantage of the railway company, nor was he unduly hastening the execution of the lease. On the contrary, he delayed the execution for several days, because the terms of the lease, as prepared by the landlord's agents, were, in his opinion, insufficient. And the complainers do not accuse him of any bad faith in the matter. On this branch of the case I am of opinion that the complainers' allegations of *mala fides* are unfounded, and that, even if well founded, they are not relevant as in a question with Lindsay, the respondent.

"On the whole matter, therefore, my opinion is that the suspension must be refused, and that the arbitration must be allowed to proceed."

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constituted a completed contract of sale. Possession, therefore, at the date of the service of the notice was requisite to give the tenant a title to compensation.[1] (2) There was no intimation to the railway company of the existence of Lindsay's lease before the notice was served. It had not even been proved that Mr Macfarlane gave the information to the clerk before the notice was handed to him, and in any view intimation to a clerk charged with the specific duty of serving the notice could not be held to bring home knowledge of the lease to the company. (3) Even if the company had notice of the lease, it was intimation of a mere personal contract, which they knew was ineffectual against a singular successor, and were therefore entitled to disregard. The case of Richards v. Lindsay relied on by the Lord Ordinary related to the prorogation of a tack, and its authority had been questioned.[2] (4) It had not been proved that even the personal contract of lease was executed before the service of the notice. The company had proved the hour at which their notice was served, and it lay upon Mr Lindsay to prove that the lease upon which his claim rested had been previously signed by the landlord. After the service of the notice the landlord could create no new right against the railway company.[3] (5) The conduct of the landlord's agents in delaying to answer Mr Johnstone's letter disentitled Mr Lindsay to plead equity.

Argued for Mr Lindsay;—The railway company were not entitled to assume that the rights and interests which they were bound to compensate were limited to those which were good against a voluntary purchaser. In the ordinary case the right of a tenant was to hold possession against the singular successor. In the case of a railway company the tenant's right was limited to a claim for compensation. It was thus to be expected that the class of persons entitled to the more limited right should be larger than the class entitled to the more extensive right. This view was borne out by the words of the 17th section of the Lands Clauses Consolidation (Scotland) Act,[4] which shewed that all "interests," a very wide word, were to be compensated. The obligation imposed upon the promoters to make "diligent inquiry" was entirely inconsistent with the notion that the only rights with which they had to deal were those patent on the face of records, or, in the case of leasehold rights, made public by possession. In short, a railway company was not in the position of an onerous disponee of a special subject, but rather in the position of a trustee in bankruptcy, or an adjudger, who (notwithstanding some old decisions to a contrary effect), it was now settled, took the right *tantum et tale* as it stood in his author.[5] In other words, a

[1] Statute 1449, c. 17 (18 in Glendook); Stair, i. 15, 4, iii. 2, 6; Erskine, ii. 6, 23-25; Bell on Leases, vol. i., pp. 52, &c.; Hunter's Landlord and Tenant, vol. i. pp. 440, &c., also pp. 472, &c., and cases there cited; Deas, Law of Railways, p. 161.

[2] Lord Cranston's Creditors v. Scott, Jan. 4, 1757, M. 15,218; Douglas' Creditors v. Carlyles, July 2, 1757, M. 15,219.

[3] City of Glasgow Union Railway Co. v. M'Ewen and Co., March 18, 1870, 8 Macph. 747, 42 Scot. Jur. 385.

[4] 8 Vict. c. 19, sec. 17.—"When the promoters of the undertaking shall require to purchase any of the lands which by this or the special Act, or any Act incorporated therewith, they are authorised to purchase or take, they shall give notice thereof to all the parties interested in such lands, or to the parties enabled by this or the special Act to sell and convey the same, or their rights and interests therein, or such of the said parties as shall, after diligent inquiry, be known to the promoters of the undertaking; . . . ."

[5] Fleeming v. Howden, July 16, 1868, 6 Macph., H. L. 113, 40 Scot. Jur. 616, L. R., 1 Sc. App. 368.

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railway took the land, subject to all equities pleadable against the landlord.[1] (2) Moreover, the service of the notice to take did not by itself constitute a completed contract of sale,[2] unless followed by farther procedure. (3) There was here knowledge on the part of the railway company of the existence of Mr Lindsay's lease, which, even assuming them to be in the position of a voluntary purchaser, disentitled them from pleading want of possession under the lease. It was said that it had not been cleared up whether Mr Macfarlane intimated that the farm had been let before or after the notice had been put into his hands. But this was of little consequence. It must be remembered that the company did not serve the notice in the way prescribed by the statute. According to the 18th section of the Lands Clauses Consolidation (Scotland) Act the notice must be served personally upon the owner of the lands to be taken, and it was only when he was out of the kingdom or could not be found that service upon his agent was allowed as an equivalent. Mr Macfarlane would have been perfectly entitled to have said to the clerk who served the notice that if the company did not agree to recognise the existence of Lindsay's lease he would do nothing to prejudice any rights, and to have insisted upon the notice being served on the landlord personally; and this was in substance what Mr Macfarlane did. (4) There was no presumption in favour of the railway company that their notice was served before the lease was signed by Mr Wedderburn. Even if the signature was later than the service of the notice they were not entitled to take advantage of this circumstance, inasmuch as acceptance of service by Mr Macfarlane was qualified by his intimation of the lease. (5) The contract of lease was complete and binding upon the landlord and tenant from the moment of the landlord's signature. Being a mutual deed the lease required no delivery. (6) There was no *mala fides* on the part of the landlord's agents, and in any view Mr Lindsay, a party to a highly onerous contract, could not be held to be responsible for their conduct.

At advising,—

LORD JUSTICE-CLERK.—This is a suspension brought at the instance of the North British Railway Company of certain proceedings taken by the respondent for the purpose of having an alleged claim of compensation settled by arbitration under the Lands Clauses Act. The land in respect of which compensation is claimed by the respondent consists of sixteen acres of the farm of Wormit, belonging to Mr Wedderburn of Wedderburn, of which farm the respondent is the tenant; and the interest on which he claims is founded on a lease of the farm bearing date the 12th of July 1873, with possession at the Martinmas following. It is alleged for the suspenders that this lease gives the respondent no interest under the statute to demand compensation, because their notice to take the land was given on the 12th of July 1873, and the lease in question not having been followed by possession at that date, is not available against the suspenders, who are singular successors.

The respondent pleads in reply,—1st, That the complainers having had notice

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[1] Carter v. Great Eastern Railway Co., April 25, 1863, 9 (English) Jurist, N. S. 618, 8 Law Times, N. S., 197; Rex v. Hungerford Market Co., 1832, 4 Barn. and Ad. 596; Bogg v. Midland Railway Co., 36 L. J., N. S. Chan. p. 440; Sweetman v. Metropolitan Railway Co., Jan. 13, 1864, 1 Hem. and Mil. 543.

[2] Richmond v. North London Railway Co., Feb. 8, 1858, L. R., 5 Eq. 352 (per Lord Romilly, M. R. p. 358), aff. July 15, 1868, L. R., 3 Chan. App. p. 679; Haynes v. Haynes, March 23, 1861, 30 L. J., N. S. Chan. p. 578.

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of the lease before the completion of their right it is effectual against them without possession; and, 2dly, he maintains that a railway company taking land under their compulsory powers are not singular successors, and acquire no higher right than a trustee under the bankrupt statute, who takes *tantum et tale*, as the bankrupt held the lands.

I am not moved by either of these considerations. It is no doubt true that no one is entitled to grant double conveyances of the same subject to two different disponees, and that if the second disponee accepts the conveyance in the knowledge of the first conveyance his right is liable to be set aside, although it may have been the first completed. But whether a purchaser under a title entirely unchallengeable, or even an adjudger or inhibiting creditor, is bound to give effect to inchoate or incomplete rights, in respect of previous knowledge of their existence, is a very different question. As in the present case, however, it would rather appear that the complainers had not, and could not have had notice of this contract, as I shall afterwards explain, it is not necessary to pursue this question farther.

As regards the contention so strongly urged from the bar, founded on the doctrine of *tantum et tale*, I think the argument involved some misapprehension as to the past history and present position of this branch of the law. It seemed to be assumed, quite erroneously as I think, that our modern jurisprudence gives greater effect to latent equities in the transmission of land than our older law. But this is not so. Until the case of Redfearn,[1] decided in the House of Lords in 1813, the rule *assignatus utitur jure cedentis* was very largely applied. In that case, in which it was for the first time found that a special assignee was not bound by a latent trust which qualified the right of his cedent, it was conceded that the previous rule of the law of Scotland was otherwise, and the judgment proceeded on views of expediency which prevailed in the law of England. The short report of the import of the judgment in the case of Gordon v. Cheyne (2 Shaw, p. 675) brings this out very clearly. It represents the Court as holding "that the general rules of law, founded on by Gordon, embraced purchasers and general assignees prior to the case of Redfearn, but that on proper views of equity and expediency the House of Lords had found that they could not be subject to latent equities," and (with the exception of Lord Gillies) as holding "that the principle of that decision could not apply to the case of a general body of creditors under a sequestration, who took the rights of the bankrupt *tantum et tale* as they stood in his person." The case of Fleeming v. Howden proceeded on this ground, and Lord Colonsay was careful to guard the judgment as far as related to the diligence of individual creditors, as to which he entirely reserved his opinion. Whatever, therefore, may be the authority of the older decisions in which the Court preferred a compriser to a tenant under a tack without possession,[2] they were pronounced at a period of the law when the Court gave more weight to latent equities than could be extended to them now. But we have here a very different case to deal with. It would be difficult to reduce the title of the complainers below that of a special assignee. But while I could not follow Mr Fraser to the point at which he wished us to arrive, I so far agree with him as to think that the position of a statutory company, taking land under their compulsory powers, is not that of a

[1] Redfearn v. Sommervails, June 1, 1813, 5 Pat. 707.

[2] See cases cited in Hunter on Landlord and Tenant, vol. i. 442, and vol. ii. 539.

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voluntary purchaser in all respects. On one hand, the title they acquire is not subject to be qualified by equities of any kind, latent or patent, as far as regards their right to and possession of the land acquired. Their right and use is only qualified by the purposes of their undertaking, and they cannot be impeded in so applying it. There can be no question as to good faith in its acquisition, for the seller has no choice in the matter, and the purchaser, within the limits assigned to him, may buy when he pleases. The fee itself is transferred, and the value of the subject and all the rights affecting it are merged in a general obligation on the part of the purchaser to make full compensation to those having an interest in the lands. But, on the other hand, the obligation on the purchaser is one of compensation or indemnity, and the right to demand it arises entirely from the provisions of the statute, and must be determined by them. It does not follow that the interests affected by the exercise of powers of compulsory purchase must necessarily be those which would affect a voluntary purchaser under a contract in which the seller may make what conditions he thinks fit. I say no more on this head, excepting that this seems to me a very large and important question, and that if the case depended on it I should have desired an opportunity of considering it very deliberately, as I think it deserves more thorough investigation than it has hitherto received.

Before, however, we can reach this question, there are two prejudicial points to be determined. First, was there a completed contract of lease when the complainers gave their notice? and secondly, if there was not, could a contract completed after that date affect the complainers' rights and obligations?

As to the first of these questions, in order to its solution it is necessary to attend in some detail to the history of this matter. In 1871 a person of the name of Blair was tenant of these lands, under a lease which at that time had eleven or twelve years to run. The railway company gave notice to take 1·540 acres of the farm, and settled the tenant's compensation at that time. In June 1873 more land was required. Mr Blair had died previously, and Mr Wedderburn, the proprietor, was in negotiation with his trustees for a renunciation of the current lease, and with the respondent for a new lease for nineteen years from Martinmas 1873. The compulsory powers of the railway expired on the 1st of August 1873. On the 7th of July Mr Law, who is a clerk to the solicitor of the North British Railway Company, wrote a letter to Kerr and Macfarlane, who had acted as Mr Wedderburn's agents in Dundee, asking to know if they would accept service of the statutory notice on behalf of the railway company. From some cause, which has not been satisfactorily explained to my mind, this letter was not answered by Messrs Kerr and Macfarlane until the 11th, a delay all the more to be regretted from its bearing on the negotiations then in progress with the new tenant. Mr Law, not having received an answer, resolved to go personally to Dundee on the 12th, and did go, although the answer arrived that morning. He arrived at Messrs Kerr and Macfarlane's office, and served the notice, he says, before one o'clock. Mr Macfarlane says that he reached the office about two o'clock, which may be assumed as the latest date on which the notice was served.

Meantime the negotiation for a lease of the farm stood thus: In the month of November 1872 the landlord had issued a general circular to offerers, stating the terms and conditions on which the farm would be let. Those conditions contain some clauses of importance. The second, third, and fourth articles of the conditions refer to land taken or to be taken by the railway, and to the tenant's interest therein; and the ninth condition is, "until the lease be adjusted

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and signed there will be no binding agreement between the landlord and any offerer." In the month of May 1873 the respondent went over the farm, and on the 13th of May he wrote asking whether the damages done by the railway are to be compensated to the incoming tenant. Messrs Kerr and Macfarlane answered that the claims would remain with the landlord, a reply which brought from the respondent an offer for the farm, dated 31st May 1873, "stipulating that all compensation for damages caused by forming the new line of railway on the farm will be left in the hands of the tenant." This offer was not at once accepted, and the negotiations go on until as late as the 10th of July, when Messrs Kerr and Macfarlane wrote to Mr Wedderburn in the following terms: —"It is only to-day that I am in a position to write as to Wormit. We have had much trouble and anxiety in connection with it. We differed with Stewart on some details. He was bearing or seeking to bear too hard upon us, and we communicated with Lindsay, and the lease which is sent herewith is the result. You will see that he is to pay £345, and is to get £300 of repairs, which is an improvement on his own terms, and better than Stewart was latterly proposing." It is therefore certain that until Mr Wedderburn received the letter of the 10th of July there not only was no concluded bargain with the respondent, but it was doubtful whether Stewart might not have been preferred.

The extended lease was returned, signed by Mr Wedderburn, along with a letter bearing date on Saturday the 12th, and received on Monday the 14th of July. In these circumstances, the question is whether there was any concluded bargain prior to the notice. I am very clearly of opinion that no such bargain has been proved. There is and can be no presumption whatever that the lease was signed before the service of the notice on the 12th of July, the date of which is fixed; and the presumption rather is, when one date is fixed and the other left uncertain, the uncertainty must fall on the party who has failed to render it certain. I think it right to observe, also, that when Mr Macfarlane wrote to Mr Wedderburn on the 10th, and when Mr Wedderburn signed the lease on the 12th, Mr Macfarlane was perfectly aware that these lands never could be the subject of the lease, because he (Mr Macfarlane) had notice on the 8th that the remaining lands scheduled were to be taken forthwith by the railway company, and that the only effect of the lease, as regarded this part of the farm, was to attempt to constitute a claim of compensation for lands which never could come into the possession of the tenant.

I am, therefore, of opinion that on the facts it is not proved that when the notice in question was served there was any concluded agreement between the respondent and Mr Wedderburn.

The only remaining question, therefore, is, what is the effect of an agreement concluded after the date of the notice, and this raises the question as to the legal effect of a notice to treat for lands to be taken compulsorily.

It has been usual to describe the nature of such a notice, by saying that the Act of Parliament empowering the company to take the land compulsorily is equivalent to an offer to sell, and that the notice is the acceptance of that offer on the part of the purchaser. Perhaps this formula may be somewhat too absolute for the real relation of the parties, for if after the notice the company do not follow it up by proceeding to take possession, and to settle the compensation to be paid under the statute, I am not prepared to say that the proprietor may not proceed in the administration of his estate as before, and create rights in the course of that administration which the company may ultimately be obliged to

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respect. If the company had not proceeded to take possession and had allowed the respondent to enter to the lands at Martinmas, 1873, the case might have assumed a different aspect. I think, however, it admits of no doubt that the notice to take the land constitutes a completed contract to this effect, that neither party is entitled to resile, and that either party is entitled to enforce it; and that no right can be created by the seller to the prejudice of the purchaser after the date of the notice, unless with the consent or tacit acquiescence of the purchaser. I do not doubt that the effect of such a notice may be entirely obliterated by the inaction of the company which gives it. But we have no such case here. The company proceeded immediately to take the necessary steps under their contract and took possession of the sixteen acres on the 3d of October, after consigning in bank sums to meet the claims of Mr Wedderburn and the former tenant. I am of opinion, therefore, that the whole case fails on the fact, and that the questions of law which have been argued do not arise.

LORD ORMIDALE.—The respondent, Mr Lindsay, on the assumption that he was entitled to compensation from the defenders for about sixteen acres of the farm of Wormit, which he said he held under lease from the proprietor, Mr Wedderburn, made a claim for the same upon the suspenders, on the ground that they had taken these sixteen acres for the purposes of their railway. The suspenders in consequence of the claim so made, and to prevent their being foreclosed as to its amount, adopted, provisionally and under protest, the proceedings necessary under the Lands Clauses Act for having its amount ascertained. They, however, at the same time, presented the present suspension and interdict, in which they maintain that these proceedings ought to be suspended and interdicted as being, in the circumstances, unnecessary, in respect that, as the respondent had no lease and was not in possession of the lands when they were taken, he is not entitled to any compensation. That the course thus adopted by the railway company is a perfectly competent one has not been, and could not well be, disputed.

On the other hand, and in answer to the suspension and interdict, Mr Lindsay, the respondent, has produced a lease bearing to have been granted on the 12th of July 1873, the day the notice to take the lands by the suspenders was served on the landlord's agents; and the respondent avers and maintains that the lease had been duly executed, not only on the same day, but in point of time before the notice was served. And the respondent also maintains and avers that although he was not then in possession of the farm, or any part of it, his entry to it not being till Martinmas thereafter, the suspenders had been made aware of the lease before their notice was served, and are, therefore, bound to compensate him as tenant of the lands taken by them.

The parties having been allowed and having adduced a proof in support of their respective averments, the Lord Ordinary, on advising that proof, has decided in favour of the respondent, and the Court has now to dispose of a reclaiming note at the instance of the suspenders against that judgment.

It is obvious that the leading, if not the only question for the determination of the Court now, is, whether the lease founded on by the respondent had been duly completed, and existed at or before the time when the suspenders' notice to take the lands was served on the landlord or his authorised agents, for if the respondent held no completed lease at that time the suspenders cannot be burdened or affected by a lease subsequently obtained. This principle was given effect to by this Court in the case of the City of Glasgow Union Railway Co. v. M'Ewen and Co., 8 Macph. p. 747, (42 Scot. Jur., 385), and by the Master of the Rolls in

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England *in re* Marylebone (Stings Lane) Improvement Act *ex parte* Edwards (Law Reports, 12 Equity, p. 389), and it has been also repeatedly determined, as exemplified by the cases referred to in Mr Deas' work on railways (pp. 144-5-6), that by a notice on the proprietor to take lands the acquisition or purchase of them is effected. It is true that, as prescribed by the Lands Clauses Act, further proceedings are necessary for ascertaining and settling the price or compensation to be given for the lands so purchased or acquired, as well as other collateral matters, but their purchase or acquisition is not thereby altered. After delivery of their notice to Mr Wedderburn or his authorised agents, the suspenders, on the one hand, could not resile from their obligation to take the lands, and, on the other hand, neither was it in the power of Mr Wedderburn to deal with the lands so taken, by granting a lease of them, or otherwise burdening or affecting them. The cases referred to by Mr Deas make this very clear.

When, then, did the suspenders, the railway company, acquire the lands in question from the proprietor, Mr Wedderburn, by serving on him or his agent, in terms of the Lands Clauses Act, a notice to take them, and had the lease founded on by the respondent been previously completed in his favour? That the notice was served or delivered in Dundee to Mr Macfarlane of Messrs Kerr and Macfarlane, the proprietor, Mr Wedderburn's agents, on Saturday the 12th of July 1873 at one o'clock, or, at latest, between that hour and two o'clock, by Mr Law, a clerk in the office of Mr Johnstone, the railway company's solicitor, seems on the evidence to be indisputable; and that Mr Macfarlane on the same day informed Mr Law that the respondent had obtained a lease of the farm of Wormit, is admitted by the suspenders in the 6th article of their condescendence. But the parties are at issue as to whether the lease had been executed by the proprietor before or after the lands in dispute had been taken by the suspenders' service of notice. In regard to this all-important question there can be no doubt, I think, that the *onus* lies on the respondent, Mr Lindsay. It is he who founds on the lease, and the existence of it prior to the service of the suspenders' notice is essential to his case. It does not, however, appear to me that Mr Lindsay has established that his lease had been duly completed prior to the service of the suspenders' notice. That it had been under consideration by him and the landlord, or their agents, is true, and that it had been sent in an extended form, with Mr Lindsay's own signature to it, by Messrs Kerr and Macfarlane to Mr Wedderburn, the landlord, for his signature, two days before the service of the suspenders' notice to take the lands, may be also true. But it is manifest from the terms of Messrs Kerr and Macfarlane's letter of 10th July,[1] sending the lease to Mr Wedderburn, that he had not previously known or approved of all its terms, and therefore he might, if he had pleased, have declined to execute it. That it was in his power to have done so is, indeed, clear from the circular,[2] subject to the terms of which the respondent must, according to the testimony of Mr Macfarlane, have offered for the lease, and which by its 9th head expressly declares that "until the lease be adjusted and signed, there will be no binding agreement between the landlord and any offerer." Mr Wedderburn, however, appears to have signed the lease and returned it to Mr Macfarlane by letter dated the 12th of July, and it also appears to have been received by Mr Macfarlane at Dundee on the 14th of that month; but at what hour on the 12th of July, whether before or after one or two o'clock, by which time the suspenders' notice had been delivered, does not appear.

[1] Quoted, p. 171.

[2] Partially quoted, p. 170.

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Nor do I think that the evidence as to what took place at the interview between Mr Law, who delivered the suspenders' notice to Mr Macfarlane, and the latter gentleman, materially affects the matter. This evidence is contained in the 6th article of the suspenders' condescendence, and in the testimony of Mr Law and Mr Macfarlane. In the article referred to of the suspenders' condescendence it is merely said "that when the said notice was delivered the person who delivered it on behalf of the company was informed by Messrs Kerr and Macfarlane that the former tenants (Blair's trustees) had executed a renunciation of the lease, and that the farm had been relet for nineteen years from Martinmas 1873 to the respondent." Mr Law, again, the person who served the suspenders' notice on 12th July, says that on arriving in Dundee he went immediately to Messrs Kerr and Macfarlane's office, saw Mr Macfarlane, and handed the notice to him; and again, "when I saw Mr Macfarlane I was told by him that the farm had been let to a new tenant. He did not give the name of the new tenant that day, and I did not ask for it." He then goes on to explain that it was not till some days afterwards that the name of the new tenant was obtained, and in this Mr Law is corroborated by the letters in process. And although Mr Macfarlane was examined as a witness after Mr Law, he does not appear to have been asked any question at all for the purpose of shewing whether his communication to Mr Law about the new tenant was made before or after the suspenders' notice had been delivered. Mr Macfarlane, indeed, could not possibly have stated to Mr Law, on the 12th of July, that the new lease had then been completed and executed by Mr Wedderburn, the landlord, for, as has been already explained, it was only sent to Mr Wedderburn for execution on the 10th, and did not come back from him executed till the 14th.

In this state of the matter it appears to me that it must be held that the notice was served before any reliable information was or could have been furnished as to the new lease or tenant; and, at any rate, that it has not been proved that the new lease had been executed by Mr Wedderburn prior to the service or delivery of the suspenders' notice. And if this be so, it is unnecessary, and would be idle, to inquire whether knowledge had reached the suspenders, prior to the service of their notice, that a lease was being executed, for, if *de facto*, the existence then of a duly completed lease has not been proved, there is an end of the matter.

In the view I take of the case as now explained, the question dealt with by the Lord Ordinary, whether a lease on which there has been no possession could affect the suspenders, does not arise. I must decline, therefore, to deal with that question as one which, however important in itself, could have no practical interest in the present case, and I must reserve my opinion regarding that question and the argument of the respondent in support of his view of it.

The result is, that, for the reasons I have stated, I am unable to come to any other conclusion than that the interlocutor of the Lord Ordinary should be recalled, and suspension and interdict granted as craved. What claim (if any) the respondent may have against his landlord in respect that a portion of the farm let to him has been taken by the suspenders is not for the Court to determine in this process. But I may remark that, if the respondent should encounter any difficulty in regard to the matter, it would appear from the correspondence that it has been very much of his own creating.

LORD GIFFORD.—In this case various questions of nicety and difficulty have

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been argued at the bar, but I have come to be of opinion that the case may be safely disposed of on the first question of fact raised between the parties, and that it is unnecessary to give any opinion on the more difficult questions of law raised by the suspenders.

The question of fact which, I think, suffices for the determination of the case is the question, whether the lease granted by Mr Wedderburn of Wedderburn and Birkhill in favour of the respondent, Mr Lindsay, was granted before or after the statutory notice served by the North British Railway Company upon Mr Wedderburn or his agents on 12th July 1873? I am of opinion, upon the evidence before us, that the contract of lease between Mr Wedderburn and Mr Lindsay was not completed until after the railway company had served the statutory notice of 12th July 1873 upon Messrs Kerr and Macfarlane, Mr Wedderburn's agents, it having been previously agreed in writing that service upon them should be the same as service upon Mr Wedderburn himself.

I think it is quite fixed in law that a statutory notice under the Lands Clauses Consolidation Act has the effect of a completed contract of sale between the landowner and the railway company, binding upon both parties, and from which neither party can resile without mutual consent. It is true, as argued by Mr Fraser, that in certain circumstances this contract may be departed from, or may be held as departed from by the conduct of both parties, particularly in cases of long delay of both parties to carry out or enforce the contract, but none of the cases and authorities quoted interfere in the least with the doctrine that the statutory notice when served is a completed contract from which the railway company cannot resile, and which can only be altered by the joint consent of both parties. There is no question in the present case, and there can be none, about presumed abandonment.

I think it is also well fixed in point of law, and the rule is in entire accordance with equity and common sense, that after a landlord has received the statutory notice from a railway company, purchasing from him a precise and definite piece of land, he cannot thereafter let that land to some third party. He may assign his own rights and claims for price or for compensation, but the moment the railway company's notice is served he can do no more. In particular he can then introduce or create no new rights or claims.

This principle has been recognised both in Scotland and in England—in Scotland in the case of the City of Glasgow Railway Company v. M'Ewen, 18th March 1870, 8 Macph. 747; in England in the case Marylebone Improvement Act, 1871, Law Reports, 12 Equity, 389, and other cases; but I do not think it needs authority to shew that a party who has sold his land to another, though by a mere personal contract, cannot thereafter create new burdens upon it so as to impose a higher price or greater compensation against the purchaser.

In the present case the question of priority of notice or of lease is a very narrow one. Both are dated the same day, 12th July 1873, and had there been no evidence in the case there would have been no presumption that the one was prior to the other. But when the circumstances disclosed in evidence are taken into account, I have come to the conclusion that the purchase by the railway company, by means of their statutory notice, must be held to have been completed before any right of tenancy was conferred by the landlord upon the present respondent, Mr Lindsay. No doubt it is unpleasant to have the two contracts running so close upon each other, but even this unpleasantness is somewhat removed, for I think it plain that, but for the delay in Mr Wedderburn or his

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agents answering the letters for the railway company the statutory notice would have been sooner served. I am also of opinion that there is no real hardship against the respondent, who knew that some land was to be taken by the railway company, and who is entitled, as in right of his landlord, to make all claims of compensation which the landlord could make, so as to vindicate his rights against the landlord under his lease, but he is not entitled to found upon the lease to the effect of getting a greater compensation than the landlord, his author, would have been entitled to.

The facts bearing upon the question of priority may be very shortly stated.

It was known to the whole neighbourhood, and, in particular, to the respondent, that the North British Railway Company would require to take part of the farm of Wormit for their undertaking, although the precise extent and boundaries of the land required were not known. On 7th July 1873 the notices were ready, and the agent for the railway company wrote the agents for the landlord inquiring, on 7th July, whether they would accept service, or whether it should be made on Mr Wedderburn himself. They had previously accepted services of former notices for Mr Wedderburn. This letter was not answered till 11th July, and the answer did not reach the railway's agents till the 12th July, although it appears that, in the interval, the landlord's agents were hurrying on the proposed lease to the respondent. On 12th July 1873 a clerk acting for the railway company was sent to Dundee to serve the notices on Messrs Kerr and Macfarlane, the landlord's agents, they having consented, by their letter of 11th, to receive service. The clerk, Mr Law, proves that he served the notices on Mr Macfarlane, the landlord's agent, on Saturday the 12th July, about one o'clock. Mr Macfarlane, who received the service, says it might be two o'clock, but nothing turns on this slight discrepancy. Admittedly the notices were served between one and two o'clock on Saturday 12th July, and from that moment the purchase was completed, and the railway company were proprietors of the lands in the notice.

The lease stands thus: It was signed by the tenant, the respondent, on 10th July, but the terms were not fully adjusted then, for the tenant, before signing it, insisted upon a new clause being inserted at the end relative to the compensation due by the railway company, and to this clause, as well as to the lease itself, the landlord's assent was necessary. The lease was sent to the landlord for signature that same day (the 10th), and he subscribed sometime on Saturday the 12th. There is no evidence as to the hour of subscription, although the respondent might have called the instrumentary witnesses, who would have proved at what time of day the signature was adhibited. In the absence of all evidence I am disposed to think that the presumption is against the respondent. The railway company have done all that they can in proving the hour of their service,—the other party have not chosen to prove the hour of Mr Wedderburn's signature, although they had the means of doing so; and I do not think it unfair to hold that they abstained because they could not bring the signature to an earlier hour than the service of the notice. But probably much does not depend on the mere hour, for the signed lease remained in the landlord's power and under his control. It was sent by him to his own agent, whom it did not reach till Monday the 14th July. Now, on Monday 14th July, it was the duty of Mr Wedderburn's agent to have withheld the delivery of the lease from the tenant, excepting on the condition that the tenant took his chance of the effect of the railway company's notice. The landlord, no doubt, signed the lease in good

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faith, not knowing of the company's notice; but he took care to send it to his own agent, who knew before he got it that the company's notice was an impediment which prevented its completion. The landlord and his agent would have been quite entitled and were bound to tell the respondent that the notice had been served, if it were prior, and to refuse to deliver the lease except under reservation of its effects. Sometimes, indeed, a mutual contract is completed by mere signature, but this is only in cases where no impediment to the contract has arisen before actual completion.

On the whole, therefore, although the point is a very narrow one, I am of opinion that the company's notice must be held to have been prior to the actual completion of the contract of lease. I reach this conclusion the more willingly that it is proved the landlord's agents knew the railway notices were coming, and, whether intentionally or accidentally, delayed their service. The result is that the respondent here must claim compensation only through his landlord or as in right of his landlord. He cannot found upon his lease, which is subsequent to the notice, and can give no broader right against the company than the landlord himself had.

It is said, and has been held by the Lord Ordinary, that "at or before the time when the notices were served," the railway company had been made aware of the respondent's lease. I do not think that this is proved, but the contrary. The utmost that is proved is that immediately after the notices were served,—that is, after Mr Macfarlane took them from Law's hand, he said to Law that the farm had been relet, but plainly this is not before service but after it. Besides, I do not think that Law, a mere clerk and messenger serving the notices, was the party to whom such intimation should be given; and even if Macfarlane's statement had preceded the service—that is, preceded the delivery of the notices—it would not legally have stopped service. The messenger had nothing to do but to deliver formal notices, and any statement made to him could not go beyond a mere protest or reservation of rights. Besides, Mr Macfarlane had no right to say on Saturday the 12th that the farm had been relet. The signed lease did not come back to him till Monday the 14th; and even then, if I am right in the view I have taken, it was in the landlord's power, and ought only to have been conditionally given to the tenant.

The view which I have now taken supersedes the much larger and much more important questions, whether, to enable a tenant to claim under the statutes, he must not be in possession of the lands under his lease; and whether, if the railway company obtain possession not only before the tenant does but before the tenant's term of entry under his lease arrives, they will be liable to him, as tenant, under the statutes. These questions do not seem to have been settled by any decided case, or by any authority of which I am aware, and I desire to reserve my opinion. I think the questions are attended with great difficulty.

Probably it may be proper, in the interlocutor about to be pronounced, to make it clear, that while the respondent is not entitled to go to arbitration or to claim as tenant under his lease, his whole claims as assignee, or implied assignee of his landlord, are reserved entire. The nomination of the arbiters is in general terms, and a simple suspension and interdict might possibly be held to exclude him altogether, which of course is not intended.

LORD NEAVES was absent.

THIS interlocutor was pronounced:—"Recall the interlocutor com-

plained of; sustain the reasons of suspension; suspend, prohibit, interdict, and discharge, in terms of the note of suspension and interdict: Find the reclaimers entitled to expenses," &c. No. 33. Nov. 30, 1875. North British Railway Co. v. Lindsay.

DALMAHOY & COWAN, W.S.—MORTON, NEILSON & SMART, W.S.—Agents.

DONALD BEITH, Suspender.—*Fraser—Balfour—Moody Stuart.* KENNETH MACKENZIE AND OTHERS, Respondents.—*Asher—Hunter—Rankine.* No. 34. Nov. 30, 1875. Beith v. Mackenzie.

Trust—Indefinite Payments.—Where a trustee, holding two different funds for the same beneficiary, makes indefinite payments to the beneficiary, without fixing at the time from which fund the payments come, the incidence and legal effect of the payments are not to be determined by the arbitrary choice of the trustee, but the payments must be equitably apportioned between the two funds according to legal rules, if the trustee has a balance in his hands from both, or, if not, they must be held to have been made from that fund in which he had a balance in hand at the time.

Executor—Bona fides.—Observations on the defence of *bona fide* payment to beneficiaries as stated by an executor against creditors who have not given notice of their claims within six months.

THIS was a suspension of a charge directed against Mr D. Beith, W.S., as sole surviving trustee under the settlement of the deceased Hugh Mackenzie of Dundonell, by Kenneth Mackenzie of Dundonell and others as trustees under the settlement of the said Hugh Mackenzie's father, Murdo Mackenzie, or as heirs *in mobilibus* of Murdo's widow, Mrs Christian Ross or Mackenzie. 2D DIVISION. Lord Young. R.

The charge was for payment of the sum of £3002, 6s. 1d. with interest, under deduction of a sum of £500, as decerned for by the Court on 2d July 1873.[1] The complainer did not dispute that this sum was due by Hugh Mackenzie's trust-estate, nor that the claim therefor was intimated to him on 4th July 1871 in the course of another inquiry referring to the same estate; but he alleged that at the said date he had no funds in his hands belonging to the trust, these having been exhausted by his payments *in bona fide* to the sole beneficiary, Mrs Catton, daughter of Hugh Mackenzie. An accounting was entered into, in which the accountant presented an interim report asking the Court's guidance on certain points of difficulty, and the present question arose on a discussion of this report.

The following is taken from Lord Gifford's opinion:—"The accounting with Mr Beith is rendered difficult, and in some respects perplexing, from the circumstance that Mr Beith, or rather his firm of Murray, Beith, and Murray, acted as law agents and cashiers not only for Hugh Mackenzie's trustees, of whom Mr Beith is now sole survivor, but also for the marriage-contract trustees of Mr and Mrs Catton, and for Mr and Mrs Catton as individuals. Mrs Catton was the daughter and residuary legatee of Hugh Mackenzie.

"Only one cash account was kept by Messrs Murray, Beith, and Murray for all these parties, that is, for Hugh Mackenzie's trustees, for Mr and Mrs Catton's marriage-contract trustees, and for Mr and Mrs Catton as individuals, and it contains entries of the whole cash transactions relating to all these different parties. It is opened in the name of 'A. R. Catton, Esq., and Mrs Catton,' and it continues throughout under the same heading. The explanation of this is that Messrs Murray, Beith, and

[1] Mackenzie v. Mackenzie's Trustees, June 12, 1873, 11 Macph. 681, 45 Scot. Jur. 433.

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Murray were originally employed by Mr and Mrs Catton as individuals, and when they afterwards became agents for the marriage-contract trustees, and for the trustees of Hugh Mackenzie, no new cash account was opened, but all payments and receipts on account of any of the trusts or parties were entered indiscriminately, in the order of their dates, in the general account which stood in name of Mr and Mrs Catton. Still farther, the entries are made for the most part in general and indefinite terms, so that it does not appear on the face of the entries or of most of them to which account they belong. In order to ascertain this, the nature of each entry must be ascertained by a reference to the vouchers by which it is instructed, so that if separate accounts are now to be made up it really involves an inquiry into the nature of each receipt and of each payment

"But farther still, a very large number of the entries, particularly the entries of payments, are indefinite not only on the face of the account, but also on the face of the vouchers, that is, the vouchers are also indefinite, and it cannot be discovered from them from what source or on what account the payments were made. In particular, this is the case with the whole or almost the whole of the very large payments made by Messrs Murray, Beith, and Murray to or for behoof of Mr and Mrs Catton. These payments, including law accounts incurred to Messrs Murray, Beith, and Murray, amount to upwards of £4000, and it is really upon them that the whole question turns.

"From time to time Messrs Murray, Beith, and Murray made indefinite payments to Mr and Mrs Catton, amounting, previous to 4th July 1871, when the charger's claim became known, to £2257, 3s. 11d.; and the question is, from what funds shall these payments be held to have been made. On the face of the payments they are indefinite, and they may have been made to Mrs Catton or her husband, either as individuals, as beneficiaries under Hugh Mackenzie's trust, or as beneficiaries under the marriage-contract, or in two or more of these characters combined. It is not necessary to distinguish between Mr and Mrs Catton as individuals. Mr Catton acted throughout for his wife."

The Lord Ordinary found "that the complainer, as trustee acting under the settlement of the deceased Hugh Mackenzie of Dundonell, is not in possession of any trust-estate to answer the debt charged for, and that there are no grounds by reason of improper payments by him or otherwise for subjecting him in personal liability: Therefore suspends the charge," &c.

The respondents reclaimed.

On the defence, in so far as depending on *bona fide* payment to beneficiaries, the following observations were made by

Lord Gifford.—I think it is quite fixed in law, and the rule is in entire conformity with the plainest equity, that a trustee or trustee and executor, after reasonable time has elapsed and after reasonable inquiry has been made, is entitled and is in safety to pay away the free trust or executry funds in his hands, either to legatees for pecuniary or specific legacies, or to residuary legatees, or ultimate beneficiaries, provided he does so *in bona fide* and without knowledge that there are outstanding claims due by the estate, and that he will not be liable in repayment or in double payment to creditors whose claims were not intimated and not known at the time when such *bona fide* payment was made. The case of Stewart v. Evans[1] is a strong example of the application of this rule, for there the trustee was held free and justified in having parted with the estate

[1] June 9, 1871, 9 Macph. p. 810.

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although he knew of the claim, because he believed it to be effectually discharged by a deed which, however, was afterwards found to be null in law. It seems to follow *a fortiori* that the trustee would have been free if he had never known of the claim at all. The principle is recognised in other cases, and indeed on no other footing would a trustee ever be safe to wind up a trust and part with the trust-funds until perhaps the lapse of forty years—the long prescription. After six months, and in a question with creditors, the trustee or executor may pay *in bona fide primo venienti*, that is, he may pay off in full the creditors who have appeared, without being answerable to creditors who may afterwards turn up; and so after six months, and after due and reasonable inquiry, he will be quite in safety to pay the free residue to legatees or beneficiaries, and if after that creditors for the first time come forward, they must look for payment not to the trustee who has honestly and in good faith handed over the funds to the beneficiaries, but only to the beneficiaries or legatees who have actually received the funds themselves. . . .

(His Lordship then referred to the accounting as in the narrative quoted above) —Now, in reference to all these indefinite payments, and to other payments in a similar position, which appear in the combined or general current account, the suspender, Mr Beith, after the present question arose, claimed right to remodel the accounts and to impute these indefinite payments as payments out of Hugh Mackenzie's trust-estate, none of them or few of them being admitted to be payments out of the marriage-contract trust-funds or payments on the individual credit of Mr and Mrs Catton. In this way, in the account of charge and discharge now founded on by Mr Beith, he shews a very large balance—upwards of £3000—due by Hugh Mackenzie's trust, while, on the other hand, there is a sum nearly of the same amount due by the firm to the marriage-contract trustees.

Now, I am of opinion that no such remodelling of the accounts is now permissible. The suspender cannot now impute payments which at the time were indefinite to one account more than to another. These indefinite payments must now be imputed and their incidence and legal effect must be determined in terms of law and in conformity with legal rules, and not according to the will or choice of the complainer or his firm. In particular, I am of opinion that the suspender cannot now be allowed to say, "I made these indefinite payments to Mr and Mrs Catton solely as beneficiaries under Hugh Mackenzie's trust, while at the same time I was retaining and accumulating for their behoof the whole income which was arising under the marriage-contract trust, to which income Mrs Catton was undoubtedly from time to time entitled." This is the practical result of the suspender's claim to remodel the accounts, and I think the claim and its results are quite inadmissible.

On the other hand, it seems to me equally clear that the respondents are not entitled to insist that these indefinite payments must have been made solely on account of the marriage-contract funds, the result of which would be to make Messrs Murray, Beith, and Murray advance, as on marriage-contract trust-account, sums greatly larger than they ever received on that account, and this in order to make them debtors under Hugh Mackenzie's trust.

The equitable rule seems to be that where a cashier or trustee holds two different funds for the same beneficiary and makes indefinite payments to the beneficiary without fixing at the time from which fund the payments come, then these indefinite payments must, whenever occasion arises, be equitably apportioned between the two trusts, if the trustee or cashier held funds belonging to

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both, or must be held to have been made from that fund or trust of which the cashier or trustee at the time had a balance in his hands, and not from any other trust of which at the time the cashier or trustee had no balance in his hands from which the payment could be made. In short, the trustee or cashier shall not be held to advance or lend to the beneficiary so long as he has any funds in his hands belonging to the beneficiary and from which the payment might be made. In other words, a trustee intromitting with two funds, and making indefinite payments to the common beneficiary of both, shall always be held to make these payments from funds in his hands, and not in expectation of getting funds on another account which he has not yet received.

LORD JUSTICE-CLERK.—This is the opinion of the Court.

LORD NEAVES was absent.

THE COURT adhered.

MURRAY, BEITH, & MURRAY, W.S.—A. P. PURVES, W.S.—SKENE, WEBSTER, & PEACOCK, W.S.—Agents.

No. 35. Dec. 2, 1875. Lord Advocate v. Brown.

THE LORD ADVOCATE, Pursuer.—*Sol.-Gen. Watson—J. P. B. Robertson.* THOMAS BROWN (Inspector of Liff and Benvie), Defender.—*Fraser—Thoms.*

Process—Relevancy—Industrial Schools Act, 1866 (29 *and* 30 *Vict.* c. 118), *secs.* 14, 35, 38.—The 38th section of the Industrial Schools Act enacts that where a child sent to an industrial school under the Act is chargeable to any parish the parochial board and inspector of the poor "shall . . . be liable to repay to the Commissioners of Her Majesty's Treasury all expenses incurred in maintaining him."

A boy, chargeable to a parish, having been committed to an industrial school under a warrant *ex facie* regular, the Lord Advocate raised an action against the inspector for the expenses of his maintenance.

Held that it was not a relevant defence for the inspector to plead that the proceedings before the magistrate were irregular, and that the warrant had been illegally granted.

1ST DIVISION. Ld. Curriehill. M.

THIS was an action by the Lord Advocate against the inspector of poor for Liff and Benvie, concluding for declarator that the defender was "liable for the expense of maintaining, at a rate not exceeding five shillings sterling per week, James Mackay, presently detained in the Dundee Industrial Schools, from the date of his commitment to said schools, under warrant dated 8th May 1871, until he be discharged therefrom, all in terms of the Industrial Schools Act, 1866." There were also conclusions for payment of £31, 10s. already incurred, and for relief for the future.

It was not disputed that James Mackay was committed under an order in these terms:—"Burgh of Dundee.—Be it remembered that on the 8th day of May 1871, in pursuance of the Industrial Schools Act, 1866, I, one of the Magistrates of the said burgh of Dundee, do order that James Mackay, now or lately residing in Perth Road, Dundee, apparently of the age of eleven years (whose religious persuasion appears to me, after inquiry, to be Protestant), being a child subject to the provisions of section 14th of the said Act, be sent to the Dundee Industrial School, and that he be detained there until he attain the age of fifteen years.—GEORGE T. GRAHAM, Magistrate."*

* The 14th section of the Act 29 and 30 Vict. c. 118, is in these terms:—"Any person may bring before two Justices, or a Magistrate, any child appar-

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The pursuer pleaded (as the record was amended in the Inner-House); —3. The said James Mackay having been within the meaning of sections 35 and 38 * of the statute libelled, sent to, and detained in a certified industrial school, the pursuer is entitled, whether the warrant for the said James Mackay's detention be valid or invalid, to recover from the defender the sums contributed by the Commissioners of Her Majesty's Treasury towards his custody and maintenance. 4. No relevant defence having been stated to the present action, the pursuer is entitled to decree, with expenses.

The defender, besides disputing the chargeability of the boy, and the correctness of the rate and amount of the expense, averred that the procedure was irregular in several respects, and stated, *inter alia*, the following pleas:—1. The declaratory conclusions of the action are incompetent, and the petitory conclusion being dependent on the declaratory, the action should be dismissed. 2. The order of detention here founded on cannot support the claim here attempted to be enforced against the defender's board, in respect that—(1) The provisions alike of the common law and of the Summary Procedure Act, as condescended on, were not respected or conformed to; (2) there was no good instance in the applicant, and no qualifications in the boy asked to be detained; (3) the order was *ultra vires* of the Magistrate who pronounced it; (4) it was granted without evidence of necessary grounds; (5) it does not state which of the alternative facts set out in the 14th section of the Act was found proved; and (6) is, as regards the defender and his board, *res inter alios acta*. 3. The Magistrate acted illegally in not sending the said James Mackay to a poorhouse, as allowed by the 19th section, with a view to inquiries being made as to his antecedents. 4. The order was illegal, in respect that the defender was not called as a party to the proceedings before the Magistrate.

The Lord Ordinary repelled the defender's first plea, and appointed the case to be enrolled for further procedure. The defender having then raised a reduction of the order of committal, the Lord Ordinary, on 18th June 1875, pronounced this interlocutor:—"In respect of the dependence of an action at the instance of the present defender against the present pursuer for reduction of the Magistrate's order referred to in the present action, sists further procedure *in hoc statu*: Grants to the pursuer leave to reclaim."

The pursuer reclaimed. At advising,—

LORD PRESIDENT.—In this action the Lord Advocate concludes for declarator against the inspector of poor of Liff and Benvie, that the defender, as representing the parochial board of the said parish, "is liable for the expense of maintaining, at a rate not exceeding 5s. sterling per week, James Mackay, presently

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ently under the age of fourteen years, that comes within any of the following descriptions, namely: That is found begging or receiving alms (whether actually or under the pretext of selling or offering for sale anything), or being in any street or public place for the purpose of so begging or receiving alms: That is found wandering and not having any home or settled place of abode, or proper guardianship, or visible means of subsistence: That is found destitute, either being an orphan, or having a surviving parent who is undergoing penal servitude or imprisonment: That frequents the company of reputed thieves; the Justices or Magistrates before whom a child is brought, as coming within one of these descriptions, if satisfied on inquiry of that fact, and that it is expedient to deal with him under this Act, may order him to be sent to a certified industrial school."

* Quoted in the opinion of the Lord President, p. 190.

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detained in the Dundee Industrial Schools, from the date of his commitment to said schools under warrant dated 8th May 1871 until he be discharged therefrom, all in terms of the Industrial Schools Act, 1866," and farther for payment of £31, 10s. as the amount of his maintenance till 17th January 1874.

It appears that the boy, when about eleven years of age, was sent to the Dundee Industrial School on the 8th of May 1871, as being within the provisions of the 14th section of the Industrial Schools Act, and the warrant for his committal was admittedly *ex facie* regular. It specifies his age, states that he is subject to the provisions of the 14th section, and orders that he is to be detained until he attains the age of fifteen years. All that is precisely in terms of the schedule of the statute, and one of the clauses of the statute provides that when an order of commitment is made in terms of that schedule it shall be deemed sufficient.

The boy has been educated at the school, and recently, although he has not been discharged, he has been allowed to work out of doors, and must now have attained the age of fifteen.

The authority for the Treasury advancing money for the support of children committed to industrial schools is contained in the 35th section of the statute, which is as follows :—"The Commissioners of Her Majesty's Treasury may from time to time contribute, out of money provided by Parliament for the purpose, such sums as the Secretary of State from time to time thinks fit to recommend towards the custody and maintenance of children detained in certified industrial schools, provided that such contribution shall not exceed 2s. per head per week for children detained on the application of their parents, step parents, or guardians." Then the 38th section provides that "where a child sent to a certified industrial school under this Act is, at the time of his being so sent, or within three months then last past, has been chargeable to any parish, the parochial board and inspector of the poor of the parish of the settlement of such child, if the settlement of the child is in any parish in Scotland, shall, as long as he continues so chargeable, be liable to repay to the Commissioners of Her Majesty's Treasury all expenses incurred in maintaining him at school under this Act, to an amount not exceeding five shillings per week."

On that section this action is laid, and there is no dispute that Liff and Benvie was the parish of the boy's settlement if he was chargeable at the time, and has continued to be so during the period in which the money has been expended. There may be a question whether he was chargeable during the whole of that time, but there can be no question that he was chargeable at the time when he was sent to the school, because his father was dead, and he lived with his mother who was in receipt of parochial relief, chiefly on account of her being burdened with several children.

The case is so far perfectly clear. All the conditions of the statute are fulfilled. We have the facts that the boy was sent to the school by a magistrate under a formal and *ex facie* valid order, that money was advanced by the Treasury, that the parochial board who are called as defenders are the parochial board of the boy's parish of settlement, and that he was chargeable.

But a number of defences have been stated, founded on objections to the validity of the warrant, but none of them appearing on the face of it. Now, I think the school directors on receiving the warrant, when they found that it appeared to be all correct, were entitled to act upon it, and, in like manner, the Treasury, finding that the boy was in the school under a warrant *ex facie*

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regular, were entitled to advance money on the faith of these facts, and consequently, under section 38, were entitled to recover their advances, provided they could bring the case within the conditions of that section.

I look upon all defences founded on objections not appearing on the face of the warrant as utterly irrelevant, and, above all, the objection stated by the parochial board, that they were not made parties to the application, appears to me entirely unfounded. When an application for the committal of a child is made by the procurator-fiscal or any one else for the public interest, it is, no doubt, indispensable that some one should be called as respondent if it is intended to make any one directly or immediately answerable for the expense of maintenance, and the proper person is usually the parent or guardian. In this case the mother herself appears to have been present, but she was quite unable to contribute to the child's support, and I do not see that anybody else was a necessary party.

The parochial board say, "We should have been cited, or, if we had known even shortly afterwards, we might have got the child out on the grounds now alleged." Now, it appears to me that the inspector of a parish must know how the paupers on his roll live, and here was a pauper with several children receiving relief from the parish, and that at variable rates, according to the circumstances of her condition. These circumstances were proper to be considered by the board in making her an allowance, and it was only their duty not to expend the public funds entrusted to them except on full knowledge and consideration of the circumstances of each pauper. Therefore, it is in vain to say that the child could have been sent to school without the fact being known to the board. That was just one of the circumstances on which they were entitled to vary, and did vary, the mother's allowance. Therefore their knowledge put them in the position, if they had any objection to the order, to apply for its recall or suspension. But they omitted to do so, and if they were allowed to do so now the machinery by which this money is advanced by the Treasury would be thrown out of gear and made unworkable.

Therefore the defences, so far as stated against the validity of the warrant are, in my opinion, irrelevant.

But there still remains a question. The boy's mother was a pauper when he was sent to the school, but she ceased to receive relief from 4th July 1871. Now if, after that date, she was in a condition to maintain herself and family, including the boy, she was no longer a pauper in any sense, and the boy was no longer chargeable, and therefore the expense of his maintenance would not be recoverable from the parochial board. We must have the facts ascertained before we can dispose of this part of the case.

LORD DEAS.—The warrant is not said to be otherwise than regular and legal on its face, and that being so, I think that both the managers of the school and the Treasury were entitled to act on it.

It does not follow that nobody had a right to inquire into the validity of the warrant. That was the right and the business of the party who was to be ultimately liable—namely, the inspector of the parochial board. He was entitled to ask that the warrant should be quashed if it was invalid. True, he could not do so unless he knew of it. I think there is strong ground for believing that he got express intimation. But apart from that, and without determining that an inspector is bound to know all about the different families of paupers in receipt

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of relief, I think that what passed between the inspector and the mother immediately after the boy was sent to the school shews that, in this case, the inspector either knew, or was bound to have known, where the boy was, and how he was being maintained. I do not understand the Crown to admit that there is anything wrong with this warrant. But I do not think the Crown can be required to go into that question.

LORD ARDMILLAN and LORD MURE concurred.

The parties adjusted a joint minute, agreeing "that the defender's first four pleas be repelled, and that the pursuer should obtain decree restricted to the period from 8th May 1871, the date of commitment, to 16th April 1873, the day of James Mackay's beginning to earn wages, and to the rate of 2s. 6d. per week."

THE COURT pronounced this interlocutor:—"The Lords having heard counsel on the reclaiming note for the Lord Advocate against Lord Curriehill's interlocutor, dated 18th June 1875, recall the said interlocutor: Find that the second, third, and fourth pleas stated in defence are irrelevant: Find that the defender, as representing the parochial board of the parish of Liff and Benvie, is liable for the expense of maintaining James Mackay, mentioned in the summons, in the Dundee Industrial School, from 8th May 1871 till 16th April 1873, and in respect of the joint minute for the parties, No. 19 of process, decern against the defender for payment to the pursuer on behalf of the Lords Commissioners of Her Majesty's Treasury of £12, 12s. 6d. sterling, being the amount of such expenses, with interest from the date of citation: *Quoad ultra* assoilzie the defender, and decern: Find no expenses due to or by either party."

CROWN AGENT—DRUMMOND & REID, W.S.—Agents.

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ALLAN GILMOUR AND OTHERS (Steuart's Trustees), Pursuers.—*D.-F. Watson—Trayner—D. Crichton,*
THOMAS HART, Defender.—*Balfour—R. V. Campbell.*

Contract—Reduction—Essential Error.—A proprietor sold part of his ground for £75, believing it to be burdened with the cumulo feu-duty of £9, 15s. The purchaser knew that the portion effeiring to it was only 3s., and was aware of the seller's mistake. The disposition was revised by the seller's agent. The purchaser took possession and laid out several hundred pounds on the property. In an action by the seller for reduction of the disposition and restitution, or alternatively for decree that the purchaser was bound to relieve the seller of the feu-duty of £9, 15s., and that that sum should be declared to be a real burden on the part sold, and that warrant should be granted to record decree to that effect in the register of sasines, the Lord Ordinary decerned in terms of the second alternative conclusions. *Held* that it was incompetent so to reform the contract, but decree of reduction and restitution granted on condition that the pursuer reimbursed the defender for his outlay on permanent additions to or improvements of the subjects.

Contract—Proof—Parole.—When a contract has been embodied in a formal deed it is not competent to modify its terms by parole evidence that the intention of the parties was different from that set forth in the deed.

1ST DIVISION.
Lord Shand.
M.

THE testamentary trustees of John Steuart, writer in Pollokshaws, advertised for sale a plot of ground in Cogan Street, Pollokshaws. The feu-duty was stated in the advertisement to be £9, 15s. Thomas Hart, mill-manager, Pollokshaws, at first made an offer of £50 for the subjects. His agent wrote,—"We have no doubt you may consider this offer a very small one, but . . . . . the feu-duty for which the subjects are liable

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being about £37, 10s. an acre, you may perhaps deem it worthy of consideration." He subsequently offered £75, on condition that the duplication of the feu-duty should not be payable for seven years. This offer was accepted, and a disposition of the property was prepared by Hart's agent, revised by the sellers' agents, and duly executed. It was in ordinary terms with an *a me vel de me* holding, and no *reddendo* expressed.

When the first term's feu-duty became payable Hart refused to pay more than a few shillings, and on examination of the titles it appeared that the duty of £9, 15s. was payable for the whole of the Printfield Lands, belonging to the pursuers, of which the Cogan Street property only formed a small part, so that the proprietor of the Cogan Street property, though liable to the superior for £9, 15s., had relief against the rest of the lands except to the extent of about 3s.

Steuart's trustees then raised this action against Hart, concluding for reduction of the disposition, and restitution *in integrum*, or alternatively that Hart was bound to relieve the trustees of the sum of £9, 15s. of feu-duty, with corresponding casualties, and that the said sum and casualties were real liens and preferable burdens on the subjects, and that warrant should be granted to have decree to that effect in the pursuers' favour recorded in the Register of Sasines.

The pursuers averred that it escaped the notice of their agents that the title did not contain any sub-division or allocation of the feu-duty; that their chief object in selling the property, which was ruinous and yielding no income, was to get quit of the payment of £9, 15s.; that of this the defender's agent was well aware; that it was of the essence of the contract that the defender should relieve them of the payment, and that he all along knew this. They further averred in Cond. 10, as amended in the Inner-House, that they were willing, and offered, on the said subjects being restored to them, to repay the price, and to reimburse to the defender his expenditure in permanent additions to or improvements of the said subjects, as the same should be judicially ascertained.

They pleaded;—(1) It having been part of the treaty between the pursuers and defender for the sale of the property in question that it was effectually burdened with a feu-duty of £9, 15s., and as the defender refuses to give effect to this, the pursuers are entitled to decree in terms of the reductive conclusions of the libel. (2) At all events, as the pursuers were labouring under essential error, and were known at the time by the defender to be so doing, in accepting of his offer, upon any other footing than that of being wholly relieved from the said feu-duty, and were under essential error in subscribing and delivering the disposition without inserting therein a clause to that effect, they are entitled to have the transaction set aside, as concluded for. (3) In any view, the pursuers are entitled, if the transaction is not set aside, to decree against the defender as concluded for, for payment of the yearly sum of £9, 15s., and for warrant to record the decree in the Register of Sasines.

The defender averred that "it was not in the contemplation of either party to the transaction to impose on the subjects in question any additional feu-duty to that which was imposed on them by the titles. At all events, this was not in the contemplation of the defender; and if the pursuers had such in contemplation, they did not disclose it to the defender." "The defender has expended on a brassfoundry on the ground about £220, exclusive of fixed machinery, which cost upwards of £200; and on the workmen's houses he has expended about £450."

He pleaded;—(3) The transaction in question having been concluded by formal deed, it is not competent to modify or contradict the same by extrinsic evidence.

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The Lord Ordinary, on 22d February 1875, repelled the defender's third plea, and allowed a proof.*

The evidence shewed that the defender knew, when he offered for the property, that it was only burdened with a feu-duty of a few shillings, and that he knew that the pursuers believed it to be burdened with £9, 15s. The evidence as to the value of the subjects was conflicting, but, on the whole, it went to shew that but for the supposed burden the value would have been considerably more than £75. It was proved that the defender had laid out several hundred pounds on new buildings upon the ground.

The Lord Ordinary, on 5th April 1875, pronounced this interlocutor:—"Finds that at the date of the sale of the Cogan Street property mentioned on record by the pursuers to the defender, the pursuers were proprietors of twelve acres or thereby of land, called the Printfield Lands, of which the Cogan Street property formed part, and which were held of the same superior for payment of a *cumulo* annual feu-duty of £9, 14s. 11½d.: Finds that at that time the pursuers' agents, who had charge of the negotiations and sale, were under the belief that the amount of this feu-duty had been allocated on the Cogan Street property, and that thereby the remaining parts of the Printfield Lands belonging to them, including parts thereof which had been sub-feued, had been freed and re-

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* NOTE.— . . . . . "As to the competency of allowing parole proof, it appears to me that the pursuers are not precluded, as the defender pleads, from referring to anything beyond the letters of 4th and 12th December. In the first place, these formed only part of the correspondence, and I think that for the purpose of shewing what was the real contract between the parties in regard to the feu-duty or burden in question, the capitalised value of which is more than three times the price paid for the property, the pursuers are entitled to have the whole correspondence before the Court, and the advertisements to which the letter of 4th December refers, as well as to prove the circumstances in which the letters were written, and the knowledge which Mr Brown, the defender's agent, had, and the representations made to and by him in the course of the transaction. The Court, in order to reach the true intention of the parties, and the real transaction between them, has repeatedly refused to sustain a plea such as that now stated by the defender in seeking to limit the pursuers to the letters of 4th and 12th December—Scottish Union Insurance Company v. Marquis of Queensberry, 1842, 1 D. 1203, affirmed 1 Bell's App. 183; Carricks v. Saunders, 1850, 12 D. 812; Lindsay v. Barmcotte, February 19, 1851, 13 D. 718. In the first of these cases Lord Cottenham observed, in language which is, I think, quite applicable to this case,—'If it were not competent for a Court of Equity to give effect to a transaction different from what the deeds executed represented to be the character of it, one of the most important branches of its jurisdiction would be cut off, and a security would be afforded to frauds which are now easily detected and defeated.' 'The only question is the intention of parties.' 'In ascertaining such intention it is competent for the Court to form its judgment upon the whole of the transaction, and upon evidence *dehors* the deed, such evidence being used not for the purpose of putting a construction upon the deed, but of superadding an equity controlling the estate and interest given by the deed.' And in the case of Carricks v. Saunders parole evidence was admitted for the purpose of ascertaining the real nature of the transaction and intention of the parties, although letters had passed between them recording the terms of the order or instructions given, and of the execution of the order or instructions by the pursuer of the action. In the case of Russell v. Freen, 13 S. p. 752, the Court, in ascertaining the true contract between the parties, proceeded, to some extent, on an advertisement, which was not even referred to in the writings which passed between them, and the opinion of Lord Corehouse especially appears to me to be of value in the present question."

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lieved of any part of said feu-duty, while in point of fact no such allocation had been made: Finds that in fixing the upset price of said property, when it was offered for sale in terms of the advertisements mentioned on record, and in accepting the price of £75 offered by the defender, the pursuers acted in the belief that the property was burdened with the whole of said feu-duty, and that the purchaser would undertake the sole liability therefor, and have no claim to be relieved of any part thereof against them as proprietors of the remaining Printfield Lands, and that they were induced to accept the price of £75 under that belief, while if they had understood that the property was ultimately liable to a feu-duty of 3s. only, with a right of relief against the Printfield Lands belonging to them for the remainder of the *cumulo* feu-duty, they would not have sold the property without providing for the allocation of the whole feu-duty thereon, or otherwise obtaining a price of £285 or thereby, which was in their view the value of the property if burdened with a nominal feu-duty only: Finds that the defender and his agent, at the time of the negotiations for the purchase and the agreement to purchase, were fully aware of the essential error under which the pursuers' agents were acting, and concluded the contract with the intention of taking advantage of that error: Finds that the disposition granted by the pursuers in fulfilment of the contract of sale was so granted under the same error on their part, and in the knowledge on the part of the defender and his agent that they were acting under that error: Finds that the defender, in the same knowledge, made considerable alterations and expenditure on the property, and that consequently *restitutio in integrum* cannot now be given by him: Finds in point of law that the contract of sale, and disposition following thereon, having been respectively entered into and granted under error *in essentialibus* as aforesaid, the pursuers would have been entitled to reduce the said contract and disposition, and to be restored against the same if matters had remained entire and restitution had been practicable; and as the defender, in the knowledge of said error, has by his actings made restitution impracticable, he is bound to implement the contract on the footing on which it was entered into by the pursuers, and the pursuers are entitled to have the said *cumulo* feu-duty made an exclusive burden on the said property: Therefore finds, decerns, and declares, under the second alternative conclusions of the summons, that the defender is bound to free and relieve the pursuers of the sum of £9, 14s. 11½d. sterling, payable from the said subjects and other parts of said Printfield Lands to Sir William Stirling-Maxwell, Baronet, of Pollockshaws, the superior of the same, with corresponding casualties, and that the said sum of £9, 14s. 11½d. sterling, and corresponding casualties, are real liens and preferable burdens on the said subjects sold to the defender as aforesaid, and decerns and ordains the defender to free and relieve the pursuers of the same accordingly as from the term of Martinmas 1873 inclusive, and for all time coming thereafter, and grants warrant to the pursuers to record this decree in the appropriate Register of Sasines for publication, or for publication and preservation: Finds the defender liable in expenses," &c.*

* "NOTE.—It is, I think, impossible to read the proof in this case without coming to the conclusion that the defender is seeking to obtain an unfair advantage in the transaction which he entered into with the pursuers for the purchase of the Cogan Street property. It is plain that the pursuers' agents were under the erroneous belief that the *cumulo* feu-duty payable from the Printfield Lands which belonged to the late Mr Steuart had been imposed exclusively on the Cogan Street property, with the effect of relieving the remainder of the lands of any part of it. The belief arose from information which had been com-

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The defender reclaimed, and argued;—The price was not unfair. Besides, the disposition contained the deliberate contract of the parties,

municated after Mr Steuart's death, which occurred in the beginning of 1871, by Mr Brown, afterwards and now the defender's agent, who had been Mr Steuart's managing clerk for some time. A valuation of Mr Steuart's heritable estate was required for Government purposes, and Mr Brown, in communicating the réntal and burdens of Mr Steuart's properties to Mr Binnie, the valuator, for the purpose of his valuation, entered the feu-duty, which may be called £9, 15s., as a burden on the Cogan Street property, while the other Printfield Lands were entered as free from any part of it, and it was on this footing that Mr Binnie valued the property at £111, 18s. 4d. In doing so he deducted the value of the feu-duty at twenty-one years' purchase, being £204, 15s. If the feu-duty had been merely nominal, his valuation, which was a guide to the trustees in exposing the property for sale, would have been £315 instead of £111, or nearly three times the amount fixed.

"It is further, I think, clear, that the defender and his agent Mr Brown were both aware of the serious error under which the pursuers' agents laboured. It is painful to read their evidence on this subject as to the communications which took place between them in reference to the purchase when the negotiations were going on, for they not only contradict each other, but each of them contradicts himself in the course of the testimony he gave. But of the result there appears to be no doubt. Both of them knew that the sellers, or their agents who represented them in the transaction, were under the erroneous belief, contrary to the fact, that the whole feu-duty had been allocated on the Cogan Street property, and both of them knew that, if this were not really so, the burden of the great part, if not the whole of the feu-duty, must be borne by the remaining lands belonging to the pursuers. It is, I think, also proved beyond question that the case is not one of mutual error. The defender states distinctly that he believed the feu-duty to be almost nominal, and that the sellers were acting under error, but he thinks it was no duty of his to enlighten them as to their mistake, and that he did nothing wrong in taking advantage of their error if he could. He distinctly states that at the very outset of the negotiations he knew the sellers understood the subjects to be burdened with the gross feu-duty as an exclusive burden on them, but that he had been informed by Mr Brown, his agent, that he would have a right of relief of all except two or three shillings. Mr Brown gives a different account of this. At one part of his evidence he states he knew there was a substantial claim of relief for a large part of the feu-duty, while at another he states that his letters to the sellers' agents were written in the belief that the whole feu-duty was exigible from the Cogan Street subjects without a right of relief. The impression, however, produced on my mind by the evidence, as a whole, is that the first of these statements is the correct one.

"Both parties, that is, the defender and his agent, are agreed, however, that before the disposition was drafted by Mr Brown and sent to the sellers' agents for revisal they were aware that under the titles the proprietor of the Cogan Street property was entitled to relief of all the feu-duty except 3s., and that the claim of relief for the whole or the greater part of the feu-duty was a claim against the pursuers. It is thus not even disputed that before the transaction was completed by the granting of the conveyance the defender and his agent knew positively the true state of matters, as well as the fact that the sellers had acted under error.

"The first question that arises in these circumstances is, What were the pursuers' rights if they had discovered the error under which they acted before granting the conveyance to the defender? On that question I am of opinion that they were entitled to resist implement of the contract of sale, and if necessary to set aside the transaction by reduction. If either party to a contract has entered into it under essential error, so that in fact there has never been that *consensus in idem* which is essential to a concluded agreement, the contract cannot be enforced. Essential error may exist with reference to the subject, the price or

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and was the only competent evidence of the contract. Although there was no specific reddendo mentioned, the *tenendas* clause had a statutory consideration, or in some cases the person with whom the contract is made. In the present case the error, which was a material one, had reference to the price.

"If the converse of the actual circumstances be assumed, I think this becomes clear. Had the sale been entered into by missives specifying a fixed price, and without any reference to feu-duty, but in the belief on the part of the buyer in consequence of what occurred during the negotiations that the feu-duty was nominal, whereas the fact was there was really a feu-duty of £10 payable, say, without relief, I cannot doubt that the error would have been *in essentialibus*, and the purchaser would not have been bound to go on with the transaction. Feu-duty is really price, and so much so that in many cases it is the sole price stipulated for. The consideration which in selling the property in question the pursuers had in their minds was, as stated to the defender, that the defender should undertake an annual payment of £9, 15s., and pay down a sum of £75. The undertaking for an annual payment was the more important part of the consideration, for the feu-duty of £9, 15s., at the ordinary rate of twenty-one years' purchase, amounts to £204, 15s.

"It is unnecessary to consider whether such an error would have been sufficient to render the contract void if the defender had been entirely in ignorance of the pursuers' real intention and state of mind. The sound rule, when the error is not mutual, necessarily destroying the contract, appears to be that laid down by Lord Wensleydale in Freeman v. Cook, 2 Exchequer, 654, 'that whatever a man's real intention may be, if he manifests an intention to another party so as to induce that other party to act upon it, he will be estopped in denying that the intention, as manifested, was his real intention'—Benjamin on Sale, p. 326. In the case supposed everything might turn upon what had taken place to manifest the real intention of the sellers; and if the real intention manifested had been to sell the property subject to the feu-duty, without any reference to its amount, as it stood in the titles, it may be they would have had no remedy against that error. In the present case the real intention was not only manifest but was known to the other contracting party. It was not even a case of mutual error, in which also the contract would have been void.

"Holding, therefore, that the pursuers might have declined to grant the conveyance to the defender, if they had been aware of their error, are they precluded from the remedy which justice requires they should obtain because of having granted that deed, or because the defender has expended a considerable sum of money on the property since his purchase? This question must, I think, be answered in the negative, because the defender obtained the disposition in the knowledge of the essential error under which the sellers sold the property and granted that very deed in his favour. He knew that there never had been that *consensus in idem* which alone can make a binding contract; but knowing this, and being aware that he had no true right to enforce the contract, he obtained the conveyance without informing the pursuers of their mistake. I think he was not entitled to demand and take implement of a contract which he knew had no real existence, because the parties had never agreed as to the price, the pursuers not having intended to take £75 as the full consideration for the subjects.

"If restitution were still practicable the pursuers would, I think, be entitled to have the disposition cancelled, and to take back the property on repayment of the sum of £75 paid by the defender. This cannot be, because the defender has changed the nature of the property. But, again, this change was made in the knowledge of the pursuers' error, and it must be assumed in the knowledge also that the pursuers were entitled to be restored against the contract. Restitution cannot be obtained, and as the defender is the party responsible for this he must bear the consequences. In many circumstances this would infer a payment of damages or compensation for loss, which is usually the alternative when restitution cannot be given. In the present case such a claim might, I think, be insisted in for payment of a sum of money, but it appears to me that as there is no difficulty in enforcing the contract in the very sense in which the defender

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meaning, which fixed the feu-duty. The disponee was either put in the place of the disponer, or he held under him at a blench duty, with an obligation to relieve the disponer of feu-duty. There was no allegation of fraud, and the disposition being the conclusive evidence of the contract, there was no reason for setting it aside on the ground of essential error. But even if there had otherwise been a case for reduction on that head, the remedy was inapplicable under the circumstances, because reduction on the head of essential error must proceed on the footing of restitution *in integrum*. But here restitution was impossible, owing to the great expenditure which the defender had made on the subjects.[1]

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knew that the pursuers understood it, and entered into it, there is no reason why this remedy should not be given, and I have therefore given decree against the defender, ordaining him to relieve the pursuers of the whole feu-duty of £9, 15s., and making that amount a real burden on the property.

"In the view which I have thus taken it has been unnecessary to enter on the question whether the contract may not be truly represented as having been procured by fraud on the part of the defender or his agent, for I am of opinion that, taking the case as one of essential error only—but such error known to the other contracting party—the law gives the remedy which the pursuers ask. If it were necessary, however, that fraud should be established in order to give the pursuers that remedy, I am disposed to think there is enough in the case to entitle the pursuers to succeed.

"It may be true that the purchaser was not under a legal obligation to inform the sellers of the mistake under which they were acting, although I think it is equally true that he was not entitled to take the benefit he has endeavoured to obtain by acting on the contract which he knew was void. But although the purchaser is in some cases entitled to take advantage of the seller's manifest ignorance—that is, where the error is not *in essentialibus*—he is not entitled in the negotiations for the purchase, by his statements and expressions, to create or confirm the error, or to induce a seller to forbear making such inquiries as for his security he might otherwise have made. Lord Eldon, in the case of Turner v. Harvey, Jacob, 178, observed in such a case, that if the least word be dropped by the purchaser to mislead the vendor, the latter will be relieved; and in the case of Vernon v. Keys, 12 East, 631, Lord Ellenborough states that a similar effect will be given to statements by a seller which may induce the buyer to forbear making the inquiries which, for his own security and advantage, he would otherwise have made, and I do not doubt that these statements embody a sound legal principle.

"The letters by the defender's agent of 8th October and 4th December 1872 contain, I think, representations which were calculated, and which, in the light of the general evidence, appear to have been intended to mislead the sellers and to prevent their making any investigation into the titles to satisfy themselves that the feu-duty had been imposed exclusively on the property which was the subject of the negotiations and sale. In the former of these letters the feu-duty is expressly stated at £9, 15s., which is put forward as the larger part of the consideration to be paid annually in perpetuity by the purchaser for the property, and the same feu-duty is plainly referred to in the subsequent letter, in which the obligation for duplication of the feu-duty is made the subject of anxious stipulation. These were misleading statements calculated to create a feeling of security in the mind of the sellers as to the fixed nature of the feu-duty, and to lead them to refrain from making inquiries or investigations into the titles to satisfy themselves on the subject, and as such entitle the pursuers to say the contract was procured by fraud; and if this be so, the pursuers are on this ground entitled to the decree they ask."

[1] *Defender's Authorities.*—Oliver v. Suttie, Feb. 1, 1840, 2 D. 514; Gillespie v. Russell, Feb. 28, 1856, 18 D. 677, June 26, 1857, 19 D. 897, H. L. July 22, 1859, 3 Macq. 757.

Pursuers' Authorities.—Squire v. Ford, 20 L. J. Ch. 308; York Buildings Co. v. Mackenzie, 3 Pat. App. 378; Fernie v. Robertson, Jan. 19, 1871, 9 Macph. 437; Rutherford v. Rankine, M. 13,422; Bell's Prin. 538.

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LORD PRESIDENT.—This is an action of reduction on the head of essential error, but it contains other conclusions, to the effect that the defender is bound to free and relieve the pursuers of the sum of £9, 15s. of *cumulo* feu-duties, with corresponding casualties, and that the said sum of £9, 15s. and corresponding casualties are real liens and preferable burdens on the subjects sold to the defender, and that warrant should be granted to the pursuers to have the decree pronounced in their favour recorded in the Register of Sasines; and the Lord Ordinary has given effect to these latter conclusions. The dispute arose out of a transaction of sale in 1872. Some property, called the Cogan Street property, was sold by the pursuers to the defender at the small price of £75. From the description it appears to have been covered to a large extent with ruinous buildings, and not to have been of very great value except from its situation. There was a great deal of communing between the parties, but in the end a disposition was granted, containing all the usual clauses in the short form now in use, and, among other things, stating, as the sole consideration, a price of £75. It provided that the subjects should be held *a me vel de me*, which, of course, means, according to the statutory interpretation, that the subjects were to be held of the sellers' superior on the same terms as the sellers held them, or by a base holding of the sellers at a blench duty. The disposition contained no other stipulation in regard to feu-duties. But the pursuers allege that during the whole of the communings they had it in view to impose on this subject a feu-duty of £9, 15s., then payable by them, not in respect of this subject only, but of another also. Their object was to relieve the other subject altogether, and they say that they believed that that would be the effect of the transaction, and that the disposition was granted on that footing. They allege, farther, that the defender and his agent were aware of their intention and belief. In short, the allegation is, that the sellers were acting under essential error, and that the purchaser knew that and took advantage of it.

That case certainly presents an appearance of relevancy, and I think it is fairly established by the evidence. It appears to me that the property was advertised as being burdened with a feu-duty of £9, 15s., and that it was very distinctly announced in various other ways that it was to be so burdened. The defender's attention and that of his agent were called to that condition of the sale very precisely. It is also apparent that the pursuers were acting in the belief that, by some means or other, they had secured this object. It is not very clear how they could imagine that they had done so by this disposition, but that is not of much consequence. It is abundantly evident that they were acting under this error, and as clear that the defender and his agent, while they knew of the pursuers' intention to impose the burden, and belief that it had been imposed, were aware that it had not really been done.

So far, therefore, I agree with the Lord Ordinary in his findings in fact. And I am not prepared to say that this is a wrong without a remedy. But it is very clear that the remedy given by the Lord Ordinary is not the right one, and indeed, is not a competent remedy at all. What he does is this. He does not reduce the sale, but alters its conditions, and not only so, but alters the defender's title and inserts new clauses constituting real burdens, which are all apparently to enter the Register of Sasines. This is a startling proceeding. I never saw anything like it. I am humbly of opinion that it is not competent to reform

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the contract of parties in the way which has been done by the Lord Ordinary. It is not in the power of any Court to alter the contract of parties, or the terms of a conveyance in implement of a contract of sale. We must, therefore, recall the Lord Ordinary's interlocutor. I think the pursuers are entitled to reduce the sale on the ground of essential error known to the purchaser and taken advantage of by him, and therefore the remedy I propose is under the reductive conclusion of the summons.

But then a sale of this kind cannot be set aside except on conditions. The feudal title is in the defender. He has entered into possession and expended money on the property, and there can be no reduction on such a ground as this, except on the footing that the sellers are not only to repay the price, but all the money which the purchaser has spent in permanent alterations or additions to the subject. The record as it stood originally did not contain a relevant averment or offer sufficient in terms of the reductive conclusion, but as it is now amended, I think the pursuers are entitled to prevail, on the conditions set forth in the 10th article of their condescendence.

LORD DEAS.—This subject was sold at the price of £75. It is clear that that price was fixed upon the footing that the property was burdened with a feu-duty of £9, 15s. If that had not been so understood, the price would have been at least double. I can have no doubt, therefore, that there was an essential error on the part of those acting for the sellers. Then, I think with your Lordship that the purchaser's agent knew of the error, and intended to take advantage of it. I need hardly add that the purchaser is not fairly entitled to take advantage of such an error, and that the sellers must be entitled to some remedy.

I agree with your Lordship that where a regular and formal disposition has been executed and delivered it is incompetent, by our law and practice, to interfere, as the Lord Ordinary has substantially done, in the way of reforming the contract. There are many decisions refusing such a remedy. But it is just as clear that redress may be obtained by reduction coupled with *restitutio in integrum*. There is no difficulty here in giving that sort of redress. It is a mere question of money. The property is not said to have been conveyed away to any *bona fide* singular successor. The only room for dispute is whether the actual sums expended are to be repaid or only so far as these have been beneficial. A tender has been made in the record, as amended, which may be held to be a tender of *restitutio in integrum*, whatever that may be found to be. I have a strong impression that it cannot be anything short of the actual expenditure. But whatever it is, I think that it is the remedy which now falls to be given. I can have no doubt that, subject to the above conditions, so gross an error, known to the other party, entitles the sellers to reduction.

LORD ARDMILLAN.—I have a strong conviction that the justice of this case is with the pursuers, and I am not the least surprised that the Lord Ordinary should have desired to give a legal remedy for what, I think, was certainly a wrong. But the remedy which he has given is inappropriate. Accordingly, I agree with your Lordships that we cannot adhere to his interlocutor. The remedy sought and given is not the right one. The introduction of a new clause into a disposition of heritage, for the purpose of creating, and having recorded, a real burden on land, and the effecting that by importing something into the contract which is gathered from prior correspondence and parole evidence, appears to me to be an

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inappropriate and incompetent remedy. However much we may regret it, we must refuse that remedy. Then there is no conclusion for damages.

But there is another remedy still—namely, restitution. The pursuers were labouring under an excusable and essential error. The defender, the purchaser, knew that the pursuers were in error, and having that knowledge he dealt with the pursuers, and entered into a transaction which was injurious to the pursuers. For this wrong some remedy should be given.

I do not think that the parole proof can be excluded from consideration, when viewed as adduced, not in support of the introduction of new obligations into the disposition, but for the purpose of proving the essential error, and proving that the error was excusable, and was known to the defender.

I think that restitution is the appropriate remedy. How restitution can be suitably and equitably given may depend on the ascertainment of facts not yet known.

LORD MURE.—I am of the same opinion; and I concur with Lord Ardmillan as to the competency of the evidence; for I am very doubtful whether, in such a case as the present, parole evidence would have been competent except for the particular purpose of proving essential error.

As to the import of the evidence, I am quite satisfied with the Lord Ordinary's findings in fact; but I cannot concur as to the remedy which his Lordship has given; and I think the proper remedy is by reduction and restitution *in integrum*, as proposed by your Lordship in the chair.

LORD PRESIDENT.—I think it right to add that the parole evidence was competent and admissible for the purpose of proving essential error, and the fact that the defender was in the knowledge of the error. These are questions which would be sent to a jury under an issue, and may therefore be competently proved by parole. But if this proof was allowed or led for the purpose of proving the terms of the contract, I think it was entirely inadmissible. The Lord Ordinary repels the defender's third plea, which is that "the transaction in question having been concluded by formal deed, it is not competent to modify or contradict the same by extrinsic evidence." I think that plea was well founded and ought not to have been repelled, and if the proof had related to the subject-matter of that plea it would not have been competent. But the proof actually led related to the matter of essential error, with regard to which it was perfectly competent.

LORD DEAS.—I think it right to say that I intended to make the same observation. The parole proof was not only competent, but necessary, in regard to the error *in essentialibus*, although as to the contract itself it would have been quite incompetent.

THIS interlocutor was pronounced:—"Recall the said interlocutor: Find that the pursuers, in concluding the contract of sale to the defender of the Cogan Street property mentioned on record, and in granting the disposition thereof sought to be reduced, were acting under the essential error that the said subjects were burdened with a feu-duty of £9, 15s., to the effect of relieving certain other subjects belonging to the pursuers of said feu-duty: Find that the defender throughout the negotiations for the said sale, and in con-

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cluding the contract and accepting of the said disposition, was well aware that the pursuers were acting under the essential error foresaid, and took advantage of that error to obtain from the pursuers a disposition of the said subjects without the burden of the said feu-duty: Find that in these circumstances the pursuers are entitled to reduce the said sale and disposition, and to have the subjects restored to them, with the whole rents and profits thereof received by the defender since the date of his entry thereto, but on condition of repaying to the defender the price of the said subjects, with interest thereof, at five per cent since the payment thereof, and of reimbursing the defender in his whole expenditure since the term of entry, on permanent additions to, or improvements of, the said subjects, with interest at five per cent on the sum so expended: Appoint the defender, within eight days, to lodge a state, with vouchers, shewing the amount due to him in terms of the above findings: Find the pursuers entitled to expenses in the Outer-House to the extent of four-fifths of the taxed amount thereof, and remit to the Auditor to tax the amount of the said Outer-House expenses, and report: Find no expenses due to either party since the date of the Lord Ordinary's interlocutor reclaimed against."

DEWAR & DEAS, W.S.—WILSON & DUNLOP, W.S.—Agents.

No. 37.

Dec. 2, 1875. Johnston and Sons v. Dove.

JOSEPH JOHNSTON AND SONS, Pursuers and Respondents.—*Balfour—Mackintosh.*

JOHN FYFFE DOVE, Defender and Appellant.—*D.-F. Watson—Trayner.*

Carrier—Reparation—Notice—Judicial Inspection.—Where a consignee of goods, which have been damaged in transit, breaks bulk without notice to the carrier, or judicial inspection, he does not thereby bar his claim for damages, although the want of such precaution to preserve evidence may be an element in the proof.

2D DIVISION. Sheriff of Forfarshire. I.

THIS was an action raised in the Sheriff Court at Dundee by the respondents, Joseph Johnston and Sons, to recover from the appellant, John Fyffe Dove, the freight from Riga to Dundee of certain hemp consigned to him.

The appellant admitted his liability for the freight, but stated a counter claim of damages, in respect that the cargo had been damaged with wet stow-wood, and that the bales of hemp which had been in contact with the stow-wood were thereby damaged.

It appeared from the proof which was led that delivery of the hemp was given on 28th, 29th, and 30th August, and 3d September 1873; that on 29th August the appellant wrote to the captain of the vessel as follows:—"I beg to intimate to you that I hold yourself and owners liable for damage to hemp under my charge on board your vessel, ... said damage having been caused by wet dunnage-wood having been used in stowing this hemp;" that on 30th August the captain replied—"I beg to state that your hemp is damaged by sweat, for which cause I am not liable;" that on 29th August the appellant caused the bales which were still on board the vessel to be examined by men of skill in the presence of the captain, but without notice to him or to the respondents; that on 1st September the appellant caused the damaged bales to be opened in his own warehouse and the damage valued by the same men of skill without notice to the respondents.

The Sheriff-substitute (Cheyne) pronounced this interlocutor:—"Finds

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that the only dispute between the parties is as to the claim made by the defender in respect a portion of the parcel in question was, as he alleges, damaged during the voyage by wet or green stow-wood: Finds in fact, as regards this claim, that the defender cut up and picked the bales alleged to have been damaged without giving any intimation to the pursuers or their agents of his intention to do so, or applying for a judicial inspection: Finds in law (1) that it is the duty of a consignee receiving goods which appear to be damaged to do nothing to change their condition without obtaining a judicial inspection, or at least without giving previous intimation to the carrier or his agents; and (2) that the defender's failure in this duty bars him from maintaining his claim of damages; and having regard to the whole of the foregoing findings, repels the defences, and decerns in terms of the libel: Finds the pursuers entitled to expenses," &c.*

The Sheriff (Maitland-Heriot) adhered.

The defender appealed to the Court of Session.

LORD JUSTICE-CLERK.—The Sheriff-substitute and the Sheriff have decided this case on what appeared to them to be a point of law, but I cannot accept the grounds on which they have based their judgments.

The action is one for freight. The Sheriffs have found that, though the defenders have a counter claim for damage to their goods during transit, they are

* "NOTE.—Had the Sheriff-substitute seen his way to take up the defender's counter claim on its merits he would, as the evidence stands, have been inclined to find that the defender had made out that the stow-wood was the cause of the damage complained of; but holding, as he does, that the defender's conduct has barred him from insisting in his claim, however well founded it may be, he does not require to express any decided opinion upon the merits. The principle upon which he has proceeded in deciding the case, and which is stated in his first finding in law, is, he humbly thinks, an important one; and though he has not been able to discover any direct authority for it, it seems to him so consonant with justice and common sense, that, acted upon as it undoubtedly is in practice, he has no hesitation in applying it. The importance of the rule no doubt lies partly in this, that without some such check a wide door would be thrown open to fraud; but its chief *rationale* is, that a carrier ought not to be prejudiced by the consignee's conduct in his defence to a claim of damages, as must in most instances be the case if the rule is not observed. In the present case it is hardly necessary to say that there is no suspicion of fraud, but the Sheriff-substitute cannot help seeing that the pursuers have been prejudiced, and possibly seriously prejudiced, in their defence to the claim of damages by the way in which the defender dealt with the damaged bales. Looking to the grounds upon which the defender's witnesses base their opinion, that wet stow-wood, and nothing else, was the cause of the damage, it was most important that the pursuers should have had an opportunity of inspecting the damaged bales in the condition in which they left the ship—*i.e.*, before they were cut up. Such an opportunity, however, it is clear, was never offered them, for the bales had been cut up and picked before Messrs Philip and Jack went, on 10th September, to inspect them on the pursuers' behalf; and it is not pretended that any intimation that they were to be so dealt with had been given to the pursuers or to Messrs Banks and Mitchell, who acted as agents for the ship. The defender's agent conceded that the general practice was to apply for a judicial inspection, and stated that the smallness of the claim was the reason why his client did not follow the usual course. That, however, is no excuse for the defender's failure to give some notice to the pursuers before cutting up the bales; and in refusing, on account of this failure, to enter on the merits of the claim of damages, the Sheriff-substitute believes that he is pronouncing a salutary as well as a sound decision."

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barred from asserting it in consequence of the way in which they have dealt with the goods carried since delivery. In coming to this result the Sheriffs have, I think, confused the case of goods received by a consignee from a carrier after being damaged during transit with that of goods received by a purchaser and found to be disconform to contract. The effect of breaking bulk in the two cases is, I conceive, very different. In the present case, it, of course, weakens the evidence as to the state of the goods on delivery that the defender broke bulk without giving the pursuers a proper opportunity of being present and examining them. And if a deduction from the appearance of the goods on bulk being broken were essential to the decision of the case, and the defender had by his acts prevented any such deduction being fairly and legitimately drawn, we should have been compelled to follow the Sheriffs' judgment.

I do not by any means lay aside such evidence as we have of the state of the goods when opened up; but that is only one branch of the evidence here, and I find quite sufficient besides to warrant me in coming to the conclusion that the goods were not damaged, as the Sheriffs have thought, by wet stow-wood, but by being shipped when themselves damp, and by the sweating which consequently ensued.

LORD ORMIDALE.—The discussion in this case has turned exclusively upon the defender's counter claim of damages. The Sheriffs, in refusing that claim, have proceeded on the ground that it cannot be sustained, because the defender did not obtain a judicial inspection of the goods, or at least did not give previous intimation to the pursuers that he was going to break bulk before he did so, in order that they might have an opportunity of judging for themselves as to the true condition of the goods. It is impossible, I think, to maintain, as a valid and sufficient ground of judgment, that the defender was bound to obtain a judicial inspection of the goods. It may be a usual and proper thing in certain circumstances, as, for example, when one of the parties chiefly interested is absent, to apply to the Judge Ordinary for such inspection; but I do not see that there was any necessity for it in the present case. What is the effect of a judicial inspection? The inspectors report—not on oath—and their report is retained, and produced in the event of an action and proof. At the proof they are examined as to the truth and accuracy of their report; but their report and their evidence together should have no more weight than the evidence of any similarly skilled persons who have had an opportunity of forming an opinion. The want of a judicial inspection is, I think, at any rate in the present case, matter to be considered in weighing the whole evidence, and ought not to constitute, as the Sheriffs appear to have held, a bar to inquiry.

It is only fair, however, to the learned Sheriffs to add that, as an alternative to a judicial inspection, they suggest that there should at least be intimation to the carrier or his agents. That may be a fair and proper step in most cases, but it is not always indispensable. The true way of considering the conduct of parties in reference to such a matter is to deal with it in judging of the whole evidence. In the present case, a proper jury question was raised, and, on the whole evidence, I concur with your Lordship in finding for the pursuers.

LORD GIFFORD concurred.

LORD NEAVES was absent.

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THIS interlocutor was pronounced:—"Find that the appellants have failed to prove that the injury of the hemp libelled was caused by the use of green or unseasoned wood: Therefore dismiss the appeal, affirm the judgment appealed against, and decern: Find the appellants liable in expenses," &c.

HENRY BUCHAN, S.S.C.—W. & J. BURNESS, W.S.—Agents.

No. 38.

Dec. 3, 1875.
Symington v. Symington.

ANDREW JAMES SYMINGTON, Petitioner.—*Fraser—Scott.*
MRS MARY SANDERSON EDMONSTON OR SYMINGTON, Respondent.—*Asher—Mackintosh.*

Diligence—Future Debt—Inhibition—Arrestment—Husband and Wife.—Where a wife had used inhibition and arrestment on the dependence of an action of separation and aliment, and had afterwards used arrestments in execution of a decree of separation and aliment, *held* that after payment by the husband of all debts secured by the diligence, except sums to become due for future aliment, he was entitled to have the arrestments and inhibition recalled.

Expenses—Husband and Wife.—In the above case *held* that the wife was entitled to her expenses incurred in opposing the petition for recall (taxed as between party and party).

Process—Diligence—Personal Diligence Act, 1838, 1 *and* 2 *Vict. c.* 114, *sec.* 16.—Where a pursuer seeks to use arrestments in security of a future debt upon the dependence of an action he should proceed by bill setting forth that the debtor is *vergens ad inopiam*, or other ground for the diligence, so as to enable the defender to answer the allegation.

Diligence—Arrestment.—It is not competent to use diligence in security of a future debt unless upon the ground that the debtor is *vergens ad inopiam*, or on similar grounds.

(*Ante*, vol. i. p. 871, and p. 1006; vol. ii. H. L. p. 41; and *ante*, vol. ii. p. 974.) 1ST DIVISION. B.

This was a petition at the instance of Andrew James Symington praying for recall of certain inhibitions and arrestments used on the dependence of an action of separation and aliment at the instance of Mrs Symington against the petitioner upon a warrant contained in the summons, and of arrestments in execution of the decree for aliment obtained by the pursuer in that action on 20th March 1874.

The petitioner had paid the whole sums of aliment due to his wife in advance up to the term of Martinmas 1875, and had paid all the expenses of process, with the exception of the expenses incurred in the House of Lords. He had found caution for these expenses. He alleged that all his funds were locked up by the inhibition and arrestments, and that that was the reason why he had not paid the expenses incurred in the House of Lords. In the course of the discussion in the Inner-House he paid the House of Lords expenses. The only question thus came to be the validity of the diligences for security of future payments of aliment.

The petitioner argued;—A creditor is not entitled to use diligence for debts not due unless on an allegation that the debtor is *vergens ad inopiam*.[1]

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[1] Macgregor v. Macgregor, Feb. 25, 1837, 15 S. 681, 9 Scot. Jur. 334; Meres and Ainsworth v. York Buildings Company, Feb. 17, 1728, M. 800, May 24, 1728, 1 Pat. App. 10; Bennett v. Fraser, June 21, 1834, 12 S. 760, 6 Scot. Jur. 432; Erskine's Inst. iii. 6, 10; Bell's Com. ii. (5th ed. 144), M'Laren's ed. 136; Lockhart v. Sharp, Nov. 13, 1828, 7 S. 1.

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The respondent argued;—She was entitled to security for future payments of aliment to a reasonable extent.[1]

At advising,—

LORD PRESIDENT.—In this case I understand that all the questions raised in the action have been disposed of, except the validity of the two diligences of arrestment and inhibition for security of future aliment.

By our interlocutor of 20th March 1874 we found the petitioner in the present case liable in payment to the present respondent in the sum of £100 of yearly aliment, payable half-yearly in advance, under deduction of such sums of aliment as she had received since the term of Whitsunday 1873; and in regard to the children, we found that the respondent was entitled to their custody during their respective pupillarities, so long as no other or different order might be made by the Court. We further found the petitioner liable to the respondent in aliment at the rate of £25 a-year for each of the children, so long as they should remain in her custody. The only variation which the House of Lords made in our judgment on appeal was in regard to the custody of two of the children. But in all other respects the interlocutor stands. The husband is liable to pay £100 per annum to his wife so long as she lives apart from him, and £25 for each of the children who remain with her. The question now is, whether the diligences ought to stand as security for the sums of aliment which are to become due in the future. This is undoubtedly an important question, and I do not think it has ever been expressly decided. The case of Macdonald and Elder v. Macleod was not a decision on the point, although the question was raised, and the Court then were equally divided.

One of the general principles of our law is, that diligence cannot be used for security of a future debt unless upon the allegation that the debtor is *vergens ad inopiam*.

The pursuer in the action of separation and aliment has not alleged that the defender is *vergens ad inopiam*. She had no opportunity of making such an allegation, because her warrant for diligence is contained in the summons, and she did not adopt the course of applying by bill. It rather appears to me that if such diligence is to be used on the dependence of an action in security of a debt not then due the creditor must proceed by a bill, so as to give the defender an opportunity of answering the allegation that he is *vergens ad inopiam*, instead of proceeding to use diligence simply by warrant obtained on the summons.

But there being no such allegation here, we must proceed on the assumption that the debtor is not *vergens ad inopiam*. When we pronounced our decision we gave the pursuer all the remedies to which we thought she was entitled, and if she had thought that she was entitled to more, that was the time for her to apply for them. If we had thought that she was entitled to security we should have given her security. That is not an uncommon practice in special circumstances, where the defender has only one source of income. It is not uncommon

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[1] Bell's Com., M'Laren's ed. i. 354 (5th ed. 338); Macdonald and Elder v. Macleod, Jan. 15, 1811, F.C.; Dove v. Henderson, Jan. 11, 1865, 3 Macph. 339, 37 Scot. Jur. 161; 1 and 2 Vict. c. 114, secs. 1 and 16; 31 and 32 Vict. c. 100, sec. 18; Balfour's Practicks, 476; Bell's Com. M'Laren's ed. ii. 70 (5th ed. p. 73).

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for the Court to order assignation for a wife's aliment of a portion of an annuity or pension on which the husband has to depend for his living. If he had an annuity, we might require him to secure part of it for his wife's aliment. But there is nothing of the kind in the present case. If the diligence is to stand as a security for the whole future aliment of his wife it must follow that the pursuer of such an action is entitled to create for herself a security which the Court held not to be necessary when they adjusted the rights of the parties at the separation. The opinion I hold is opposed to this view.

I think that a lady who is separated from her husband, as she does not thereby cease to be his wife, must still follow his fortunes; and if he should by unforeseen occurrences fall into poverty, that is the misfortune of the whole family. I should be very slow to hold that, because a wife is separated from her husband, she is entitled to have her aliment secured, so as to give her a preference for life over all her husband's creditors. That would be a very anomalous consequence of diligence used upon the dependence of an action of this kind. But still more anomalous consequences would follow if the arrestment was to cover future aliment. The debtors in whose hands the arrestments were used would require to keep the money in their hands during the whole time of the wife's life, and to pay her yearly and termly the amount of her aliment. By what means would she enforce her rights? In the present case she would require to bring a furthcoming at Whitsunday and Martinmas yearly; it may be for the next twenty years. This would be a proceeding of an extraordinary character, never seen before, and entirely inconsistent with legal principle. I do not think that a creditor can, by arresting money in the hands of his debtor's debtor, convert him into a trustee for his interest. Arrestments are often used in the hands of persons, such as bankers, who would make very good trustees. But are bankers, against their will, to be converted into trustees? If the arrestments were used in the hands of traders or mercantile companies, are they to continue to act as custodiers, and remain for a lifetime in the position of debtors to the husband? Are they to be called upon to pay at every Whitsunday and Martinmas when the wife brings a furthcoming? That would place them in a most extraordinary position. I do not think that they are to be turned into trustees without their own consent. It would interfere with the whole business of life, and the consequences of sustaining this diligence are so anomalous and monstrous that I do not see how we can uphold it. For all that is due and bygone the diligence is competent, but for future debts I think we cannot lay it down too distinctly that the diligence is incompetent unless the debtor is *vergens ad inopiam*, or there be other circumstances of a parallel kind. I can quite conceive circumstances in which the diligence would be fairly used, as if the defender in an action of separation were *in meditatione fugæ*, although quite solvent. He might intend to remove his effects beyond the power of his creditors, but there is no case of that kind here, and I think, therefore, that, on the grounds I have stated, the diligence ought to be recalled.

LORD DEAS, LORD ARDMILLAN, and LORD MURE concurred.

The respondent moved for expenses, on the ground that she was justified in appearing to oppose the petition, and that caution had only been offered at the close of the discussion.

The petitioner answered;—The Court had laid down in the case of

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Donald v. Donald, 30th March 1863, 1 Macph. 741, 35 Scot. Jur. 434, that there was no general rule in such matters, and each case must be decided on its own merits. The wife was here seeking to maintain a diligence against her husband in very unusual circumstances. It was only on the ground of necessity that in actions between husband and wife the Court compelled the husband to bear his wife's expenses. Here there had been no such necessity.

THE COURT pronounced this interlocutor:—"In respect all the debts secured by the diligence used on the dependence of the action of separation and aliment have been paid, with the exception of sums of aliment to become due in the future, recall the inhibition and arrestments used by the respondent on the dependence of the said action, and also the arrestments used by her in execution of the decree pronounced in said action," and granted warrant for marking the inhibition as discharged in the Register of Inhibitions, and found the respondent entitled to expenses, taxed as between party and party.

JOHN GALLETLY, S.S.C.—J. & R. D. ROSS, W.S.—Agents.

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Dec. 3, 1875.
Mitchell and Baxter v. Davies.

JAMES ALEXANDER MOLLESON (Cormack's Trustee), Pursuer and Nominal Raiser.
MITCHELL AND BAXTER (Assignees of Charles R. M'Millan), Claimants.—*Guthrie Smith—Sir W. Simpson.*
JOHN DAVIES AND OTHERS, Claimants.—*Fraser—J. C. Lorimer.*

Foreign—Domicile—Succession—Testament.—*Held* that in the construction of a testamentary deed the presumption that the testator intended his deed to be interpreted in accordance with the law of his domicile may be overcome by evidence of a contrary intention derived from the deed and the circumstances.

Succession—Domicile.—A woman of Scotch origin, wife of a domiciled Englishman, conveyed to trustees (a majority residing in Scotland to be a quorum) a fund, which she was entitled to dispose of under the settlement of a Scotch testator, secured over heritage in Scotland. She directed her trustees to realise the security after her husband's death, and divide the proceeds among her children. The trust-deed was prepared in Scotch form by a Scotch conveyancer, and executed in Scotland. *Held* (*rev.* judgment of Lord Shand) that the deed must be interpreted according to the law of Scotland, that being evidently the intention of the testatrix.

1ST DIVISION.
Lord Shand.
B.

IN 1830 Mrs Alexander R. Forbes or M'Millan, wife of Peter M'Millan, mariner, residing in Liverpool, had right to a provision under the settlement of Charles Rowatt, surgeon in Campbelton, who died in 1826.

By deeds dated in 1830 and 1835 Mrs M'Millan, with consent of her husband, conveyed this fund to her husband and two persons residing in Scotland as trustees, a majority residing in Scotland being declared to be a quorum, with directions to divide the fund after the death of her husband among the children of the marriage, share and share alike, or the survivor of them upon their respectively attaining the age of twenty-one.

Mrs M'Millan died in 1860, and was survived by her husband, who died in 1872.

She was also survived by two children, a daughter, Mrs Davies, who predeceased her father leaving four children, and a son, Charles R. M'Millan, who survived both his parents.

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On Peter M'Millan's death an action of multiplepoinding was raised by Charles R. M'Millan in name of J. A. Molleson, a judicial factor in whose hands the trust-funds then were, all Mrs M'Millan's trustees being dead.

Charles R. M'Millan (and afterwards his assignees, Messrs Mitchell and Baxter, W.S.), claimed the whole fund, on the ground that he was the only child of his mother at the date of his father's death.

He pleaded;—(1) The trust-disposition and settlement having been executed by the husband in England, he being a domiciled Englishman, it and the relative deed of alteration must be construed according to English law. (2) The succession under the trust-disposition and settlement and relative deed of alteration did not vest until the death of the husband. The parties having been domiciled in England at the date of the execution of the said deeds, and up to the time of their death, the succession must be ruled by English law.

Edward Davies and others, Mrs Davies's four children, claimed one half of the fund, and pleaded;—(1) The trust-disposition and settlement and relative deed of alteration executed by Mr and Mrs M'Millan fall to be construed according to the law of Scotland. (2) The claimants being the whole children of the late Mrs Mary M'Millan or Davies, one of the two children of Mr and Mrs M'Millan, are entitled under the deeds before mentioned to one-half of the fund *in medio* in equal shares. (3) Even on the assumption that the said deeds fall to be construed according to the law of England, the present claimants are entitled to one-half of the fund *in medio*.

In regard to the question thus raised between the competing claimants, whether Mrs M'Millan's deeds were to be construed according to the law of Scotland or the law of England, the following were the material circumstances:—Mrs M'Millan was born in Scotland. Her deed of 1830 was prepared in the office in Edinburgh of Edward M'Millan, S.S.C., one of the trustees (the others being her husband and a clergyman in Campbelton), and was signed by Mrs M'Millan at Edinburgh, and by her husband at Liverpool, where he was described in the deed as residing. By the deed of alteration in 1835 Mrs M'Millan, who was therein described as presently residing in Campbelton, spouse of Peter M'Millan, presently mate on board the "Magdalene" of Greenock, with his consent, of new conveyed to the same trustees the sum of £500 "contained" in the bond and disposition in security aftermentioned. The trustees were appointed upon Mrs M'Millan's death to realise the security, and invest the fund in their own names, to apply the interest to the education and maintenance of the children of the marriage till the youngest should attain majority, thereafter to pay the interest to Peter M'Millan till his death or second marriage, and upon either of these events happening to divide the money "among the children to be procreated of the marriage between us, share and share alike, or survivor of them, upon their respectively attaining the age of twenty-one years." This deed was also prepared in Edward M'Millan's office, and was subscribed by Mrs M'Millan at Edinburgh, and by Peter M'Millan at Campbelton.

The nature of the provision assigned by Mrs M'Millan was as follows:—Dr Rowatt, a surgeon in Campbelton, by his settlement above referred to, directed his grandson and general disponee to "pay to the heirs, executors, or assignees of Mary M'Millan or Forbes, and Miss Alexander Rowatt Forbes [afterwards Mrs M'Millan] or the longest liver of them, the sum of £500." He further appointed his grandson to grant heritable security over the whole or such part of any heritable subject thereby conveyed and disponed to him as the testator's testamentary trustees should

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think reasonable for securing the provisions "at whatever time he may be called on to do so."

Mary M'Millan or Forbes predeceased the testator. In 1827 the heirs of the grandson (who had also predeceased) having been called on by Alex. R. Forbes, then Mrs M'Millan, granted a bond and disposition in security of certain heritable subjects for the £500 in favour of three trustees (one of whom was Peter M'Millan, husband of Mrs M'Millan) for behoof of the heirs, executors, and assignees of Mrs M'Millan, upon which the trustees were infeft.

The Lord Ordinary pronounced this interlocutor:—"Finds that the deceased Mrs Alexander Rowatt Forbes or M'Millan having been a domiciled Englishwoman from the date of her marriage to the now deceased Peter M'Millan in 1826 till her death, the effect of the provisions contained in the trust-disposition and settlement, and relative deed of alteration by her, dated in 1830 and 1835 respectively, bearing on the rights of the respective claimants to the fund *in medio*, must be determined according to the law of England; and directs the case to be enrolled for further procedure, reserving in the meantime all questions of expenses; and grants leave to the said claimant, Edward Davies, to reclaim," &c.*

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* "NOTE.—Messrs Mitchell and Baxter claim the whole fund, as representing the sole survivor. The other claimants maintain that, on a sound construction of the deed, it was an implied condition of the bequest that in case a child should not survive the period of division, but should have issue, the children of such child should take their parent's share, and accordingly they claim the one-half of the fund to which their mother would have had right had she survived her father.

"If the effect of the testator's deeds were to be determined by the law of Scotland the fund would be divisible as the claimants Davies and others contend. The parties differ as to the legal construction of the deed according to the law of England; for while Messrs Mitchell and Baxter, as representing Charles M'Millan, allege that the deed must receive effect, according to its literal interpretation, as a gift of the whole fund in favour of the survivor, the other claimants maintain that, according to English law, there is an implied condition in their favour, which gives them right to the share their mother would have taken by survivance of their grandfather. They maintain, however, in the first place, that the deed must be construed according to the law of Scotland.

"I am of opinion that this contention is not well founded. It is admitted that the testator was domiciled in England, and some special ground must be established for the view that her settlements are now to be interpreted by the law of this country, with the effect of introducing as part of their provisions the *conditio si sine liberis decesserit*, an implied condition which is not expressed in the language used, and no such ground appears to me to exist. The deeds, though drawn in the Scotch form, and executed by the testator during temporary visits to this country, are not expressed in technical language which can only be properly understood or construed by a Scotch Court. It was no doubt thought advisable to have the deeds prepared in this country, for they related to a fund secured in Scotland, and the right to which was vested in trustees, the majority of whom resided there; but the testamentary effect was simply to dispose *mortis causa* of estate, with which the testator, a domiciled Englishwoman, was entitled to deal, and that not by the use of any technical legal phraseology peculiar to this country, but in language of plain ordinary signification. If the parties were agreed that the language used—which is of this character, and certainly not technical, at least in regard to the truster's directions as to the disposal of the fund in question—should be interpreted literally, and so receive its literal effect according to the law of England, it would follow, according to the rule settled in the case of Thomson's Trustees, 14 D. 217, that this Court should

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Edward Davies and others reclaimed, and argued;—(1) The fund was heritable, and therefore must be distributed according to the law of Scotland. (2) Although the domicile of a testator may afford a presumption that he intends his succession to be regulated by the law of his domicile, that presumption may be overcome by pregnant indications of a different intention.[1] Here there were such circumstances. The fund was secured over heritage in Scotland. The testatrix had entrusted it to trustees resident in Scotland, and the deeds were prepared according to the Scotch form, and executed in Scotland.

Messrs Mitchell and Baxter argued;—The question whether the fund was heritable or moveable must be determined by the terms of the original deed of gift, Dr Rowatt's will, where this was plainly a bequest of a sum of £500, and there was no absolute direction to invest in heritable security. In a settlement of moveable estate the domicile of the testator rules the succession[2] unless there is something on the face of the deed to shew that the testator intended otherwise. The Court may construe a deed, as in the case of Thomson's Trustees, where there is only a question of grammatical construction. But this was not a question of construction, but a question of law,—whether the words *si sine liberis decesserit* should be engrafted into the deed. The law of Scotland said yes, the law of England no.

At advising,—

LORD PRESIDENT.—The fund *in medio* is a sum of £500 settled by the testamentary disposition of the deceased Charles Rowatt, surgeon in Campbelton. The dispute between the parties depends on the construction of certain deeds executed by a Mrs M'Millan, by which she, in exercise of a power of disposal given to her by Rowatt's settlement, provided that the £500 should be divided in a particular way, and the question immediately before us is, whether Mrs M'Millan's deeds are to be construed by the law of England or the law of Scotland.

The Lord Ordinary has found that Mrs M'Millan, "having been a domiciled Englishwoman," the effect of the provisions of her settlement must be determined according to the law of England. I think that interlocutor is not satisfactory on the face of it, because it deals with the question as if the domicile of the maker of these deeds was absolutely conclusive. I do not think it is so. The real question, as in every testamentary deed, is what was the intention of the testator? In solving that question it no doubt becomes necessary to inquire what system of jurisprudence the testator had in view in making his settlement. But it does not follow of necessity that that must be the law of his domicile. It might be his intention that his settlement should be construed by the law of a different country, and that intention might be expressed in his will. If so,

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now settle the interpretation of the deed; but the parties differ as to this, for while Messrs Mitchell and Baxter allege that according to the law of England the provisions of the deed must be interpreted in accordance with the language used, the other claimants maintain that according to English law a condition in their favour is implied, though not expressed, similar to the *conditio si sine liberis decesserit* of the Scotch law. It is thus necessary to ascertain the sound construction of the deeds according to the law of England."

[1] Rainsford v. Maxwell, Feb. 6, 1852, 14 D. 450, 24 Scot. Jur. 221; Ferguson v. Marjoribanks, April 1, 1853, 15 D. 637, 25 Scot. Jur. 376; Thomson's Trustee v. Alexander, Dec. 18, 1851, 14 D. 217, 24 Scot. Jur. 101.

[2] Durie v. Coutts, Nov. 30, 1791, M. 4624.

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the law of that country would regulate the construction, and if from other circumstances it can be shewn that he had in view the law of a particular country, although that may not be the law of his domicile, it must govern the construction of his settlement.

Now, what are the circumstances of this case? Rowatt the elder made his settlement in 1821. He settled £500 in liferent on Mary M'Millan and her daughter Alexander, afterwards Mrs M'Millan, giving the fee to the heirs, executors, or assignees of the longest liver of these two; and he appointed his heir to give security over his heritable estate for payment of this sum if the mother or daughter should ask for it. After his death a demand for security was made, and Flora Rowatt, the heir, did, in 1827, grant a bond and disposition in security over the heritable estate. The bond is conceived in favour of three trustees for behoof of the heirs, executors, or assignees of Alexander M'Millan, her mother having predeceased. These trustees were infeft, and, as I understand, the bond is still undischarged, or, at least, was so at the death of Mrs M'Millan. Mrs M'Millan, by her first deed, conveyed this bond to her testamentary trustees, and by her second deed she provided that the principal sum in the bond should be divided among the children procreated of her marriage, or the survivor of them. These deeds executed by Mrs M'Millan are testamentary. They were prepared by a Scotch conveyancer, and are expressed in the language of Scotch conveyancing. Mrs M'Millan herself was of Scotch birth, though her legal domicile might be in England, as the wife of Peter M'Millan, who is designed in the first deed as residing in Liverpool, but in this second deed is called the mate of the "Magdalene" of Greenock. Both deeds were executed by the testatrix in Scotland. One was signed by her husband at Liverpool, but the second was signed by him at Campbelton. The subject conveyed was a heritable bond and disposition in security, and the object of the deeds was to dispose of the sum secured by that bond. Now, it appears to me that in these circumstances Mrs M'Millan and her husband could scarcely have had in view any other law than that of Scotland. The sum to be disposed of had been left by the settlement of a Scotchman, and was secured upon heritable property in Scotland, and they evidently imagined, and I think rightly, that this fund could not well be disposed of except by a Scotch deed. If there were any technicalities in these deeds I could not conceive that they should be construed by any law but the Scotch, and if so, there can be no necessity to resort to any other law.

But the argument has been pressed upon us that this is not so much a question of construction as one of succession,—whether the succession is to be regulated by the one law or the other. It is said that according to the Scotch law of succession the claimants Davies are entitled to get a share, although their mother predeceased her father, whose death was the period of distribution, but that according to the law of England they would not be entitled to any share under an English deed expressed in the same way as this. But, in truth, this is not a question on the law of succession, but a question on the construction of a deed. It may be that the one law gives a meaning to the words which the other law does not. The law of Scotland reads into the deed a condition which is not expressed. The law of England, we are told, does not do so. But the meaning of this deed, according to the law of Scotland, is, that the sum is to be divided among the children of the marriage, with the proviso, that in the event of any one of the children dying and leaving issue, such issue shall take the share of

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their deceasing parent. Whether the deed is to be so read or not is a question of construction. And it is clear that the maker of the deed contemplated that it would be construed by the law of Scotland.

LORD DEAS.—We have no occasion to resort to the law of England for the solution of this question. The bequest originated in a deed of settlement by Charles Rowatt (the first), a Scotchman residing in Campbelton, and practising as a surgeon there. That deed was prepared by a Scotch conveyancer in the Scotch form, and was executed at Campbelton 21st July 1821. It bore to convey the general means and estate of the granter to his grandson, Charles Rowatt (the second), under the burden, *inter alia*, of a sum of £500 to be paid to "the heirs, executors, and assignees" of the survivor of two ladies, of whom the one who is designed in the record as "Mrs M'Millan" became the survivor, and had consequently the £500 at her disposal. Mr Charles Rowatt's deed of settlement stipulated that his grandson should grant heritable security for, *inter alia*, this £500, at whatever time he might be called upon to do so. Accordingly, the grandson's heir and successor, Flora Rowatt, executed at Edinburgh, on 2d September 1827, a bond and disposition in security in the usual Scotch form for the £500 over the heritable subjects conveyed to her predecessor by the deed of 21st July 1821. The bond was taken in favour of trustees for behoof of the heirs, executors, or assignees of Mrs M'Millan, and was followed by infeftment (duly recorded) in October 1827.

In 1830 Mrs M'Millan, with consent of her then husband, executed a deed of settlement, prepared by a Scotch solicitor in the Scotch form, disposing of the £500. The deed contained a consent to registration in the books of Council and Session for preservation and execution, and described the parties as residing in Liverpool, and was executed by the husband there, but by the wife at Edinburgh, where it was judicially ratified by her before a Scotch Justice of the Peace. This deed, however, became immaterial, being superseded by a deed of alteration, likewise prepared by a Scotch solicitor in the Scotch form, executed by the parties respectively in Scotland on 11th April 1834 and 28th January 1835, and ratified in Scotland by Mrs M'Millan before a Scotch Justice of the Peace. It designed Mrs M'Millan as residing in Campbelton, and her husband as then mate on board the "Magdalene" of Greenock; and it contained a consent to registration in the books of Council and Session for preservation. This is the operative deed by which the £500, under certain specified deductions, is provided to the children of the marriage between Mr and Mrs M'Millan, of whom there were two—a son, who is still alive, and a daughter, who survived her mother but predeceased her father leaving issue; and the question upon the merits is, whether the daughter's issue are or are not to participate in the succession. The present question, however, simply is, whether the deed of alteration is to be construed according to the law of Scotland or according to the law of England, where Mr M'Millan, and consequently also his wife, is said to have been domiciled. I cannot doubt that, apart altogether from the effect of the investment on heritable security in Scotland, the destination in the deed must be construed according to the law of Scotland. Mrs M'Millan was the principal party, and she was residing in Campbelton. Her husband was only a consenter, and he is described as mate of a ship belonging to Greenock. This deed is also in the Scotch form.

I agree with your Lordship that the question is entirely one as to the inten-

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tion of Mrs M'Millan. She was the principal party, her husband, as I have said, being a mere consenter. At the date of the deed she was residing in Campbelton. Her husband was a seafaring man, who had at the time no particular residence; but assuming his domicile to have been in England, the facts I have narrated, and need not repeat, as to this deed and the deeds which preceded it, are of great importance as bearing upon the question what was the intention of the testatrix, Mrs M'Millan. There are no technicalities in the deeds, and, if there were, they would necessarily be technicalities of Scotch law and not of English law. It is a fallacy to attempt to rear out of these facts a question of legal succession, instead of a question of intention.

The question is one of intention merely; and if anything were awanting to warrant us in discovering that intention, for ourselves, in the terms of the deeds, it might be found in this, that the heritable security, which still stands good, was and is a security to the beneficiaries. Trustees were appointed for their behoof, but the heritable security inures to the beneficiaries, and this, perhaps, even more directly than if it had been granted to Mrs M'Millan herself.

I am of opinion, in every view, that it is not necessary to have recourse to the law of England.

LORD ARDMILLAN.—By the elder Rowatt's settlement Mrs M'Millan became entitled to dispose of this fund, which, under the will of the testator himself, was secured by a heritable bond. In this view I am inclined to think that the subject was truly heritable, which would be sufficient to dispose of the question.

But, apart from that, the deeds were executed in Scotland, and prepared by a Scotch conveyancer, and were to be administered in Scotland according to Scotch law and practice, and therefore I think they must be construed by the law of Scotland. That a deed must be read in the light of the law of the place where it is made is a general rule. It is true that the domicile of the maker was English. But your Lordship made some most important observations, in which I concur, in considering the effect of the domicile of a party, where that is out of the country where his deed is executed. The intention of the party must then be considered. It is plain that this woman and her husband deliberately chose Scotland as the place of execution of the deeds, because they wished to have the fund administered in Scotland. Therefore, if this is a pure question of construction, there can be no doubt that the law of Scotland applies.

I think it a nice point which was raised in the latter part of the argument, whether this is a question of construction or one of succession. But though I have felt some difficulty, I have come to the same result as your Lordship. This is not a question of intestate succession. It cannot be solved without reading the deeds. It must be determined by ascertaining the intention of the maker. The real question is, what is the meaning of the deeds, reading them in the light of the law of the place where they were made. The law of Scotland reads the deeds as meaning that the child of a child shall take if the child dies. Another way of stating the same thing is that the rule *si sine liberis* is to apply. But in a question of construction we do not now proceed upon it as a rule of succession apart from the deed but as a result arising out of the meaning which the law of Scotland puts upon the words of the deed.

LORD MURE.—I think the rule that such a question as this must be decided by the law of the domicile of the maker of the deed has been pressed in argu-

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ment in too absolute a sense. That may be the rule in intestate succession, and it is an important element in questions of testate succession, but it is not conclusive, for there are other elements bearing on the intention of the testator, such as the place where the deed was made, and the local situation of the fund, and the place where it is intended to be administered, which must be kept in view in dealing with cases of testate succession. Now, in the present case, the deeds were made in Scotland. They relate to Scotch estate, apparently heritable, and they are to be carried out in Scotland by trustees, the majority of whom reside there. In these circumstances, the evidence of the maker's intention is very strong, to the effect that the disposition which has been made of the estate is to be regulated by the law of this country. If the domicile and the place where the will is made are the same, that will probably, in the ordinary case, lead to the result that the deed is to be construed by the law of that place. But even then, if there are no technical expressions, it may sometimes be right that a deed should be construed by the law of the country where the question arises. That was done in the case of Thomson's Trustees, referred to by the Lord Ordinary. The precedent was followed in the case of Ferguson (15 D. p. 637), and the same course appears to have been adopted in the older case of Mackay, 22d July 1760, M. 4610. I do not, therefore, think it is necessary in this case that the will should be construed by the law of England.

THIS interlocutor was pronounced:—"Find that the question raised in the competition upon the construction and effect of the deeds executed by Mrs M'Millan and her husband in 1830 and 1834-35, falls to be determined according to the law of Scotland, and remit to the Lord Ordinary to proceed accordingly: Find the reclaimers, Davies and others, entitled to expenses since the date of the interlocutor reclaimed against," &c.

MITCHELL & BAXTER, W.S.—D. J. MACBRAIR, S.S.C.—Agents.

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Adams v. Glasgow and So.-Western Railway Co.

Poor AGNES HOBBS OR ADAMS, Pursuer.—*R. Johnstone—D. Crichton.*
THE GLASGOW AND SOUTH-WESTERN RAILWAY COMPANY, Defenders.—*Balfour—Jameson.*

Reparation—Culpa—Collaborateur—Railway—Process—Jury Trial.—Held (1) In accordance with Calder v. Caledonian Railway Company, 9 Macph. 833, that a railway company were liable for injuries caused by the fault of a stationmaster in their employment to a fireman on the train of another railway company using their line under running powers; and (2) that the claim was not barred by contributory negligence on the part of the engine driver on the train and of another fellow-workman of the fireman.

Observations on the English cases of Thorogood v. Bryan, 1849, 8 Com. Bench Rep., 1st ser. 115, 18 L. J. C. P. 336; and Armstrong v. Lancashire and Yorkshire Railway, 1875, L. R. 10 Ex. 47.

Jury Trial.—Where a case of damages was withdrawn from a jury by a joint minute for the parties agreeing that the jury should assess the damages, leaving the question of legal liability to the Court on the record and notes of evidence, but the Judge's notes bore that at the request of the parties he had asked the jury their opinion on a particular question of fact in the case, *held* (*diss.* Lord Ormidale) that the Court was not bound by the jury's expression of opinion on that point.

2D DIVISION. Lord Young. R.

MRS AGNES HOBBS OR ADAMS brought this action against the Glasgow and South-Western Railway Company to recover damages for the death of her husband, James Adams, who, while a fireman in the employment

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of the Caledonian Railway Company was killed through a collision which occurred on 20th June 1874 on the defenders' Dumfries and Castle-Douglas line about a mile west of Dalbeattie.

The defenders were proprietors of the line from Dumfries to Castle-Douglas, which from Lochanhead to Castle-Douglas was a single line, worked on the train staff system. The Caledonian Company were lessees of the line from Castle-Douglas to Stranraer and Portpatrick, and, as such, under the Glasgow and South-Western Railway (Amalgamations) Act, 1865, had running powers over the defenders' Dumfries and Castle-Douglas line.*

On the 20th June 1874, about 11 o'clock forenoon, a ballast train of the defenders' was sent forward from Dalbeattie station towards Castle-Douglas, the driver of the ballast train having received the train staff from the stationmaster at Dalbeattie. The ballast train was timed to return to Dalbeattie in time to allow a Caledonian Company's goods train which was due at Dalbeattie at 12.17 P.M. to pass on its way to Stranraer and Portpatrick.

Under the train staff system it is not permissible to send forward a train from any train staff station unless the driver have received from the stationmaster or person in charge of the station the train staff, or else what is termed a train staff ticket.† Nor is it permissible to the stationmaster to give a train staff ticket unless he is at the time in possession of the train staff. In fact, it ought not to be possible for the stationmaster to give a train staff ticket without being in possession of the train staff, as the tickets should be kept in a locked box, the key to which is a part of the train staff itself. One train staff is appropriated to the portion of the line between each two train staff stations. The driver who has received from the stationmaster at one station the train staff appropriated to the portion of line over which he is going to run, delivers it to the stationmaster at the next station, who cannot despatch a train in the reverse direction until he has received it, the object being to secure that, as the line is only a single line, the trains running at any one time between two particular train staff stations shall, if more than one, always be running in the same direction.

James Adams was acting as fireman on the Caledonian goods train, which should have passed Dalbeattie at 12.17 P.M. on 20th June 1874. The train was four minutes before its time, but in passing slowly through

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* Sec. 19 of the Glasgow and South-Western Railway (Amalgamations) Act, 1865, 28 and 29 Vict. cap ccxcviii. provides,—"The Caledonian Railway may run over and use with their engines, trucks, and carriages of every description, the Castle-Douglas and Dumfries Railway, for the purpose of conveying Caledonian traffic, and the Caledonian Railway shall be entitled to the conveniences and privileges and be subject to the regulations and obligations hereinafter mentioned (that is to say), ... (5) The Caledonian Railway Company shall, in the use of the Castle-Douglas and Dumfries Railway, be subject to the bye-laws and regulations for the time in force of the company" (*i.e.* the Glasgow and South-Western Company).

† Form of Train Staff Ticket:—

"GLASGOW AND SOUTH-WESTERN RAILWAY.
Train Ticket, Castle-Douglas to Dalbeattie.

(To be filled in with ink.)—Date, 187 Time, H. | M.
Train Staff following.
Signature,

The Train Staff will be shewn to the Engine Driver when giving him this Ticket, both being shewn to the Guard."

the station the driver, John Robb, received from William Douglas, clerk who was in charge, it being the stationmaster's usual hour of absence from the station, a train staff ticket, and was informed he might go on, as all was right. The stationmaster and all the other officials at Dalbeattie station were servants of the defenders. Neither the driver nor the guard of the Caledonian train asked to see the train staff, but went on, and about a mile from Dalbeattie the Caledonian goods train came into collision with the defenders' ballast train, which was returning to let the Caledonian goods train pass, and the driver of which was in possession of the train staff. In consequence of the collision Adams was killed.

The pursuer pleaded;—The pursuer's husband having been killed by the fault of the defenders, she is entitled to reparation, as concluded for.

The defenders admitted the collision, and that Adams was, in consequence, killed on the spot. They also admitted the fault of their servant, William Douglas, the clerk who was in charge of Dalbeattie station at the time. But they stated, that according to sec. 19, sub-sec. 5, of their Act of 1865,[1] which conferred their running powers on the Caledonian Railway Company, that company were, in their use of the Dumfries and Castle-Douglas line, made subject to their (the defenders') bye-laws and regulations for the time in force; that rule 18 of the Caledonian Railway Company's rules for the guidance of their servants provided that when working over any part of the Glasgow and South-Western system of railways the rules of that company were to be observed, "and every Caledonian engineman, guard, and breakesman so working must have in his possession a copy of such rules and regulations;" that the driver of the Caledonian goods train, John Robb, and also the guard, William Robertson, were in possession of and familiar with the defenders' rules and regulations for the time in force,* and that according to these rules and regulations it was the duty of John Robb, the driver, not to have proceeded past Dalbeattie station without seeing the train staff with which the line was worked, in addition to receiving the ticket, and that it was also the duty of the guard, William Robertson, not to have allowed the train under his charge to start from Dalbeattie station without seeing the train staff; and that had he or the engine-driver complied with their duty in this respect, which both of them failed to do, the accident complained

[1] Vide, *supra*, p. 216, note.

* The following were amongst the rules and regulations of the defenders' company issued to the servants of the Caledonian Company working over their line:—"1st, No engine or train shall be permitted to leave any train staff station unless the train staff for the portion of the line over which it is to travel is then at the station." "3d, If other engines or trains are intended to follow before the staff can be returned a train ticket stating 'staff following' shall be given to the engine-driver, the staff being exhibited along with the ticket to both engine-driver and guard. This shall be done with all other trains till the last, when the staff itself shall be given to the engine-driver of the last train. After the staff has been sent away, no other engine or train can leave the station or junction, under any circumstances whatever, until its return." "9th, No engineman is to start with a train or engine from any train staff station until he has received the train staff or ticket." "11th, When a ballast train has to work on any portion of the line, the train staff will be given to the engine-driver. This will close that portion of the line whilst the ballast train is at work. The ballast train must proceed afterwards to one of the terminal stations of the staff to open the line before the ordinary traffic can be resumed." The following additional regulation had also been issued shortly before the accident, viz., "It shall also be the stationmaster's duty to have the 'staff or ticket' in readiness, and exhibit it to the guard, who shall not start the train until he sees the staff. The stationmaster will then hand it to the engine-driver."

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of would not have happened, as they could not have seen the staff till the return of the ballast train; that the accident was therefore due in whole or in part to neglect of duty on the part of the engine-driver and guard of the Caledonian goods train, or one or other of them, and that they were both fellow-servants of the deceased James Adams, in the employment of the Caledonian Railway Company. They also maintained that William Douglas, the clerk, and the other officials at Dalbeattie station, though in their (the defenders') employment, were fellow-workmen with the deceased James Adams in working the Caledonian traffic over the Dumfries and Castle-Douglas line, in accordance with the Act of Parliament of 1865, the practice following thereon, and the rules and regulations of the Caledonian and Glasgow and South-Western Railway Companies.

The defenders pleaded;—(2) The collision complained of having been caused, or at least materially contributed to, by the fault of fellow-workmen of the deceased James Adams, the defenders are not liable in reparation to the pursuer. (3) The collision complained of having been caused, or at least materially contributed to, by the fault and negligence of the said John Robb and of the said William Robertson, who were fellow-workmen of the deceased, the defenders are not liable in reparation to the pursuer. (5) *Separatim*, assuming the said collision to have been caused by the fault of the said James Carmichael (the stationmaster), William Douglas (the clerk), and Thomas Hutton (a porter at Dalbeattie station), or any of them, the defenders are not liable in reparation, in respect that the said persons were at the time fellow-workmen of the deceased.

The case went to trial before Lord Young and a jury on the issue "Whether, on or about the 20th day of June 1874, near to Dalbeattie station, on the defenders' line of railway, the said James Adams was killed through the fault of the defenders, to the loss, injury, and damage of the pursuer? Damages laid at £500."

After the evidence was led a minute was adjusted and signed in these terms:—"The parties agree that the jury shall assess damages on the assumption of the defenders' liability, and that the Court shall enter a verdict for the pursuer for the damages which shall be so assessed, or for the defenders, according as they shall be of opinion on the record and notes of evidence that the defenders are or are not legally liable."

The Judge's notes of evidence also bore,—"Minute adjusted, to the effect that jury should assess damages on footing of liability, leaving legal question to Court on record and notes. At the request of the pursuer's counsel, assented to by counsel for defenders, I asked the jury their opinion on the question—Whether or not the engine-driver and guard (or either of them) of the goods train were in fault in passing the Dalbeattie station without seeing the train staff?

"The jury retired, and on their return, stated that they assessed the damages at £300, and, on the question put as above noted, that by a majority of ten to two they were of opinion that neither the engine-driver nor the guard of the goods train was in fault."*

Both parties moved the Court to enter a verdict for them.

Argued for the defenders;—(1) Admitting the fault of Douglas, the

* When the case came to be argued before the Court on the point of legal liability, a question arose as to the effect to be given to this expression of opinion by the jury. The defenders maintained that it was merely an expression of opinion, so that the Court might be informed as to what the jury thought on the point, but that it was nothing more, and that the Court were not bound by it. The pursuer maintained that it was as much part of the judicial contract between the parties that they should be bound by the jury's opinion on this point as by their assessment of damages.

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clerk in charge at the Dalbeattie station, still the deceased must be regarded as in law a fellow-workman with Douglas, and consequently the defenders were not liable to his representatives. Though not receiving his wages directly from the defenders, he was engaged to work over their line, and he was by statute and by the rules of his own company subject to their rules and regulations. At the time when the fault was committed which caused the accident he was engaged with Douglas, their clerk at Dalbeattie, in the common work of working a train over their line, and though the train was a Caledonian train they had an interest in it as they received by statute a mileage proportion of the traffic receipts. The two companies were practically amalgamated *quoad* this line.[1]

(2) Even if it were held that the deceased was not a fellow-workman of Douglas, the defenders' clerk at Dalbeattie, still he was a fellow-workman of Robb, the driver, and Robertson, the guard, in charge of his own train. They were undoubtedly guilty of fault in passing Dalbeattie, and accepting a train staff ticket without insisting on seeing the train staff. They were guilty of contributory negligence, without which the accident could not have happened, and their contributory negligence must be held to have attached to him, as a fellow-servant, so as to bar his representatives from recovering. It was one of the risks which he must be held to have undertaken in entering into his contract of service.

(3) If the doctrine of *collaborateur* were held not to extend to such a case, still he must be held as so identified with them that their contributory negligence was his contributory negligence. This had been held in England even in the case of a passenger.[2]

Argued for the pursuer;—(1) It could not be held that the deceased was a fellow-workman of the clerk in charge of the defenders' station at Dalbeattie. Both common work and common employment were necessary to make a case for the application of the doctrine of *collaborateur*. Here it might possibly be said that there was common work, but there certainly was no common employment. The doctrine of *collaborateur* was founded on the fiction that the servant had in respect of his wages contracted to run the risk of his fellow-workman's fault. The doctrine had already been stretched to its utmost limit, but the defenders' contention would carry it to a point where it would want the support even of the fiction on which it was founded, for there was no contract between the deceased and the defenders.[3]

(2) The defenders' argument, that the pursuer was barred from recovering because of the contributory negligence of the deceased's fellow-servants required for its support either the application of the doctrine of

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[1] Bartonshill Coal Co. v. Reid, June 17, 1858, 3 Macq. 266, 20 D. (H. of L.) 13, 30 Scot. Jur. 597; Bartonshill Coal Co. v. Macguire, June 17, 1858, 3 Macq. 300, 20 D. (H. of L.) 13, 30 Scot. Jur. 597; Degg v. Midland Railway Co. 1857, 1 Hurl. and Nor. 773, 26 L. J. Ex. 171; Waller v. South-Eastern Railway, 1863, 32 L. J. Ex. 205; Wiggett v. Fox, 1856, 25 L. J. Ex. 188.

[2] Thorogood v. Bryan, 1849, 8 Com. Bench Rep. 1st series, 115, and 18 L. J. C. P. 336; Armstrong v. Lancashire and Yorkshire Railway Company, 1875, L. R. 10 Ex. 47; Waite v. North-Eastern Railway Company, 1859, 28 L. J. Q. B. 258; Bridge v. Grand Junction Railway Company, 1838, 3 Meeson and Welsby, 244.

[3] Gregory v. Hill, Dec. 14, 1869, 8 Macph. 282, 42 Scot. Jur. 132; Wyllie v. Caledonian Railway Company, Jan. 27, 1871, 9 Macph. 463, 43 Scot. Jur. 220; Calder v. Caledonian Railway Company, June 16, 1871, 9 Macph. 833, 43 Scot. Jur. 465; Warburton v. Great-Western Railway Company, 1866, L. R. 2 Ex. 30; Abraham v. Reynolds, 1860, 5 Wels. Hurl. and Gor. 143; Shearman and Redfield on Negligence (New York, 1870), p. 125.

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collaborateur in a still wider and more extravagant manner or the introduction of the principle of identification amongst those travelling by the same conveyance, which had never been accepted by the Courts of this country. It was certainly to be found in the English cases of Thorogood and Armstrong, relied upon by the defenders. But these decisions were not approved of by the legal profession in that country,[1] and had even been called in question on the bench,[2] and no rational principle could be adduced in support of them.[3]

At advising,—

LORD JUSTICE-CLERK.—This case has come before us upon the Judge's notes of evidence taken at the trial. Apparently the parties did not think it necessary to take a verdict from the jury at all, but they entered into a minute to the effect that "the parties agree," &c. (as quoted *supra*, p. 218), and therefore we are now to judge both of the facts as proved by evidence and also of the law of the case.

The nature of the case is this: It is an action brought by the widow of a man named Adams, who acted as a fireman on a goods train belonging to the Caledonian Railway Company, and running between Dumfries and Stranraer. The Caledonian Railway have running powers over the Glasgow and South-Western line, and in the course of going along that line on the morning of 20th June 1874 that train passed the Dalbeattie station about twelve o'clock. It seems that the train staff, as it is called, ought to have been exhibited, as the train was passing through that station, by the stationmaster of the South-Western line, and that the stationmaster was not entitled to allow the train to go on, or to give a ticket for that purpose, until he exhibited that train staff. He did not exhibit it, but he gave a ticket; the train went on, and a ballast train which had started in front of it, and was then returning, ran into it. There was a collision in which Adams was killed, and the present action is at the instance of his widow for reparation.

Now, in regard to the facts which I have stated, there is no doubt at all that the train staff was not exhibited. That it ought to have been exhibited, that the ticket was given without that exhibition, that, in point of fact, it could not have been exhibited, because it had gone with the ballast train, and therefore that there was fault on the part of the person in charge of the Glasgow and South-Western station is certain.

On the notes of the evidence three questions arise for consideration:—

1. Was the deceased a fellow-workman with the servants of the South-Western Company?

2. Did the servants of the Caledonian Company contribute to the injury of the deceased?

3. If they did, does their contributory fault limit or exclude the action?

On the first head it is unnecessary to resume the questions which have been so frequently discussed as to the law of reparation for injuries caused by the fault of fellow-workmen. I had occasion to state my views fully in the case of

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[1] Smith's Leading Cases, 6th ed. vol. i. p. 266; Addison on Torts, 4th ed. 388.

[2] "The Milan," 1831, 31 L. J. Prob. Mat. and Adm. 105 (Dr Lushington's Opinion).

[3] Rigby v. Hewett, 1850, 5 Wels. Hurl. and Gor. 240; Greenland v. Chaplin, 1850, 5 Wels. Hurl. and Gor. 243.

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Gregory v. Hill (8 Macph. 282), and I adhere to the views I then expressed. The ordinary rule of reparation may be stated in the words of the brocard, "*culpa tenet suos auctores.*" In cases, however, in which the person who actually does the wrong is at the time engaged in work on the employment and under the orders of another, the law has given a wide interpretation to the term "author," and has held it to embrace the employer, on the corresponding maxim "*qui facit per alium facit per se.*"

The Courts in England, chiefly since the passing of what is called Lord Campbell's Act, have introduced a practical limitation of the application of this last mentioned maxim in cases arising out of injuries inflicted by one fellow-servant on another, not by way of limiting the scope of the principle of liability, but by inferring an implied condition in the contract of service. It is held that the master on the one hand stipulates to be free of responsibility to the servant for injuries arising from the acts of his other servants, and the servant undertakes the risk of such acts occurring in the course of the common employment in consideration of the stipulated wages.

If the question were open it might perhaps be doubted whether any such condition can be legitimately deduced from the contract of service, and whether the supposed obligation does not partake more of the nature of a legal fiction than of that of a sound and just inference. The duty of a man to protect those whom he induces to enter his service is to the full as great as any he owes to the public. If it were thought that in the present condition of society, and the greater risks incurred in manufacture, the old doctrine of "*qui facit per alium facit per se*" has too wide a scope, it would have been a more convenient rule to have limited its operation to cases (whether with servants or the public) in which the master had been wanting in due and reasonable precaution. But it is too late to raise any such question. The fiction, if it be one, is firmly fixed in the law, and was found to be part of our own system by the House of Lords in the Bartonshill case (3 Macq. 266), and it is settled that a servant cannot make his master responsible for injury arising from the wrong of a fellow-servant, because, by his own contract with the master, he has barred himself from doing so. From this it follows that no one but the employer can plead the benefit of the contract, and the only question remaining on this head is whether the deceased was employed by the Glasgow and South-Western Company.

I am of opinion that the deceased was employed solely by the Caledonian Company, and that the fact that the latter had the right of running over the rails of the former, and was subject to the rules of the former in doing so, had no more effect in making the deceased the servant of that company than the use of a private wharf or pier, or a private road, would convert the persons using it into servants of the proprietor. It would be a hardship on railway companies to impose on them liability for the servants of all the companies or traders who use their line. But the case of Calder (9 Macph. 833), in which the running powers were precisely the same as in the present case, is conclusive on this point.

On the second point, I am of opinion that the engine-driver and the guard of the Caledonian train were guilty of negligence, which contributed to the death of the deceased. Understanding from Lord Young that the opinion of the jury was not intended to operate as a verdict, I have no hesitation in coming to an opposite conclusion. The engineman and the guard were both aware that it was the duty of the stationmaster to exhibit the train staff to them before

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giving them a ticket to proceed, and that he was not entitled to allow the train to proceed without doing so. The rules which are admitted to have been in their hands make that clear, and although the injunction on them to see the train staff before proceeding might have been more directly expressed, there could have been no reasonable doubt on their minds as to what their duty was. To hold otherwise would be to remove all security for the safety of the public.

3. On the third ground, two separate views were submitted. It was maintained, in the first place, that the contributory negligence of the fellow-servant is equivalent to the contributory negligence of the deceased himself; and secondly, that this would have been the case even if the deceased had been a passenger.

On the first view I am of opinion that it is entirely untenable. It proceeds on the idea that on some unexplained ground a servant is liable for the wrongful acts of his fellow-servant. But the doctrine I have been considering implies the reverse. The fact that a fellow-servant did, or contributed to do the wrong liberates the master; but it does not liberate the fellow-servant, who remains liable for his wrongful act, and still less can it liberate a stranger who participated in the wrong. But in no view which can be plausibly stated can the injured man be responsible for the acts of a fellow-servant, with whom he has no contract, nor can these free from responsibility a third party, with whom he had not only no contract, but no relations—*culpa tenet suos auctores*; and if this action had been directed against the stationmaster, he never could have been heard to maintain that he was not liable for his own wrong because a fellow-servant of the deceased was also liable. The second view must be carefully examined.

The proposition maintained by the defenders on this head, as I understand it, is the following,—That if in the execution of a contract of carriage between a public carrier and a passenger the passenger be injured through the joint fault of the carrier and a third party the passenger has no right of action against the third party, who is to escape altogether because the carrier and the passenger are in law identical, and are responsible for the acts of each other, and the passenger thus caused or contributed to his own injury.

On any principles or analogies with which we are familiar the mere enunciation of such a proposition would be sufficient to refute it; but we have been referred by the defenders to the case of Thorogood v. Bryan, in the English Common Law Courts (1849, 18 Law Journal, C. P. 336), and the recent case of Armstrong v. the Lancashire and Yorkshire Railway Company (1875, L. R. 10 Exch. 47), as giving it sanction. I have read these cases attentively, and certainly the opinions in the case of Thorogood affirm the proposition I have stated to its full extent. The case of Thorogood was this: It was an action by a passenger in one omnibus against the proprietors of another omnibus in order to obtain reparation for injury sustained through being run over by the latter omnibus while alighting from the former. It was pleaded for the proprietors of the latter omnibus—and the plea was sustained by the Common Law Court—that in respect that the driver of the omnibus from which the plaintiff was alighting had been in fault also, and that the plaintiff being a passenger was identified with the driver, he was guilty of contributory negligence, and therefore could not obtain reparation. Now, that is the proposition which is given effect to in Thorogood's case, and is pleaded here, and I am far from saying that if we were to follow that precedent it is not directly applicable. But before we

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can be expected to follow the opinions of English Judges, entitled and certain to receive at our hands deserved respect, we must have something more than mere judicial asseveration for our guidance, some intelligible principle, some foundation in law and reason, in support of the rule. After carefully examining this case of Thorogood, I entirely sympathise with the surprise expressed by Dr Lushington (in the case of "The Milan," 31 Law Jour. Prob. Mat. and Adm. 105), at the judgment itself, and the inability which that great lawyer felt to comprehend the grounds on which it proceeded. It has not been received with favour by the profession in England, as the significant passage in Smith's Leading Cases (6th ed. i. 266) sufficiently shews; but as the Judges in the recent case of Armstrong certainly expressed approval of it (although their remarks were *obiter*), and the scope of the principle or rule is very wide, it may be right to examine the matter closely, and ascertain to what amount of authority the decision is entitled.

The ground, such as it is, on which the judgment in Thorogood's case is defended by the Judges who pronounced it, as far as I can understand it, is the supposed identity in law between the carrier and the passenger, and I presume that identity holds in every contract of carriage, and makes the passenger or the customer liable for the wrongful acts of the carrier. No stronger expression could be used to imply mutual responsibility than identity. The persons, that is to say, are one and the same, and the acts of the one are the acts of the other, as if they had been master and servant, or principal and agent. But this is merely the rule of "*qui facit per alium facit per se*" in a very questionable, and, indeed, as with deference I think it, extravagant application of it. The very maxim which it taxed the ingenuity of Courts to abridge, when the effect was to shelter the master from responsibility for the acts of his servant, is now revived in this shape, with the effect of protecting the actual wrongdoer from the legitimate consequences of his own wrong.

If it be true that the wrongful act of the carrier is constructively and by imputation the wrongful act of the passenger, it necessarily follows that whenever a third party is injured in the course of the execution of the carrier's contract by rail, every passenger in the train is liable to make reparation to the person so injured, because, being identical with the carrier, and responsible for his wrongful acts, they did, or contributed to, the injury.

I am quite aware that the Judges in Thorogood's case had no intention of giving any countenance to such a demand. But I see not how it is to be avoided, excepting on the assumption, which is manifestly true, that the passenger is not identified with the carrier, and is not responsible for what he does. I can only infer that the identity spoken of is not to be understood of a complete legal identity, but that the term is used in a popular sense, sufficient to exclude the action, but not capable of being, nor intended to be carried out to all its other legitimate and logical results.

The question whether the passenger contributed to the injury is a matter of fact, which cannot be partially true, and partially false. But is there any ground for holding it to be true in any sense? It seems clear to me that the element which is essential to the application of the maxim *qui facit per alium facit per se* is entirely absent in the relation of carrier and passenger, namely, the element of authority and control. No man can be responsible for the acts of another who has no authority over him. The contract of carriage is a branch of the contract *locatio operis*, and has well known incidents and obligations. The car-

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rier is bound to carry the passenger safely, and if he fails so to do he is guilty of a breach of contract. The passenger is bound to pay the fare contracted for, and there the legal relation ends. There is beyond this no more identity between them than exists between a Liverpool trader who commissions and the Clyde shipbuilder who builds a ship, or between an English railway company which orders and the manufacturer at Carron who constructs a boiler. They are independent parties to a contract, and neither has control or authority over the other.

It was suggested in one of these cases that the carrier might be considered as the agent of the passenger. I do not think he can be so considered, unless in law he is the agent of the passenger, and he is not the agent of the passenger. There is no contract of principal and agent between the parties, and no such relation is implied in the contract of carriage. The carrier does not act on the passenger's authority, but on his own. He runs his public vehicle at his own pleasure, at such times, in such places, and in such manner as he thinks fit. If these things form part of his contract he must fulfil them, but he is in no respect subject to the passenger's orders or direction. It follows, therefore, that the carrier is not the agent of the passenger.

No doubt, although the contract of carriage does not imply any mutual responsibility for the acts of those who are parties to it, either may so act as to be participant in the wrongful acts of the other. The passenger may trust himself to a driver whom he knows to be intoxicated or incapable. He may sit beside the driver and take the reins. He may bribe the driver to drive at a dangerous pace, and in many other ways may contribute to his own injury, or that of another. But his liability for such acts will be direct, and will depend on his own delict. As long as he simply acts under his contract he has no responsibility for those who are employed to convey him.

It was suggested in the case of Thorogood that the passenger selected the vehicle in which he chose to travel, and therefore became responsible for the wrongful acts of the driver. I do not know what virtue there may be in the term "selected," but I suppose the same thing may be said of every man who uses a public conveyance. Selecting the vehicle only means that he used it, and how the use of a public conveyance by a passenger should be a wrongful act I am quite unable to understand.

I am therefore of opinion that our judgment must be for the pursuer, with the sum of £300 of damages, as found by the jury.

Lord Ormidale.—Accidents on railways and consequent actions of damages are unfortunately so frequent—perhaps unavoidably so—that it is right I should in the present case fully explain the grounds upon which I have formed my opinion.

The issue in this case which raised the question, whether the pursuer's deceased husband, who was in the service of the Caledonian Railway Company as fireman of a goods train, was killed through the fault of the defenders, in place of being left to be disposed of by the jury in the ordinary way was withdrawn from them in terms of a joint minute by which the parties agreed that "the jury shall assess damages," &c. (as quoted *supra*, p. 218).

The damages were assessed by the jury at £300; and the Judge's notes bear that,—"At the request of the pursuer's counsel," &c. (as quoted *supra*, p. 218).

Each of the parties claimed the verdict, and moved the Court accordingly.

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The defenders maintained they were not liable, in respect, 1st, That the pursuer's husband, and their servant who commited the fault, were at the time of the occurrence fellow-servants engaged in the same common work; and 2d, That, at any rate, the pursuer's husband was the fellow-servant of the driver and guard of the goods train of which he was fireman, and that the driver and guard were in fault in passing the Dalbeattie station without having the train staff exhibited, which, on the doctrine of contributory fault, disentitled the pursuer to recover, it being clear that without this fault on their part the collision which resulted in the death of the pursuer's husband could not have taken place.

1. In regard to the first of these propositions, it cannot be disputed, and, as I understood, was not disputed, that the defenders' servant in charge of the Dalbeattie Station was in fault in directing or allowing the goods train, of the engine of which the pursuer's husband was fireman, to pass at a time when the train staff neither was nor could have been exhibited. The defenders' argument proceeded upon this assumption. The only point, indeed, attempted to be made on the part of the defenders under this branch of their case was founded on the further assumption that their faulty servant and the deceased were fellow-servants engaged "in the same common work." The basis of the defenders' argument, as thus stated by themselves, is somewhat peculiar, and at once suggests the question, whether on their own shewing their contention can be sustained, for I take it to be clear that in order to constitute the relation of fellow-servants not only must they be engaged on the same work but also under the same employment. Waiving, however, this and any other criticism on the language used by the defenders, their case, on this branch of it, appears to me to be fatally defective, for the reason that their faulty servant and the pursuer's deceased husband cannot, in any reasonable or correct sense, be held on the evidence to have been on the occasion in question within the doctrine established and settled by the House of Lords in a series of consecutive judgments (Bartonshill-Coal Company, 3 M'Queen's House of Lords Cases, pp. 266 and 300, and Wilson v. Merry and Cunninghame, L. R. 1 Scotch App. 326), to the effect that where the injury caused by the negligence or unskilfulness of a servant is sustained not by the public, but by another servant acting in the same employment, under the same master or employer, the master or employer is not liable unless there be proof of general incompetency on the part of the servant causing the injury, or insufficiency or defectiveness in the machinery or other appliances furnished by the masters, the reason of this being that although a servant may be taken to have engaged to encounter all risks which are incident to the service he undertakes, he cannot be expected to anticipate those which may happen to him on occasions foreign to his employment. Applying the doctrine thus established to the present case, I think it is impossible to hold that the defenders, the Glasgow and South-Western Railway Company, were the masters or employers of the pursuer's deceased husband. There was no contract of service between them; he was not in their employment at all, but in a different service, and under different masters or employers altogether. The defenders' servant therefore by whose negligence or unskilfulness the fatal injury was caused to the pursuer's husband, and the latter, were not fellow-servants engaged in the same service, or under the same master or employment. And, if this be so, there is no room for the assumption that the pursuer's deceased husband when he entered the service of the Caledonian Company must have engaged to encounter not only all the risks incident

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to that service, but also all the risks incident to the service of the defenders' company, in which he never was.

Not only does it appear that the rule, but also that the reason of the rule, established by the cases referred to is inapplicable to the present case.

Accordingly, in circumstances in all essential respects similar to those which occur here, it was in Calder v. The Caledonian Railway Company (9 Macph. 833) held unanimously by the Court that a railway company was liable in damages for injuries caused by the fault of a pointsman in their employment to the guard of a train belonging to another company while passing over a portion of the line of the former company; and this judgment is entitled to all the more weight that it followed on the case of Gregory v. Hill (8 Macph. 282), decided not two years before, on the same grounds, and to the same effect.

It is true that the Acts of Parliament regulating the running powers of the Caledonian Company, in whose employment the deceased was on the occasion in question a servant, were nominally different from those in the case of Calder v. The Caledonian Railway Company, but on the clauses in both, so far as they related to the matters in dispute, being examined in the course of the discussion in the present case, it was conceded that there was no substantial difference in their terms.

In the words, therefore, of the Lord President, who delivered the judgment of the Court in Calder's case, it appears to me that the Caledonian Company, and the deceased, one of their servants, are to be considered as strangers to the defenders' company, and their servant who committed the fault. And, if I am right in this, the first ground on which the defenders maintain their case entirely fails.

2. The other and only other ground on which the defenders rely is to this effect, that the pursuer's husband was, if not the fellow-servant of the individual in the employment of the defenders who committed the fault, the fellow-servant of the driver and guard of the goods train of which he was fireman, and that as the guard and driver were in fault in passing the Dalbeattie Station without having the train staff exhibited to them, the pursuer is, on the principle of contributory negligence, debarred from recovering damages. This proposition involves different considerations from those which have been already noticed, and may, in consequence of the English decisions which were cited in the course of the argument, be held to be attended with some difficulty.

Clear, however, it is, that if the Court is to be guided by the opinion of the jury as stated in the notes, neither the engine-driver nor the guard of the goods train,—the only fellow-servants of the deceased who are said to be implicated,—was in fault, and if so all room for the defenders' contention under this branch of their case is excluded. But it was strenuously urged that although both parties are stated in the notes to have assented to the opinion of the jury being taken on the question of fault, it was not intended that they should be bound by it. Now, I must own my reluctance to accede to this view, which necessarily assumes that the parties meant nothing by consenting to the opinion of the jury being taken, and that neither was to be bound by it. I cannot understand how this could be, and, for myself, I cannot help thinking that the correct course would be for the Court now to hold both parties bound by the opinion of the jury obtained as it was of mutual consent.

If this course, however, is not to be adopted, and assuming that the Court is entitled to determine for itself, on a consideration of the evidence, whether the

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deceased's fellow-servants, the engine-driver and guard of the goods train, of which he was fireman, were, on the occasion in question, in fault, as well as the defenders' servant, I would be disposed to hold that they were. Without entering into details, it appears to me that it was the duty, as enjoined by the rules of the service, of the engine-driver and guard not to have passed, on the occasion in question, Dalbeattie Station without seeing the train staff, and that they were in fault in doing so. The question of law is thus raised, whether the fault of the deceased's fellow-servants—for it is not said the deceased was in fault himself—excludes the pursuer's right to recover damages on the ground that their fault must be held to have been contributory fault on the part of the deceased.

So far as I am aware, this question has not been the subject of direct decision in Scotland; and I cannot help thinking that a decision now in the affirmative of it would be inconsistent alike with sound principle and the reasoning on which the House of Lords proceeded in the cases which have been referred to, viz., that in order to support the defence of an employer to an action at the instance of a servant for injury sustained in the course of his employment, it is necessary for the master to shew that it was not he who was in fault, but a fellow-workman of the sufferer engaged in the same employment, and this because it must be presumed that the sufferer, in entering the service, undertook all the risks of that service arising from the fault of his fellow-workmen engaged in the same employment. This doctrine may perhaps be thought, and I believe has been thought by many, to go far enough adversely to workmen, but to extend it still farther and to say, not only that a workman who has sustained injury in the course of his service through the fault of a fellow-workman cannot maintain action for reparation against his employer, but also to say that he cannot do so against another party altogether, for an injury sustained through the fault, not of a fellow-workman in the same employment, or at the same work with himself, but in the employment and at the work of that other party, between whom and the sufferer there was no contract of service whatever, would, I think, be altogether inconsistent with sound principle and good sense. To take the present case as an illustration of what I mean, let me ask how is it possible to suppose that the deceased when he entered into the employment of the Caledonian Company can be presumed to have undertaken not only all the risks of that employment including the risk of injury caused by his fellow-workmen engaged in the same service, but also all the risks of service with the defenders' into which he never entered, and of whose workmen he knew nothing, and between whom and himself there never was, in any correct sense, any community of work or interest whatever? It is surely more consistent with reason and with established law to hold in such a case that the defenders must on the principles involved in the maxims *qui facit per alium*, and *respondeat superior*, be answerable for the consequences of the death of the pursuer's husband, caused by the fault of one of their servants who was not a fellow-servant of the deceased.

But the defender maintained in reference to various English cases—none of them, however, decided in the House of Lords—that the question is no longer open, but must be held to be conclusively settled against the pursuer. The decisions of the English Courts and the opinions of the English Judges are always received in this Court with the greatest respect. It so happens, however, that the English decisions bearing on the present question were shewn at the discussion not to be uniform, and as none of them appear as yet to have been under the consideration, or to have received the approval of the House of Lords, they

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cannot be held as conclusive. It is necessary, therefore, to examine the English cases, or at least such of them as the defenders seemed chiefly to rely upon, viz., the cases of Thorogood v. Bryan (18 Law Journal, Com. Pleas, p. 336), and Armstrong v. The Lancashire and Yorkshire Railway Company (Law Reports, 10 Ex. p. 47). In the former the action for reparation was at the instance of a passenger by one omnibus, who, after he had got out and was standing on the road, was knocked over and injured by the pole of another omnibus, and the Court of Exchequer appear to have held that if the accident was caused by the fault not only of the passenger himself but of the driver of the omnibus in which he had been a passenger he would be disentitled to recover. The precise principle, however, on which this was held is not easily discoverable from the report of the case. Mr Justice Coltman, who gave the leading opinion, seems to have held that a passenger in a public omnibus is so identified with the driver of it as to make the fault of the former the fault of the latter; and in the case of Armstrong v. The Lancashire and Yorkshire Railway Company where a passenger by one of two railway trains belonging to different companies was injured in consequence of the fault of both companies, the Judges of the Court of Exchequer seem to have expressed an approval of or perhaps I should rather say stated that they did not dissent from the decision in Thorogood's case. But only two Judges, Barons Bramwell and Pollock, composed the Court in deciding Armstrong's case, and they do not appear to have been agreed either in their understanding of the principle upon which Thorogood's case was decided, or of the principle on which they proceeded themselves in deciding Armstrong's case. While it is not very easy to see what was the understanding of Baron Bramwell as to the principle of decision in Thorogood's case, Baron Pollock expressly says that he felt a difficulty in consequence of the use of the word "identified" in that judgment, and he goes on to add, "But what I understand it to mean is, that the plaintiff, for the purpose of the action, must be taken to be in the same position as the owner of the omnibus or his driver." So, according to this explanation, it would seem to follow that every passenger in a public omnibus, or other vehicle, must be held, in regard at least to any action for reparation in respect of injury sustained through the fault of another omnibus or vehicle, to be in the same situation as the driver or owner of the vehicle in which he was himself a passenger.

Now, I must say that I cannot assent to a doctrine so very startling in itself, and so serious as regards its consequences. On the contrary, I can see no reason why in the present case the defenders, who are admittedly wrongdoers through the fault of one of their servants, should not be held liable to the pursuer as representative of a person who was himself free from fault, and not answerable for the fault of the defenders or any one in their employment. Nor can I think that the opposite doctrine, which seems to have been given effect to by the learned Judges in the cases of Thorogood and Armstrong, has been as yet so established that it ought to be followed or adopted without a more thorough discussion, and a more authoritative judgment than it has yet received. Not only has it been adversely criticised by the profession in England, as in Smith's Leading Cases (6th ed. vol. i. p. 266), and Mr Addison's book on Torts (4th ed. p. 388), but that it has not been hitherto accepted in the Courts in England as settled law is clear from the case cited in the report of Armstrong v. The Lancashire and Yorkshire Railway Company of "The Milan," where Dr Lushington expressly said that he declined to be bound by Thorogood v. Bryan.

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I am therefore, for the reasons now stated, of opinion that the defenders have failed in both branches of their argument, and that the verdict in this case should be entered for the pursuer for the damages assessed by the jury.

LORD GIFFORD.—In this case, after the evidence had been led, the parties agreed to withdraw the whole case from the jury, excepting the mere assessment of damages, and consented that the jury should assess the damages on the footing of liability, leaving the legal question of liability to the Court on the record and notes of evidence. That was a judicial bargain by which the parties became bound. It was acted upon. The jury, on the assumption of liability, assessed the damages at £300, and there the duty of the jury under the joint minute terminated. But at the same time, and at the request of the pursuer's counsel, assented to by the counsel for the defenders, the presiding Judge asked the jury their opinion as to whether or not the engine-driver and guard of the goods train were in fault in passing Dalbeattie Station without seeing the train staff. To that question the jury gave an answer, by a majority of ten to two, that neither the engine-driver nor the guard was in fault.

The first question with which we have to deal is, whether the Court, in now disposing of the case, are bound by this answer of the jury to the special question put to them, and whether the Court must take it as conclusive that no fault attached to the guard and driver of the Caledonian train. On that point I think that the bargain of parties embodied in the minute must receive full effect. The parties have made the Court, and not the jury, the judge of the facts upon the notes of the evidence. If the question put to the jury by the Judge at the request of counsel was intended to modify the terms of the joint minute for the parties the minute itself should have been altered. I do not think the parties, in consenting to the special question being put to the jury, intended to depart in any degree from the bargain contained in the joint minute. I may add that, even if the answer of the jury to this question were taken as a verdict on a special point of the case, I should be prepared to hold it as contrary to evidence. But I would rather take the broad ground, that it was not within the bargain of the parties that the Court should be excluded and held bound by this answer of the jury as by a verdict, and that the joint minute cannot be held as departed from.

Now, upon the facts as disclosed on the notes of evidence I have no doubt whatever that the lamentable accident out of which this case has arisen was caused by the fault of three persons—first, of the acting stationmaster at Dalbeattie, who, in violation of a rule essentially necessary for the safe working of a single line, and emphatically enjoined upon the servants of the Glasgow and South-Western Railway Company, allowed a train to go forward on a single line when the train staff was not in his possession. Nothing is more emphatically laid down in the company's rules than that, once the train staff is away from a station, no more trains are to be forwarded in the same direction. Now, the acting stationmaster gave the driver a train ticket, which was admissible, indeed, if he had had the train staff in his possession, but which was directly in violation of the rules when he had not the train staff, which was, in fact, on its way back to him on board of the ballast train. Not only was he in fault in this, but also in having the bundle of train tickets lying open and accessible, instead of being locked up in their proper receptacle, which could only be opened by a key connected with the train staff.

The second and third persons whose fault contributed to cause the accident

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were the engine-driver and guard of the Caledonian train. The duty of the driver on entering a single line was to get the train staff itself, or, if he only got a train ticket, then to see that the train staff was at the station. The duty of the guard was to see the train staff at the station, and to see that it was in the hands of the stationmaster or given to the driver. In the case of a train starting with a train ticket, it was the duty of both driver and guard to see that the staff was in the possession of the stationmaster. They both failed in this duty. The rules under which they were working, and which were admittedly in their possession, bore that "no engine or train shall be permitted to leave any train staff station unless the train staff for the portion of the line over which it is to travel is then at the station." The additional rule, that "it shall also be the stationmaster's duty to have the staff or ticket in readiness, and exhibit it to the guard, who shall not start the train until he sees the staff." "The stationmaster will then hand it to the engine-driver" was added as an additional precaution. It was contained in a set of additional regulations, which there is evidence to shew were attached as an appendix to the document issued monthly to the servants of the Caledonian Company working over this part of the South-Western system as a working time-table.

There were, therefore, three individuals who must either see or have the train staff before the train starts, and thus secure the safety of the train by seeing that the train staff was at the station, and hence that no train could be coming in an opposite direction.

Now, on these facts certain questions of law arise. In the first place, was the pursuer's husband, to whom no fault is attributed, the fellow-servant of those who were in fault? He was certainly the fellow-servant of the driver and guard of his own train, for they were all in the service of the Caledonian Company. If the action had been raised against the Caledonian Railway Company it would have been excluded by the well-known rule that a servant cannot recover against his master for injury sustained through the fault of a fellow-servant.

The next question is whether the deceased Adams was or was not a fellow-servant of Douglas, the remaining man whose fault caused the accident, and whether the fault of Douglas, who was acting for the Glasgow and South-Western Company's stationmaster at Dalbeattie, disentitles the pursuer to recover against the South-Western Company. Now, was Adams the fellow-servant of Douglas? I think not. Douglas was the servant of the Glasgow and South-Western Company, and of them only. He was in no sense the servant of the Caledonian Company, though he had certainly some duties to perform with reference to passing Caledonian trains. Almost all the servants of a railway company have some duties to perform towards the passing trains of any other company which has running powers over their own company's line, and it would lead to absurd and inconvenient results if they were all to be held servants of the company exercising the running powers. The Caledonian Company, having running powers, is not really in a different position from any private trader who chooses to run his own locomotive and waggons; and surely the servants of such private trader could not be held to be fellow-servants with all the railway company's servants. But as there are no specialties in this case, I need not go further on this point, for it is directly disposed of by the decision of the other Division in the case of Calder v. Caledonian Railway Company, in which I entirely concur, and by which I am bound. Therefore, I take it, Douglas, the South-Western Company's servant, who was in fault, was not the fellow-servant of Adams.

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The last question, and perhaps the most difficult of all, is, whether the pursuer is disentitled to recover, because not only Douglas was in fault, but also the driver and guard of her husband's own train. This question is one of nicety, and authorities have been referred to in the English Courts which are of the greatest weight, and with which we must deal deliberately. Now, in the first place, the principle of *collaborateur* does not, in any way, interfere with the direct application of the maxim, *culpa tenet suos auctores*, but only with the maxim, *qui facit per alium facit per se*. No defence whatever is given by it to the *collaborateur* or fellow-servant who is guilty of fault, but only to the common master. If one servant causes injury to a fellow-servant he is as much liable to him in a direct action as if he was a total stranger. Therefore, whether they were fellow-servants or not, Adams' widow has a direct action against Douglas, as well as against the driver and guard. All the actual wrongdoers are, conjunctly and severally, liable to the person whom they have injured. The only question is, whether she has also a direct action against Douglas' masters. The only defence against that action is that, besides Douglas, Robb and Robertson, the driver and guard of the goods train, contributed to the injury. That is not, in my opinion, a good defence. It would be a very strong thing to hold that, merely because a fellow-servant is to blame as well as a third party, therefore the injured person is not to recover against that third party or his master. If the pursuer has a good action against Douglas, why not against Douglas' employer? I can see no principle whatever why he should not. Suppose this had been a passenger train, could it be contended that the passengers were debarred from recovering against the South-Western Company because the driver and guard of their own train were also in fault? Were it not for the two English cases of Thorogood and Armstrong I should have had no difficulty on the point. With regard to these cases, I concur in the remarks of your Lordship in the chair. I can find no principle on which they can be held to proceed. On the contrary, I think they go clearly against principle. Fortunately we have not only the adverse criticism of standard writers on the law of England, but also the authority of that great lawyer, Dr Lushington, to support us. I therefore decline to be bound by the cases of Thorogood and Armstrong till they are endorsed by a higher authority.

Therefore, in law and on the facts disclosed, I am of opinion that the South-Western Company are liable to the pursuer of this action, and that a verdict should be entered up for her for £300, the assessed amount of damages.

LORD NEAVES was absent.

THIS interlocutor was pronounced:—"The Lords having considered the issue, the minute No. 20 of process, and the Judge's notes of evidence, find for the pursuer, and decern in terms of the conclusions of the summons for £300; and find the pursuer entitled to expenses, including the expenses of the trial, and remit to the Auditor," &c.

ROBERT PRINGLE, W.S.—GIBSON-CRAIG, DALZIEL, & BRODIES, W.S.—Agents.

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Dec. 7, 1875.
Mackintosh
v. Ross.

A. S. Ross or Mackintosh, Petitioner (Appellant).—*Lancaster—Mackintosh.*
Ann Ross or Robertson and Others, Petitioners.—*D.-F. Watson—Thoms.*
Andrew Gildart Reid, Petitioner.—*Fraser.*

Process—Petition for Service—Appeal for Jury Trial—Titles to Land Consolidation Act, 1868 (31 *and* 32 *Vict. c.* 101), *sec.* 41.—When a petitioner for service appeals for jury trial from the Sheriff of Chancery under the 41st section of the Titles to Land Act, 1868, the Court will consider whether the case is suitable for jury trial, but the appellant has a right to jury trial unless cause is shewn to the contrary. It is not a sufficient reason for refusing jury trial that the evidence in the case mainly consists of a large mass of correspondence and other documentary evidence as to pedigree.

1st Division.
Ld. Curriehill.
M.

(Sequel of case reported May 30, 1873, 11 Macph. 637.)

In May 1872 Mrs Christina Cockburn Ross died vested in the lands of Shandwick.

Competing petitions for service were presented by Mrs Agnes Stuart Ross or Mackintosh, A. M. Ross, and others.

The petitions were conjoined by the Sheriff of Chancery, and were then brought before the Court by an appeal under the Titles to Land Consolidation Act, 1868, sec. 41,* at the instance of Mrs Mackintosh.

The Court, on 30th May 1873, dismissed the petition of A. M. Ross, and appointed the other petitioners to lodge issues.

Issues having been adjusted, the petitioner Reid moved the Lord Ordinary to appoint the case to be sent to proof before a Judge instead of to a jury.

His Lordship reported the case verbally to the First Division.

Argued for Reid;—The case depended on a mass of documentary evidence, which it had taken more than two years to recover from different parts of the world, and which was unsuitable for the consideration of a jury. The principle was the same as in consistorial causes, which were never sent to a jury.

Mrs Mackintosh, the appellant from the Sheriff of Chancery, argued that she had a statutory right to jury trial; and besides, that the case was quite suitable for a jury properly directed by the Judge.

At advising,—

Lord President.—When this case was before us on 30th May 1873 we pronounced an interlocutor dismissing the petition of one claimant, who is now out of the case, and appointing the other parties to lodge issues. We did not in express terms find that the case ought to be tried by jury. But before ordering issues we certainly formed an opinion how the case ought to be tried. I expressed my opinion that it ought to be tried by jury. The other Judges concurred in that opinion, and I observe that Lord Deas mentions, as the great

* Titles to Land Consolidation Act (31 and 32 Vict. c. 101), sec. 41.—"In all cases in which competing petitions presented to the Sheriff . . . . have been conjoined as aforesaid . . . . . it shall be competent to any of the parties at any time before proof is begun to be taken by the Sheriff . . . . to remove the proceedings to the Court of Session by a note of appeal, ... which note of appeal shall be proceeded with in like manner with notes of appeal presented with a view to jury trial against judgments of the Sheriff Courts of Scotland, and such judgment shall be pronounced on the said note of appeal as shall be just; and in the event of it appearing proper that the cause should be tried by a jury, the same shall be tried according to the law and practice in trials by jury of causes in the Court of Session, ... and the verdict . . . . shall be equally final and conclusive with the verdicts returned in trials by jury in the said Court, but with all and the like remedies by bill of exceptions, motion for a new trial, or otherwise, competent in regard to such verdicts . . . ."

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advantage of trial by jury, "that the verdict fixes the matter of fact which otherwise would be open to controversy in this Court and in the House of Lords."

It is quite open to us to reconsider this matter, and if I were now satisfied that this case differed from ordinary cases of pedigree in any essential point, so as to make it unsuitable for jury trial, I should be willing to alter our decision, but I cannot come to that conclusion. It is important to attend to the position of the parties under the Titles to Land Act. They go before the Sheriff of Chancery with their petitions maintaining their various claims. The decision of the Sheriff, on matters of fact, is equivalent to the verdict of a jury. It cannot be reviewed except on the ground of error in law or as being against evidence, the latter being a very unlikely ground of objection to the verdict of a Sheriff of Chancery. Now, any one of the parties may not desire that the questions of fact should be conclusively settled by the Sheriff, and may prefer that the case should be tried by a jury; and he is entitled, under sec. 41, to bring the competition here for that purpose. We are directed to consider the question whether the case ought to be tried by a jury, and, if so, to send it for trial. I do not say that in this class of cases we are bound to follow our practice in ordinary appeals under the 40th section of the Judicature Act of George IV., because it was plainly intended that these latter cases should not be tried in this Court except by jury trial, so that they might be finally tried here on appeal, and not go to the House of Lords. But here the case is different. One party says, "I want jury trial"; another may say, "I don't object to your taking the cause away from the Sheriff, but jury trial is unsuitable; let it be tried by the Court." But still the party who appeals has a certain statutory right which is not to be defeated except on good cause shewn. Here I do not see sufficient reason for interfering with that right. If I saw grounds sufficiently strong I should not hesitate to do it.

It is said that the evidence will be chiefly documentary, because the facts are beyond human memory. I am not sure that that of itself is any reason for withdrawing the case from a jury. If inferences are to be drawn not from deeds but from miscellaneous documents and correspondence, that is a very proper subject for the consideration of a jury. Besides, where there are a great many ancient documents there often arise incidental issues of a very peculiar kind—for example, as to whether documents are genuine or fabricated. Surely that is a jury question. Those who have had experience in such cases know how frequently, and sometimes how unexpectedly, such questions arise; and, for my own part, I should very much desire to have the benefit of a jury in deciding them. To take another example, we know that tombstones, which are documentary evidence in a certain sense, often require a great deal of investigation, and (in order to appreciate their value as evidence) just that every-day common-sense power of discriminating between truth and falsehood, which is the best attribute of a jury, is required. I cannot see, therefore, that the abundance of documentary evidence affords any reason why the case should not be tried by a jury.

LORD DEAS.—It was stated to us, when this case was formerly before us, that there would be a large mass of documentary evidence, but we did not think this conclusive against the expediency of a jury trial. Apart, however, from any opinion we expressed then, I should come to the same conclusion now. I agree with your Lordship that we are warranted in exercising a larger discretion as to the mode of trial in these appeals from the Sheriff of Chancery than in ordinary

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Sheriff Court cases. At the same time good cause must be shewn why the case is not to go to a jury. In the Fenton Livingstone case the question came to be altogether a question of law. And the Breadalbane case came largely to turn on a legal question also. I do not say it is necessary in every case to shew such strong grounds as were shewn in these cases for taking the course we there did, but I do not see any sufficient ground here for doing otherwise than sending the case to a jury.

Lord Ardmillan.—I concur in thinking that the appellant has a certain statutory right to jury trial when he demands it, not indeed absolute, but a right not to be defeated unless good reason is shewn.

I think we had before us on the former occasion most of the materials for disposal of this question as to the mode of procedure, even though the case may have expanded. But if we are now again to consider whether any sufficient reason has been shewn for refusing to the appellant the mode of trial which he desires, and came to this Court to obtain, then I must say that, in my opinion, no such reason has been shewn. There must be a number of witnesses, and the credibility of witnesses is a jury question.

There is a great deal of correspondence, but the authenticity of correspondence is a question very proper for a jury with the assistance of the Court, for, as the appellant's counsel observe, we are not to contrast the judgment of the Court with the unaided judgment of the jury. In Scotland we do not attach excessive weight to the opinion of experts or engravers. The best proof of authenticity is of a simple and more practical kind. Then as to the inferences to be drawn from a series of letters a distinction must be drawn,—a proper legal presumption or inference of law is for the Court to decide or to direct. But moral and ethical inferences from one, or more, or all, of a long series of letters is fair matter for the decision of a jury, aided by the Court. Therefore, while admitting the right of the parties to raise this question, and acknowledging that the case might have been satisfactorily tried by a Judge, I think that the appellant had, to a certain extent, a right to select the course of procedure, and that the other petitioners have shewn no sufficient cause why we should interfere with the statutory privilege in the exercise of which the appellant has come to this Court to claim a trial by jury.

Lord Mure.—I agree with your Lordships in thinking that appeals of this kind stand in a somewhat different position from those under the Judicature Act of George IV. At the same time, it occurs to me that the appellant, under this 41st section of the Titles to Land Act, has a certain statutory privilege of choosing trial by jury, subject to the discretion of the Court, upon a motion being made to have it otherwise disposed of.

If the case, however, were before me for the first time I should have felt some difficulty in deciding it; for I understand that the oral evidence will apply not to the material parts of the case but to parts of the pedigree which are not in dispute. But looking to what passed when the case was before the Court in May 1873, I can see no such change of circumstances as should now lead us to come to a different conclusion. After all, I do not see why this case should not be as well tried by jury as the Woodburnden case or the Morgan case, and I never heard it said that these cases were not satisfactorily tried.

H. & A. Inglis, W.S.—George Wilson, S.S.C.—Hunter, Blair, & Cowan, W.S.—Agents.

JOHN R. KIRKWOOD, Pursuer.—*Balfour—J. P. B. Robertson.*
AGNES WRIGHT OR KIRKWOOD, Defender.—*Blair.*

No. 42.

Dec. 9, 1875.
Kirkwood v. Kirkwood.

Proof—Witness—Adultery—Criminating Questions—37 and 38 Vict. c. 64, sec. 2.—The provision of the Evidence Further Amendment Act, 1874, that "no witness shall be liable to be asked or bound to answer any question tending to shew that he has been guilty of adultery," is solely for the protection of the witness, and if he is willing to answer such a question the defender in an action for divorce has no right to object to its being put or answered.

Observations by the Lord President on the duty of the Judge in such cases.

1ST DIVISION. Ld. Craighill. M.

IN an action of divorce for adultery by J. R. Kirkwood, baker, Falkirk, against his wife, Arthur Brown, with whom the defender was stated in the pursuer's condescendence to have committed adultery, was examined as a witness for the pursuer. He deponed,—"I know the defender, Mrs Kirkwood. I first saw her about the beginning of November 1870. I met her in Stanley Road, Liverpool, in a public house. We had a little conversation and a few drinks together. (Q.) Did you make any arrangement about meeting her again? (Question objected to. Objection repelled)."

The Lord Ordinary having assoilzied the defender, the pursuer reclaimed.

The defender argued, *inter alia*, that both at common law and under the Evidence Further Amendment Act, 1874,* the Lord Ordinary ought to have sustained the above objection as tending to shew that the witness was guilty of adultery.

The Court recalled the Lord Ordinary's interlocutor, and found the adultery proved. In delivering his opinion, the

LORD PRESIDENT said—Before leaving the evidence of Brown there is one point which, as matter of law, is of considerable importance. When he is examined he says,—"I know the defender. I first saw her about the beginning of November 1870. I met her in Stanley Road, Liverpool, in a public house. We had a little conversation and a few drinks together. (Q.) Did you make any arrangement about meeting her again? Question objected to." The Lord Ordinary repelled the objection, and the first question is, whether there was any room for the objection at all. The ground of it was that the answer might tend to prove that the witness had committed adultery. But I do not see that it could prove anything of the kind, unless it was followed by other questions. Therefore I think the objection came too soon, supposing it to have been otherwise well founded. But waiving that view, it is important to inquire whether this was a good objection at all in the mouth of the counsel for the defender, against a question proposed to be put to the pursuer's witness. The defender appeals to the statute. But, first, let us suppose there was no statute. At common law, I think it would not have been the duty of the Judge to sustain the objection, but to warn the witness that he need not answer the question unless

* 37 and 38 Vict. c. 64, sec. 2.—"The parties to any proceeding instituted in consequence of adultery, and the husbands and wives of such parties, shall be competent to give evidence in such proceeding, provided that no witness in any proceeding, whether a party to the suit or not, shall be liable to be asked or bound to answer any question tending to shew that he or she has been guilty of adultery, unless such witness shall have already given evidence in the same proceeding in disproof of his or her alleged adultery."

No. 42.

Dec. 9, 1875. Kirkwood v. Kirkwood.

he chose. The common law interposes to protect the witness, not to give an advantage to the defender, and I apprehend that this statute, like the common law, was intended only for the protection of witnesses. They are protected from examination on this subject of adultery, and therefore if a question is likely to elicit an answer criminating the witness, it is the duty of the Judge to explain to the witness that he is so protected, and is under no obligation or liability to answer such questions when addressed to him. I would go farther: where the party named on record as the paramour is called, I think it is the duty of the Judge to make him aware of his protection when he is put in the box. It may, of course, escape observation when the witness is called that he is in that position. But if not, the Judge should explain the nature of the protection, but not force it on the witness. The defender has no privilege entitling him to insist that the witness shall avail himself of the enactment, which was not made in the interest of anybody but the witness, and if he says that he desires to tell the whole truth, there is nothing in either the common or statute law to prevent him. Therefore I think the objection taken by the defender was not the proper form in which to raise the point. He had a right to call the attention of the Judge to the matter. But the protection of the witness is not the business of the defender but of the Judge, and it is not his duty to protect the witness against his own will. It is clear that Brown came with his mind made up to tell the whole story.

Therefore, I am not inclined on any of these grounds to reject the evidence, or to say that the objection should have been sustained.

LORD DEAS.—I concur. I think, however, that it was not incompetent to raise the point in the form of an objection.

LORD ARDMILLAN and LORD MURE concurred.

C. S. TAYLOR, S.S.C.—JOHN LATTA, S.S.C.—Agents.

No. 43.

Dec. 10, 1875. Dunn v. Chalmers.

ISABELLA DUNN, Pursuer.—*J. P. B. Robertson.*
JOHN CHALMERS, Defender.—*Mackintosh.*

Proof—Parent and Child—Filiation.—In an action of filiation brought by the daughter of a small farmer against a wright who lived near her father's house, it was proved that, for some time prior to 29th October 1873, the alleged date of conception (at which time the pursuer and defender were aged respectively eighteen and sixteen years), the parties were considered sweethearts, but that no familiarities had been observed between them. That after a raffle meeting on that day at the pursuer's father's house the parties had been left alone together in the kitchen for half an hour about midnight. The pursuer deponed that connection between them then took place, and that in consequence she bore the child 8½ months after. The defender stated in regard to his acquaintance with the pursuer that he had just spoken to her, and deponed that on the occasion in question they merely talked together, and that he had never had connection with her. *Held* that the paternity had been proved.

1ST DIVISION. Sheriff of Aberdeenshire. M.

IN March 1875 Isabella Dunn, residing at Invernorth, in the parish of Rathen, raised an action in the Sheriff Court of Aberdeenshire, at Peterhead, against John Chalmers, wright, residing at Invernorth, for aliment for an illegitimate child of the pursuer born on 17th July 1874, of which the defender was alleged to be the father, in consequence of his having had connection with the pursuer "in or about the month of October 1873."

The defender denied the libel, and a proof was led. The whole proof is given below.* No. 43.

Dec. 10, 1875. Dunn v. Chalmers.

The Sheriff-substitute (Comrie Thomson) assoilzied the defender. On appeal the Sheriff (Guthrie Smith) recalled the Sheriff-substitute's

* *Pursuer's Proof.*—JOHN CHALMERS, defender (eighteen).—In August last I lived about five minutes' walk from pursuer. I came there about two years ago. I have just spoken to her. In October 1873 I was at a harvest-home at pursuer's father's. Alexander Davidson, and Jane Greig, pursuer, and I remained in the barn after the others had left. I sat beside pursuer; Greig and Davidson were apart from us. We were sitting together for about half an hour, but we were doing nothing except talking. I was at a raffle at pursuer's father's, but I cannot say when that was, except that it was after the harvest-home. I saw Lewis Grant there. He was about the last to leave, and he left pursuer and me in the kitchen together. We were alone there for about half an hour. We did nothing but talk. I was at pursuer's father's on sowens night—old Christmas day. I was also at her sister's marriage. It was about that time. Pursuer was there. Davidson, and Jane Greig, pursuer, and I went to Greig's house. I was in company with pursuer. I do not remember being in the barn at Greig's that night. Pursuer told me she was with child to me, but I cannot say when. I denied that I was the father. I did not say to her to go to some one else, nor did I tell her to go to a doctor and get quit of the child.

"ISABELLA DUNN, pursuer (twenty).—Chalmers works near my father's. He has been a sweetheart of mine. At a harvest-home in 1873 he was in our barn with me. He had no connection with me that night. On 29th October there was a raffle at our place, and defender was there. He remained after the others had left, and he had connection with me in the kitchen. I slept in the kitchen, but defender was not in bed with me, but had connection with me on a sofa which was also there. My sister was married on 10th January 1874, and defender accompanied me to Jane Greig's, and had connection with me in the barn. We were alone there. Greig and Davidson had been in the barn, but had left. I bore a child on 17th July 1874, which was the result of defender's connection with me. He is its father. It is a boy, and is still alive. I produce a certificate of birth.

"JANE GREIG (eighteen).—I live with my father, who is a crofter in Rathen, about a quarter of an hour's walk from pursuer's place. I was at the harvest-home at Invernorth in 1873. Alexander Davidson and I were in the barn that night; so were the parties to this action. We remained there till about five o'clock in the morning. I think at that time the parties were sweethearts. I was at pursuer's again on sowens night. The parties were there also. I was also at the marriage of pursuer's sister on 10th January. Davidson and I and parties left between eleven and twelve, and we four went to my father's. We were in the barn. Davidson and I left the parties alone there. I went to the house, and the parties left the barn after they had been there for about twenty minutes. I never saw defender treat pursuer with familiarities.

"ALEXANDER DAVIDSON, farm-servant, New Deer (twenty-three).—In summer of 1873 I was in service near the residence of pursuer and the last witness. I understood the parties to be sweethearts, but I never saw him use any liberty with her. I was at the harvest-home at pursuer's. I was also at pursuer's sister's marriage; and afterwards we, along with last witness, went to her father's. Jane and I left the parties in the barn. They came to us in about half an hour.

"LEWIS GRANT (twenty-one), farm-servant, Cairness.—I was at the raffle at pursuer's in October 1873. It was to help a poor man. I was among the last to leave. The only persons I left behind were the parties. They were in the kitchen. I left between eleven and twelve. I did not see him taking any liberty with her."

"*Defender's Proof.*—DEFENDER recalled.—I had no connection with pursuer on the night of the raffle. *Cross.*—I never had connection with her. *By the Court.*—It is impossible that I could be the father of her child."

No. 43. interlocutor, and found it proved that the defender was the father of the pursuer's child.

Dec. 10, 1875. Dunn v. Chalmers. The defender reclaimed.

LORD DEAS.—The nature of the proof in this case is peculiar. The parties were very young. At the date of conception of the child the alleged father was sixteen and the mother eighteen years of age. Both apparently had been respectable and well conducted. It is clear they had formed a strong attachment to each other, and such as might naturally have led ultimately to marriage. It is proved that they were on several occasions left alone together, and this, under the circumstances, was not calculated to lead to suspicion of anything wrong. Three occasions, in particular, are spoken to. The first, on the night of a harvest-home; the second, of a raffle; and the third, of a marriage. It is not suggested that anything improper occurred on the first occasion; but it is alleged by the woman that on the second occasion connection took place on a sofa, and that it was repeated on the third occasion—viz. the night of the marriage. These are the only occasions on which connection is said to have taken place, and the child was born at a time which would sufficiently correspond with the first of them.

It is not alleged that any improper familiarities had been observed between the parties. There is no suggestion that the girl was loose in her manners, and there is no trace of intimacy between her and any other man. These are the peculiarities of this case. The proof of paternity, in an action of filiation, generally turns upon familiarities observed between the parties. Nothing of the kind is found in this case. But I am inclined to think that, under the circumstances, that does not tell against the reliability of the woman's testimony but rather in favour of it. The proof suggests that the connection took place without any premeditation on either side. The parties being together on the sofa and alone, and having an affection for each other, probably forgot themselves on the first occasion, but they did not lose all control over themselves afterwards, so that the fault was repeated once only. There is no improbability in the account given of the matter by the woman. The fact is of great importance that she is not proved to have been even intimately acquainted with any other man. Her conduct was habitually correct, and her general character is unimpeached. Her evidence is uncontradicted except by that of the defender, which has not the same appearance of candour. He had lived for two years within five minutes' walk of where she lived. It is abundantly proved that they had behaved as sweethearts, and were regarded as being so. He represents his acquaintance with her very differently. He says, "I have just spoken to her." He admits having been at the marriage, and having subsequently gone with her and the witnesses, Davidson and Jane Greig, to Greig's father's house. "But," he says, "I do not remember being in the barn at Greig's that night." Now, that forgetfulness is incredible and suspicious; for Jane Greig says that they left the marriage party "between eleven and twelve, and we four went to my father's. We were in the barn. Davidson and I left the parties" (that is, the pursuer and defender) "alone there. I went to the house, and the parties left the barn after they had been there about twenty minutes." In like manner Davidson, who is the next witness, says he was with them at the marriage, "and afterwards we, along with last witness, went to her father's. Jane and I left the parties in the barn. They came to us in about half-an-hour." The evidence of

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these witnesses is thus entirely corroborative of the evidence of the pursuer as to the defender and her being left alone together that night in the barn, which, the pursuer says, was the second occasion on which connection took place.

The case, as I have said, is, no doubt, peculiar. It is not proved by facts and circumstances of the kind usually relied on in actions of filiation, but the question is whether the facts and circumstances actually proved are not in themselves such as to satisfy the judicial mind that the woman's testimony is true. I am satisfied that they are so, and therefore I am for affirming the judgment of the Sheriff.

LORD ARDMILLAN, LORD MURE, and the LORD PRESIDENT concurred.

THE COURT adhered.

J. B. DOUGLAS, W.S.—ALEX. MORRISON, S.S.C.—Agents.

No. 44.

Dec. 14, 1875.
Kellock v. Anderson, &c.

JOSEPH KELLOCK, Petitioner and Respondent.—*D.-F. Watson—Gloag.*
JOHN ANDERSON AND OTHERS, Respondents and Petitioners.—*Asher—Lorimer.*

Bankruptcy—Sequestration—Awarding and Recall.—A creditor presented a petition in the Sheriff Court of D for the sequestration of the estates of a debtor, but before the *inducia* had expired the debtor, with the consent of a concurring creditor, presented a petition for sequestration in the Bill-Chamber, which was awarded, as matter of course, and the process remitted to the Sheriff Court of L, where it was stated the estate could be most conveniently administered. Sequestration was thereafter awarded in the Sheriff Court of D. The petitioning creditor then presented a petition in the Bill-Chamber for the recall of the Bill-Chamber sequestration, and the debtor also presented a petition for the recall of the Sheriff Court sequestration. The Court, following the procedure in the case of Jarvie v. Robertson, Nov. 25, 1865, recalled the Bill-Chamber sequestration *in hoc statu*, and remitted the Sheriff Court sequestration to the Sheriff Court of L.

1ST DIVISION. Bill-Chamber. Lord Rutherfurd Clark. M.

THE affairs of John Anderson, draper, Thornhill, Dumfriesshire, having become involved, a meeting of his creditors was held in Kilmarnock on 16th September 1875, and at which a trust-deed for their behoof was executed. The trustee proceeded to realise the estate. On 23d October, however, John Kellock, a creditor for £66 contained in a bill of exchange, which had been duly protested, and the charge upon which expired that day, caused Anderson to be imprisoned, and on the same day presented a petition for sequestration of his estates in the Sheriff Court at Dumfries. The first deliverance on that petition was pronounced on that day. While the *inducia* on this petition were running Anderson, with the concurrence of William M'Laren, Sons, and Company, Glasgow, creditors, presented a petition for sequestration of his estates on 29th October in the Bill-Chamber, which was immediately awarded, and the sequestration remitted to the Sheriff Court of Lanarkshire.

On 2d November the Sheriff-substitute (Hope) at Dumfries, there being no evidence before him of the Bill-Chamber sequestration, on the expiry of the *inducia* on Kellock's petition, awarded sequestration under that petition.

Kellock, on 3d November, presented a petition in the Bill-Chamber setting forth the above facts, and praying for the recall of the Bill-Chamber sequestration. Anderson and his concurring creditor lodged answers to this petition on 12th November, having previously on 8th November presented a petition in the Bill-Chamber for the recall of the Dumfries

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sequestration, or otherwise for a remit of that sequestration to the Sheriff Court of Lanarkshire. In their answers to Kellock's petition, and in the body of their petition, they stated that as the general body of Anderson's creditors were in Glasgow the estate could be most advantageously administered there. Kellock lodged answers to this second petition in which he maintained that it would be for the advantage of the creditors that the 23d of October—the date of the first deliverance in the Dumfries sequestration—should be retained as the date of the sequestration instead of the 29th of October—the date of the Bill-Chamber sequestration. He also denied that the bulk of the creditors were in Glasgow.

On 23d November 1875 the Lord Ordinary on the Bills (Lord Rutherfurd Clark) refused Kellock's petition;* and in Anderson's petition his

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* "NOTE.—It was not disputed that the petition presented on 23d October to the Sheriff of Dumfriesshire was well-founded, and that but for the petition presented in the Bill-Chamber on 29th October, and the proceedings following thereon, the Sheriff would have been bound to award sequestration. The date of the sequestration so awarded would of course be the date of the first deliverance.

"It was maintained, however, that inasmuch as the sequestration had been awarded in the Bill-Chamber on 29th October, it was incompetent for the Sheriff to award sequestration in the petition depending before him. The Lord Ordinary cannot take that view, because no evidence was produced to the Sheriff that sequestration had been awarded in another Court. If evidence of the sequestration awarded in the Bill-Chamber had been produced, it would probably have been incompetent for the Sheriff to have awarded sequestration. But the Lord Ordinary does not think that this would have ultimately prevented the petitioning creditor from having sequestration awarded on his petition, though it might have necessitated the recall of the sequestration granted in the Bill-Chamber, in order to enable the Sheriff to sequestrate. In the view of the Lord Ordinary, a creditor who has presented a petition for sequestration cannot be deprived of the rights under that petition, by reason of a petition being subsequently presented in another Court. If this were so, it would be competent for the bankrupt, by his own act, to delay the sequestration by presenting a petition during the currency of the *inducia*.

"It was urged that it was of no consequence whether the sequestration was awarded on the 23d or 29th October, as the bankrupt was admittedly notour bankrupt on the former date. The Lord Ordinary thinks that he cannot enter into that question. It is impossible for him to determine it, and he cannot, as he thinks, dispose of the present case, on the supposition that the date of the sequestration is of no importance.

"But it was maintained that there was no ground for recalling the sequestration awarded in the Bill-Chamber, even though the sequestration awarded by the Sheriff was to stand, and that the only lawful course was to remit the latter to the Sheriff of Lanarkshire, to whom the sequestration awarded in the Bill-Chamber has been remitted. It is here that the Lord Ordinary has felt most difficulty. The 19th section of the Bankrupt Act deals with the case of sequestration awarded in the Bill-Chamber and Sheriff Court, and directs that the Court or Lord Ordinary shall 'remit the sequestration' to such Sheriff Court as shall be deemed most expedient. It was urged that this enactment required the Court to maintain both sequestrations, though of different dates, and that its only province was to remit them to the same Sheriff Court. Without going so far as to hold that it is incompetent to recall the sequestration granted in the Bill-Chamber, the Lord Ordinary thinks that it is the safer course to remit the one sequestration to the other. In doing so, he follows the direct injunction of the Act in the case which has occurred; for he is of opinion that it is most expedient that the sequestration should proceed in the Sheriff Court of Lanarkshire. This is the wish of the great body of creditors, and it was stated by Mr Kellock that it was indifferent to him in which Court the sequestration proceeded.

No. 40.

Dec. 7, 1875. Adams v. Glasgow and So.-Western Railway Co.

The last question, and perhaps the most difficult of all, is, whether the pursuer is disentitled to recover, because not only Douglas was in fault, but also the driver and guard of her husband's own train. This question is one of nicety, and authorities have been referred to in the English Courts which are of the greatest weight, and with which we must deal deliberately. Now, in the first place, the principle of *collaborateur* does not, in any way, interfere with the direct application of the maxim, *culpa tenet suos auctores*, but only with the maxim, *qui facit per alium facit per se*. No defence whatever is given by it to the *collaborateur* or fellow-servant who is guilty of fault, but only to the common master. If one servant causes injury to a fellow-servant he is as much liable to him in a direct action as if he was a total stranger. Therefore, whether they were fellow-servants or not, Adams' widow has a direct action against Douglas, as well as against the driver and guard. All the actual wrongdoers are, conjunctly and severally, liable to the person whom they have injured. The only question is, whether she has also a direct action against Douglas' masters. The only defence against that action is that, besides Douglas, Robb and Robertson, the driver and guard of the goods train, contributed to the injury. That is not, in my opinion, a good defence. It would be a very strong thing to hold that, merely because a fellow-servant is to blame as well as a third party, therefore the injured person is not to recover against that third party or his master. If the pursuer has a good action against Douglas, why not against Douglas' employer? I can see no principle whatever why he should not. Suppose this had been a passenger train, could it be contended that the passengers were debarred from recovering against the South-Western Company because the driver and guard of their own train were also in fault? Were it not for the two English cases of Thorogood and Armstrong I should have had no difficulty on the point. With regard to these cases, I concur in the remarks of your Lordship in the chair. I can find no principle on which they can be held to proceed. On the contrary, I think they go clearly against principle. Fortunately we have not only the adverse criticism of standard writers on the law of England, but also the authority of that great lawyer, Dr Lushington, to support us. I therefore decline to be bound by the cases of Thorogood and Armstrong till they are endorsed by a higher authority.

Therefore, in law and on the facts disclosed, I am of opinion that the South-Western Company are liable to the pursuer of this action, and that a verdict should be entered up for her for £300, the assessed amount of damages.

LORD NEAVES was absent.

THIS interlocutor was pronounced:—"The Lords having considered the issue, the minute No. 20 of process, and the Judge's notes of evidence, find for the pursuer, and decern in terms of the conclusions of the summons for £300; and find the pursuer entitled to expenses, including the expenses of the trial, and remit to the Auditor," &c.

ROBERT PRINGLE, W.S.—GIBSON-CRAIG, DALZIEL, & BRODIES, W.S.—Agents.

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Sheriff of Lanarkshire. Four days after this, the *inducice* having expired on the Sheriff Court petition, the Sheriff-substitute, in ignorance of the Bill-Chamber sequestration, awarded sequestration at Dumfries.

What remains for us to do is to put the matter into shape. The Lord Ordinary has refused the petition for the recall of the Bill-Chamber sequestration, and the result is that two petitions of different dates go into the Sheriff Court of Lanarkshire with awards of sequestration standing on each. That is very awkward. The estate cannot have been sequestrated at two different dates—the first on 23d October and the other on 29th October. In that case, parties who had an interest might object to the sequestration of 29th October standing. A great many things depend on the date of the first deliverance in such petitions.

It appears to me that we should recall the Lord Ordinary's interlocutor in the petition as to the Bill-Chamber sequestration refusing the petition, and follow the course taken in the case of Jarvies, recalling the sequestration *hoc statu*. The first petition presented in Dumfries, with the first deliverance of 23d October, is thus left standing, and if anything goes wrong with it, the second petition in the Bill-Chamber can be resumed.

I may add that I quite concur in the Lord Ordinary's finding as to expenses, that neither party is entitled to any.

Lord Deas.—I am not prepared to say that the remit made by the Lord Ordinary might not have suited the purpose in view; but I think the course proposed by your Lordship is fully better. I concur in the remarks made by your Lordship.

Lord Ardmillan and Lord Mure concurred.

The Court, in Kellock's petition, pronounced this interlocutor:—"Having heard counsel on the reclaiming note for the petitioner, Joseph Kellock, against Lord Rutherfurd Clark's interlocutor of 23d November 1875, recall the said interlocutor: Recall *in hoc statu* the sequestration awarded by the Lord Ordinary on the Bills on the 29th October 1875 on the petition for sequestration of the estates of John Anderson, presented by the bankrupt with concurrence of M'Laren, Sons, and Company, warehousemen, Glasgow: Appoint this judgment of recall to be entered in the Register of Sequestrations, and on the margin of the Register of Inhibitions, all in terms of the 31st section of the Bankruptcy (Scotland) Act, 1856: Find no expenses due to or by either party."

In Anderson's petition the Court adhered to the interlocutor of the Lord Ordinary.

Ronald, Ritchie, & Ellis, W.S.—Hamilton, Kinnear, & Beatson, W.S.—Agents.

No. 45.
Dec. 10, 1875.
Miller v. Walker.

James Miller, Son, and Company, Pursuers.—*D.-F. Watson—Balfour.*
John Walker, Defender.—*Asher—Keir.*

Partnership—Joint Adventure—Minerals.—A proprietor of mines agreed to grant to A a lease for nineteen years, on condition of receiving a rent or royalty of 15s. per ton on the ore removed, without any stipulation that the tenant should work the mines. Subsequently A entered into a contract of joint adventure with B to work the mines for their joint interest, in consideration of B accepting bills at twelve months for £2000, to be repaid from the first profits, A guaranteeing profits to that amount, and undertaking to grant bills for the balance unpaid at the end of twelve months, and to renew the same from time to time until the balance should be extinguished.

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In an action brought by B three years after the date of the agreement, *held* (1) that there being no obligation in the lease requiring the tenant to work the mines for the nineteen years, the joint adventure was not a joint adventure to work the mines for any specific period; (2) that the defender's guarantee was to be construed as a guarantee that the mines should, within a few years, produce £2000 of profit; (3) upon the proof, that no profit had been realised, and that there was no reasonable prospect of profit being realised in future; and (4) that, in these circumstances, the pursuer was entitled to bring the joint adventure to an end, and to require implement of the guarantee (*diss.* Lord Deas, on the ground that it had not been proved that the joint adventure was not still a reasonable speculation).

1st Division.
Lord Gifford.
B.

In 1872 Mr Leisk, proprietor of the island of Haaf Grunie, one of the Shetland Islands, entered into an agreement with John Walker, contained in the two following letters:—

"Uya, 21st Feby. 1872.—Dear Sir,— . . . I am now thinking as the spring of the year advances to try and see if any more of the chromate of iron can be got out of my island of Haaf Grunie. As Mr A. Sandison informs me you might be induced to take a lease of the chromate ore mine, I therefore would now offer you a nineteen years' lease of these mines on the condition that you pay me 15s. per ton of rent or royalty on all chromate ore lifted, whether first, second, or third, and that, should my tenant for the time being of said island require surface damage paid him, you to arrange and pay that. . . . GEO. T. LEISK."

"29th February 1872.—. . . . I agree to accept a nineteen years' lease of these mines on the condition that I pay you fifteen shillings per ton of rent or royalty on all chromate ore lifted, whether firsts, seconds, or thirds, and that, should the tenant of the grazings require surface damage paid him, I will arrange and pay that. JOHN WALKER."

Thereafter Mr Walker entered into negotiations with Messrs James Miller, Son, and Company, merchants, Glasgow, which resulted in an arrangement contained in the following letters:—

"Glasgow, 22d March 1872.—Messrs James Miller, Son, & Co.—Dear Sirs,—In consideration of your now having given me your acceptance for £2000 at 12 months as a bonus for a half share in George Leisk of Uya nineteen years' lease of his chrome ore mines in Haaf Grunie I agree to same being worked on joint account, and the understanding is that I guarantee that the profits upon said mine shall amount to £2000, and are first to be applied to paying said acceptance, and that thereafter the profits are equally divisible between us, and if at the maturity of said bill (£2000) two thousand pounds have not been cleared I agree to renew same for the balance aye and until said account has been made up. —Yours truly, JOHN WALKER.

"Glasgow, 22d March 1872.—Dear Sir,—We confirm the arrangement come to between us to-day as expressed in your letter of this date anent the joint account of the chromate mine lease from Mr George Leisk of Haaf Grunie.—Yours truly, JAS. MILLER, SON, & Co."

In implement of this arrangement Messrs Miller, on 22d and 23d March 1872, granted two promissory-notes for £1000, payable twelve months after date. These were renewed in 1873, and again in 1874.

On 1st May 1872 the works were commenced.

On 13th October 1874 Messrs Miller raised this action against Mr Walker, concluding (1) for declarator that the agreement contained in the letters of 22d March 1872 has all along been and is now null and void, and that the same has now fallen and come to an end, and is no longer binding upon the pursuers; (2) for delivery of the bills for £1000 each, which were renewed by them in March 1874; (3) or for payment of £2000; (4) charges for interest or discount on the bills; (5) interest at 5 per cent on the bills since 27th March 1873; (6) that the defender was

No. 45. liable for the whole expenses of working; (7) for payment of £139, 3s. 8d. There was also a conclusion for reduction of the missives of 22d March 1872 by which the joint adventure was entered into.

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The pursuers alleged that they had been induced to enter into the joint adventure by false representations by the defender as to the value of the minerals. "By their examination and by inquiries the pursuers learned, and it is the fact, that the representations made by the defender as aforesaid relative to the chrome ore and chrome ore mines in the said island and its workability to profit, in reliance and on the faith of which they entered into the said joint adventure arrangement, and renewed the said bills from time to time, were unfounded in fact, and were false. The pursuers so ascertained, and it is the fact, that there did not at the date of the said arrangement, and that there does not now, exist in the said island, any chrome ore mines or chrome ore capable of being wrought so as to pay working expenses, and yield either within one or two years, or during the entire currency of the said nineteen years' lease, a profit of £2000; and further, that there was not at the said date, and is not now, in the said island, chrome ore capable of being wrought to any profit whatever. The said joint adventure arrangement was thus entered into under essential error on the part of the pursuers, induced by false representations made to them by the defender as aforesaid."

The pursuers pleaded;—(1) The pursuers are entitled to have decree declaring the said joint adventure agreement at an end, as also to have decree of delivery, relief, and payment, as concluded for, in respect that the said island did not at the date of the said agreement, and does not now, contain any chrome ore workable to the profit promised, or to any profit at all, and that the defender is not in a position to give the equivalent stipulated as the counterpart of the obligations undertaken and fulfilled by the pursuers. (2) The pursuers are entitled to have such decree, or otherwise to have decree of reduction as concluded for, in respect that the said arrangement was entered into by them under essential error; and, *separatim*, that the said error was induced by false and fraudulent misrepresentations on the part of the defender.

The defender denied the alleged misrepresentations, and stated that for several years prior to March 1872 the pursuers and defender had been engaged together in extensive transactions in chrome ore which was got from the island of Unst; that with the view of obtaining better terms from the proprietors of the Unst quarries they were anxious to obtain possession of other chrome ore quarries, and that this led to the joint adventure; that after the working of the mine had been started it was stopped by a process of interdict at the instance of Mr Leisk's sister and nephew till March 1873; that it was only in the summer seasons that operations could be carried on; and that in September 1873 operations were again stopped for want of an efficient foreman.

The defender further alleged that he still believed that the mines could be successfully worked.

A proof was led before the Lord Ordinary, the import of which sufficiently appears from the opinions of the Judges.

The Lord Ordinary pronounced this interlocutor:—"Finds that the pursuers have failed to instruct any relevant or sufficient grounds for reducing or setting aside as null and void *ab initio* the agreement for joint adventure entered into between the pursuers and defender on 22d March 1872, and embodied in missives of that date passing between the pursuers and the defender: Therefore, repels the reasons of reduction, and assoilzies the defender from the reductive conclusions of the summons, and decerns: Farther, and in reference to the nature and effect of the said agreement,

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finds that the pursuers and defender, as joint adventurers under said agreement, have differed as to the mode in which the joint adventure is to be carried on; and, in particular, that they have differed as to the amount of capital to be advanced for testing or proving the amount of chrome ore in the island of Haaf Grunie, in Shetland, referred to in said agreement, or for working and mining the chrome ore in said island, and also, as to the parties by whom, and at whose risk said capital is to be contributed: Finds that there are no *termini habiles* contained in the agreement, according to which the Lord Ordinary or the Court can be called upon to define the amount of capital to be advanced or expended, or to define and fix the mode in which the said joint adventure is to be carried on: Therefore, and in the circumstances disclosed in evidence, finds that the pursuers are entitled to bring the said joint adventure to an end; and finds, declares, and decerns that the same has come to an end accordingly: Finds, in point of law, that the pursuers having offered to renounce in favour of the defender all right and interest of any kind belonging to the pursuers in the chrome ore mines of Haaf Grunie, or in the lease thereof granted to the defender by Mr George T. Leisk of Uya, and now vested in the defender, the pursuers, on such renunciation, are entitled to demand that the defender shall relieve them of two bills for £1000 each drawn by the defender upon and accepted by the pursuers, dated 21st and 26th March 1874; or otherwise, if the pursuers have paid said bills, that the defender is bound to repay the same to the pursuers, with all interest which has accrued or which may accrue thereon; and also to repay to the pursuers any interest or discount which the pursuers may have paid or incurred on previous bills, of which the said two bills are renewals; and to this extent and effect decerns in favour of the pursuers under the declaratory conclusions of the summons; and in order that effect may be given to the above findings, and the cause concluded, appoints the cause to be enrolled for further procedure: Finds the pursuers entitled to expenses hitherto incurred, subject to some modification, and remits the account thereof, when lodged, to the Auditor of Court to tax the same and to report: Meantime grants leave to reclaim against this interlocutor."*

* "NOTE.—The main and the only difficult part of the case relates to the construction and legal effect of the agreement, assuming it to be valid and legally binding on both parties. The missives of agreement are in the following terms. The defender's offer to the pursuers is"—(His Lordship here quoted the defender's letter, dated Glasgow, March 22, 1872, and the pursuers' answer of the same date).

"A great many questions have been raised by the parties regarding the true meaning and construction and regarding the legal effect of this agreement, which the Lord Ordinary now assumes to be binding on both parties. To aid in the construction the Lord Ordinary has the advantage of the whole preceding circumstances being fully disclosed in the proof and correspondence.

"Without entering into details or into argument the Lord Ordinary will state shortly the results to which he has come as to the construction and legal effect of this written agreement.

"(1) He thinks that the missives constitute an agreement of joint adventure or limited partnership, the subject of the joint adventure being the lease of the chrome ore in Haaf Grunie, then vested in the defender, Mr Walker. The contract, then, has the incidents and legal effects of a contract of joint adventure or limited partnership.

"(2) The defender by the contract guarantees that the profits of the joint adventure 'shall amount to £2000.' The Lord Ordinary thinks this means, and must mean, that the net profits, after paying all outlay and cost of every kind, and after paying interest upon outlay and cost, shall amount to at least

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The defender reclaimed. He argued that one of two joint adventurers was not entitled to put an end to the adventure unless some circumstance

£2000. It is a guarantee not only against loss and against all sunk and irrecoverable outlay, but it is a guarantee that every outlay, including interest, shall be repaid, and that at least £2000 shall be over of clear profit.

"(3) This clear profit, the certainty of which the defender guarantees, is to be applied in retiring the pursuers' acceptance or acceptances for £2000, which were granted in the first instance at twelve months' date. No time is fixed in the agreement within which the net profits shall be forthcoming, but it is implied that the profits shall begin to emerge immediately, for the defender undertakes, if the £2000 of profits have not been realised the first year, to renew the balance of the bill or bills 'aye and until the said amount has been made up.'

"(4) The Lord Ordinary thinks that this implies that the pursuers, while granting their bill and credit for the purpose of raising £2000 to start with, were not to be required to pay the said amount, for the defender agrees to renew the bills—that is, to keep the pursuers free from advance until the bills are paid from profits, and this payment is assumed to begin, to some extent at least, the first year.

"(5) Nothing is said in the agreement as to proving or testing the mines, or as to boring or searching for mineral. It is assumed that the defender had satisfied himself upon that head, for he guarantees productiveness, and agrees to the mines being at once worked 'on joint account.'

"(6) There is no obligation laid upon either party to advance capital; no definition of the amount of capital which each partner or joint adventurer may be called upon to pay; and no machinery is provided as to settling any disputes or differences which may arise between the two partners as to the mode of working the minerals, or as to the mode of carrying out the ends of the joint adventure. All these matters are left unsettled, and to be determined by the rules of common law.

"The reason of the missives making no provisions for advance of capital, or for the other matters now referred to, appears to have been that the defender was confident that the mines had only to be touched to become instantly productive.

"It is established by the proof that the parties—that is, the two partners or joint adventurers—have differed—hopelessly differed—as to the working or carrying out of the joint adventure. The pursuers have satisfied themselves that the mines are wholly unproductive, and, being of opinion that to attempt to work them would just be to throw away money hopelessly and irrecoverably, they decline to advance money or capital in the working of the mines for the repayment of which capital they have no security whatever, for the defender denies that he will be personally bound to repay advances of capital which may be required for working and for proving the mine. The defender admits that he must guarantee profits to amount to £2000, but he maintains that in the meantime the pursuers must advance, and advance indefinitely and speculatively, whatever is necessary for sinking pits or shafts on the chance that ore will ultimately be found. As the Lord Ordinary understood the defender's argument, there is no limit to this either in amount or time. The advances may go on till near the end of the lease, and the amount is only to be limited by the defender becoming hopeless of ultimate success. The pursuers seem to have been willing to advance to some small extent at first, for they placed the half of the first year's outlay to the defender's credit in account with them, and the bills for £2000 have been twice renewed—that is, they have not run one year, but three years. By October 1874, however, the pursuers were satisfied that the mines were valueless, they refused to make further advances, and called upon the defender to relieve them from the current bills. The defender refused, and hence this action.

"(7) The Lord Ordinary is of opinion that the partners or joint adventurers, having differed in regard to the carrying out the highly speculative adventure in question, the Court cannot ordain this speculative adventure to be carried on, but the adventure must terminate on equitable terms.

not contemplated at the time the contract was entered upon had occurred. The adventure was a speculative one, and it could not be said that it had so failed as to entitle one of the parties to bring it to an end. In all

"The Lord Ordinary declines to say or to prescribe to the parties how much money must be sunk in excavating pits or quarries or shafts in Haaf Grunie in the hope of ultimately getting a return. It is no part of the duty of the Court to conduct speculative mining, or to say how it is to be conducted, or how much the parties are to risk in the venture. If the joint adventurers do not choose to define all this for themselves in their agreement, and if they differ, there is no alternative. Their vague agreement must come to an end. The Court cannot make an agreement for the parties which they have not made for themselves.

"In the present case the evidence does not enable the Lord Ordinary to say, either on the one hand that the mines are sterile, or on the other that they can be worked to profit, and he declines to decide this question. He thinks that the decision of this question is not necessary for the disposal of the case. Nor is it necessary or possible for the Lord Ordinary to fix how much money must be sunk before the mines are abandoned as hopelessly sterile.

"It is needless to refer to the evidence, which, even as to the experts, is of the most vague and inconclusive nature. The speculation at best is a matter of risk, chance, and hope; and as the parties themselves have not chosen to fix the extent of their risk and of their venture, if they differ, the Court can only terminate their agreement.

"There has been here full and fair opportunity for trial. The defender in substance guaranteed that the working should be instantly profitable. Three years have elapsed and the profit has not begun. The Lord Ordinary thinks that the pursuers are not bound to wait longer or to do more.

"(8) It follows that the pursuers are entitled to have the joint adventure declared at an end, and to be relieved of their bills or of their obligation for the £2000. If they have paid or incurred interest either upon the ultimate bills or on previous renewals they seem entitled to repayment. Interest on an advance is as much outlay as the advance itself, and as the defender guaranteed the net profit to be £2000, he is liable to that extent over and above the outlay and interest.

"(9) Nor, in the Lord Ordinary's opinion, can the defender complain of the slightest hardship. He has himself to blame. If he wanted a copartner or co-adventurer who would bear equal risk with him he should have so stipulated in the written agreement. On the contrary, he undertook to relieve the pursuers of all risk whatever—he guaranteed that there should be no loss at all, but at least £2000 of profit. He is now simply called on to fulfil his guarantee.

"The Lord Ordinary is happy to think, however, that the defender himself must regard his present defeat as in reality a great gain. He is now receiving back by the present judgment the whole lease as his exclusive property, and as he values it as worth at least £8000, and no one can tell how much more, he has every reason to be satisfied. It is seldom that a Judge can by any judgment give gain and satisfaction to both parties. As the lease is fully vested in the defender he requires no reconveyance.

"As the bills last current fell due 24th and 29th March last, and as the Lord Ordinary has not been informed whether they have been taken up or renewed, and as the exact amount of interest or discount is not stated or ascertained, the Lord Ordinary cannot exhaust the case by an absolutely final judgment. He has pronounced such findings, however, as he hopes will define the rights of parties, and leave nothing but the mere details of figures for adjustment. For this purpose he has appointed the case to be enrolled.

"As the present Lord Ordinary is only acting as Interim-Ordinary, under the authority of the Lord President, he has thought it right to dispose of the question of expenses; and, as the pursuers have been substantially successful, they are entitled to their costs. Probably the reductive conclusions have not created any separable part of the expense, but the failure therein is a good reason for some modification. The Lord Ordinary has granted leave to reclaim the judgment, being in its form interlocutory."

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the cases where the Court had decided that one partner was entitled to bring the adventure to an end the object of the joint adventure had failed.[1]

Argued for the pursuers;—The adventure was now of a more speculative nature than at the time it was entered on. There was now no reasonable prospect of profit.

At advising,—

LORD PRESIDENT.—There is one part of the case about which I do not think there can be any difficulty,—I mean the reductive conclusions of the summons; and I quite agree with the Lord Ordinary that there is no proof of fraud. I think that the allegations of fraud should never have been made. The pursuers ought to have known that the adventure upon which they entered was of a hazardous kind, and I do not think they had any reason to charge their co-adventurer with fraud.

The other part of the case is of a delicate kind. It deals with the right of one of two co-adventurers to put an end to a joint adventure. There may be such a right under certain circumstances and conditions, but the great difficulty is to apply the law to the circumstances, and to determine what is sufficient to terminate the contract. The contract out of which the joint adventure sprang is founded upon missives of lease between George Leisk and John Walker. The first of these is dated 21st February 1872, and is from the proprietor. He offers a nineteen years' lease of the mines "on the condition that you pay me 15s. per ton of rent or royalty on all chromate ore lifted, whether first, second, or third." Then there is a condition as to surface damage. On the other hand, Walker, by letter dated 29th February 1872, agrees "to accept a nineteen years' lease of these mines on condition that I pay you 15s. per ton of rent or royalty on all chromate ore lifted, whether firsts, seconds, or thirds." Now, it must be observed that, although this is a lease for nineteen years, it does not stipulate for a fixed rent. The only prestation is to pay a royalty of 15s. per ton on the ore actually taken. If there is no working and no ore taken there is to be no rent. It is clear that the working is a matter of option; the tenant may either work the mine or let it alone, in which case the lease would be practically inoperative. Whenever he stops working, the obligation to pay royalty stops also. I think the Dean of Faculty correctly characterised the contract as a license to work for nineteen years. Now, Walker having secured the lease, makes a proposal to share it with the pursuers in the following terms:—"In consideration of your having now given me your acceptance for £2000 at 12 months, as a bonus for a half share in George Leisk of Uya's nineteen years' lease of his chrome ore mines in Haaf Grunie, I agree to same being worked on joint account, and the understanding is that I guarantee that the profits upon said mine shall amount to £2000, and are first to be applied to paying said acceptance, and that thereafter the profits are equally divisible between us, and if at the maturity of said bill (£2000) two thousands pounds have not been

[1] Lindley on Partnership, vol. i. (3d ed.) p. 234; Montgomery v. Forrester, June 17, 1791, Hume, 748; Marshall v. Marshall, Jan. 26, 1815, 3 Ross, L. C. (Com. Law), 611; Warner v. Cunningham, Jan. 24, 1798, M. 14,603, 3 Dow, 76, 2 Bell's Com., 5th ed., 633; Jennings v. Baddeley, Dec. 12, 1856, 3 Kay and Johnston, 78; Dickie v. Mitchell, June 12, 1874, *ante*, vol. i. 1030; Bain v. Black, Feb. 22, 1849, 6 Bell's Appeals, 317.

cleared, I agree to renew same for the balance aye and until said amount has been made up."

The bonus given by the pursuers to Walker, on consideration of their being taken into the lease was a loan of £2000. The loan was given in the form of a bill of exchange, accepted by the pursuers. The bill was for twelve months, and it was anticipated that the profits of the mine would be sufficient to retire the bill at the end of the twelve months, or at some future time, when the bill should have been renewed and again become due. Walker undertakes to guarantee that the mine should yield £2000 of profit, and as soon as that is done the money should be applied in payment of the bill—thereafter the profits were to be divided between the joint adventurers. If the mine had turned out as profitable as Miller and Walker hoped, there would have been no difficulty. I cannot see why the work should not have been carried on. The difficulty of the Lord Ordinary makes no impression upon my mind. He seems to think that this is a very imperfect contract. He says that as the partners differed, either of them was entitled to put an end to the joint adventure. I cannot subscribe to that. No doubt there is nothing said as to who is to supply the capital or who is to bear the losses, but the law will supply the defect when two persons enter into a joint adventure without making such stipulations. When nothing is said about the amount of capital, the law presumes that each partner supplies what is sufficient to carry out his share of the joint adventure. There are large adventures carried on in this country where the terms of contract are not more explicit than here. No doubt it is easy for the partners to state difficulties if they quarrel, but though there are no conditions in the contract itself to regulate the rights of the partners the law will supply them. The effect of the contract is for the decision of a Court of law. This case is one of difficulty, but the decision of the Lord Ordinary does not commend itself to my mind.

The general rule is that one of two joint adventurers is entitled to put an end to the joint adventure if it comes to be attended with greater risk than when the contract was entered into, or if there be no reasonable belief that profit will be made for either party. It is necessary to attend to the terms of the contract itself, and see what it was. The first question which arises is on the construction of the contract, whether there was any definite term of endurance. That is attended with considerable difficulty. There is no term in the contract itself, but there is a reference to the lease, which was for nineteen years. If the parties had been bound to work, or to pay a fixed rent whether they worked or not, the term of the joint adventure would then have been the same as the lease, and it would not have come to an end till the lease came to an end, because, while Walker was bound, he had communicated the one-half of the lease to the pursuers. But, looking to the lease, I entertain great doubts if it is a lease for nineteen years. The lease does not bind the parties to work; there is no difficulty then in abstaining from working if they do not find it profitable. Therefore I think the joint adventure is not for a fixed period. But neither do I think the absence of a fixed term will entitle the parties to put an end to the contract. It was evidently intended to last for a considerable time. If the joint adventure is being carried on, it is out of the question for one of the parties to say he is tired of it. There must be notice given before he can put an end to it, or there must be some recent cause. Now, the case which is alleged on the part of the pursuers is that nothing has been made out of this mine during the three years it has been worked, and that there is no reasonable

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prospect of anything being made out it. If that be so, the pursuers are entitled to put an end to the adventure. They are not entitled to do so at a day's notice, but they are entitled to have it settled in the course of the action that the adventure is to be brought to an end.

The question comes to be one of evidence, and having given my best attention to the case I come to this result: Nothing has been made out of the mine hitherto. No doubt there are reasons of a temporary kind for this. There has been a litigation and a difficulty about the manager, but, looking to the evidence, and especially to the scientific evidence, to see if there is a reasonable prospect of profit, I have come to the conclusion that the great weight of the scientific evidence is against the prospect of the mine being worked to a profit. That being so, what is to be the effect of the contract between the parties? The defender has guaranteed that the mine shall yield £2000, and that that shall be applied to repaying the pursuers. Mr Walker is therefore bound to pay £2000 for retiring the acceptance.

I confess I have not come to this conclusion without difficulty, but I think it a just and fair result.

Lord Deas.—I agree with your Lordship that this case is attended with great difficulty. I likewise agree that it is impossible to concur with the reasons which the Lord Ordinary in his note has given for his judgment. His view comes to this, that it is sufficient to put an end to a contract of partnership that one of the parties says he has differed with the other as to how the affairs of the partnership ought to be conducted. When partners differ between themselves we are familiar with the appointment of a judicial factor. But that is a different thing from one partner being entitled *de plano* to put an end to the contract without the consent of the other.

Another part of the case in which I agree with your Lordship is, that there was no ground for imputing any fraudulent motives to the defender, or any motives whatever inconsistent with good faith. It is not in favour of the conclusion at which the pursuers ask us to arrive that they thought it necessary to support that conclusion by unfounded allegations of fraud.

Laying aside these allegations, I confess that I have great difficulty in coming to the conclusion that there are here sufficient grounds for putting an end to the contract. It is true that the contract is not for a definite period, in which case, as your Lordship has stated, we could not have put an end to it. But it is clear enough, I think, that the contract was intended to last for some considerable time.

The first part of the contract provides that steps should be taken to ascertain whether the metal could be worked to profit. I am not satisfied that that part of the contract has been yet followed out. There seems to be a great difference of opinion whether the mine can be worked to profit or not. A considerable time has no doubt elapsed without this having been ascertained one way or the other. But this is accounted for to a great extent by the interdict which stopped the working. The workmen, after being interdicted, could not, in that part of the country, go back to the island till April 1873. Then the manager was found to be unfit for his duties, and there was difficulty in getting another. A variety of other circumstances combine to account for the delay. Therefore, admitting the principle that such a contract may be put an end to by a change of circumstances, I doubt if the time can be said to have arrived for doing so.

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Your Lordship suggested that either of two things would justify the Court in putting an end to the contract—1st, if there were greater risk than the parties had contemplated at the time of entering into the contract; and, 2d, if there were no reasonable prospect of profit being made. I agree that the second might put an end to the contract. But I do not think that a greater risk of loss in testing the mine would have that effect.

Although this is a matter for the discretion of the Court, we have a duty to protect the defender as well as the pursuers. It seems impossible that this action, if it is to come to the result pointed at by the Lord Ordinary, can be unattended with loss to Mr Walker. He has devoted his time and attention to this mine, and has been thereby diverted from other schemes, and probably kept from making profit in other ways. If it be a reasonable speculation, and he is prepared to go on with it, we are not entitled to interfere, unless for very strong reasons. My difficulty is, that I do not think it proved that there are any such strong reasons here. The partners entered into the joint adventure with their eyes open, and whatever may occur hereafter I do not think there are as yet sufficient grounds for us to interfere.

LORD ARDMILLAN.—I am of opinion that the Lord Ordinary has rightly disposed of the reductive conclusions of this action. There is no sufficient evidence, indeed there is no evidence, of fraud, or of wilful misrepresentation inducing essential error. I do not think that there was any fraud or intentional misrepresentation on the part of the defender.

The parties entered on a mineral speculation, or joint adventure, in regard to which the defender, Mr Walker, having the best means of judging, and being best acquainted with the locality and with the nature of the speculation, was the most eager and sanguine, and he may have expressed strongly his hopes and expectations. These, it seems to me, he honestly entertained and communicated. But there is nothing in his conduct which can sustain the conclusion for reduction.

The remaining conclusions,—declaratory and petitory,—are rested on different grounds, and cannot be similarly disposed of, though they also are of a nature requiring careful consideration. These conclusions, depending chiefly on evidence, are peculiar. The application of the rules of the law of joint adventure to the facts of this case is attended with difficulty.

Mr Walker held a lease from Mr Leisk of the minerals on or in the island of Haaf Grunie for nineteen years. The "rent or royalty" is 15s. a-ton on all chromate ore lifted. There is no fixed rent. There is no obligation on the tenant to work the ore; but, if he work it, he pays 15s. a-ton on all he lifts. That is the only obligation undertaken by the tenant. It is important to observe the nature of this lease. It must be read fairly. The landlord is, I think, bound to permit the tenant to work for nineteen years on the terms stated if the tenant chooses to do so. It is to him a license to work at a certain lordship per ton. But the tenant, though not taken bound to work, could not, I think, hold the lease for its whole currency without working at all, and exclude the landlord or another tenant from working. If the tenant were to refrain persistently from working,—and so escape all payment of rent,—and yet to insist on occupying under the lease so as to prevent all working by the landlord or by another, I am disposed to think that the lease could, at the instance of the landlord, be brought to an end. But, however that may be, I am satisfied

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that the tenant, Mr Walker, was not under absolute obligation to work the minerals during the nineteen years. The proper prestations of a lease are absent. Therefore when Mr Walker assumed a partner, and introduced him into this joint adventure, then nineteen years was not necessarily the endurance of the joint adventure. I cannot so read it. When working this ore on the lordship as stipulated becomes impracticable in consequence of not finding sufficient quantity of ore, then I think that the joint adventure must terminate or be terminable by either party. It could not, in equity, be permitted to one of the joint adventurers to force the other joint adventurer to proceed in a disastrous speculation to the great loss of both. I cannot say that mere difference of opinion as to the possibility or probability of success is a sufficient ground for calling on the Court to declare the joint adventure at an end. On that point I agree with your Lordship in the chair, and I do not quite agree with the Lord Ordinary. I think that we cannot avoid the question of reasonable probability of success,—the question on which the parties have led proof: Is there now in Haaf Grunie such an amount of chromate of fair quality as to justify continued working? Or, is it reasonable to hold that continued working cannot be conducted with profit, or indeed, without loss?

I cannot hold mere difference of opinion sufficient. I cannot recognise the pursuers' right to terminate the adventure because they doubt the prudence of proceeding. Inquiry is necessary in order to protect the one party from the caprice of the other. But on the answers to the two questions I have indicated the decision of this case must, in my opinion, depend.

In the view which I take of the lease, or license to work, and the agreement, the mutual obligations of the parties to the joint adventure cannot be held as continuing for the whole lease, so as necessarily to last for nineteen years. I scarcely think that the defender himself maintained that proposition. On the other hand, the pursuers cannot, at their pleasure, and without reason or explanation, enforce the termination of the adventure. Between these extreme propositions the justice of the case appears to lie; and, I think, there is sufficient support for it in law. The pursuers can, in my opinion, put an end to the adventure, if there has been reasonable trial, and if the result is that the mineral does not exist in this island of such quality and in such quantity as to justify continued expenditure with any fair prospect of success. To force the continuance of a very hazardous, perhaps ruinous, adventure, against the will of the pursuers, would not be equitable, nor would it be in accordance with legal principle. The authority of Professor Bell (Bell's Com. vol. ii. pp. 632–3), and the decisions in the case of Montgomery v. Forrester (June 17, 1791, Hume, 748), and in the case of Barr v. Speirs, 18th May 1802, F. C., and Marshall v. Marshall, 23d Feb. 1816, F. C., are favourable to the pleas of the pursuers, and several decisions in England mentioned by Mr Bell confirm the same view of the law. I may also refer to the English case of Crawshay v. Maule, decided by Lord Eldon in 1818 (1 Wilson's Chan. Rep. 181).

Accordingly, it is necessary to consider the proof in order to ascertain the true state of the facts, whether the continued working of this chromate can be conducted with reasonable hope of success.

On the evidence in regard to the state of the chromate in Haaf Grunie I confess I have had difficulty in forming an opinion. It is in some respects conflicting, and in some respects unsatisfactory. I do not enter on any analysis of the evidence, which I have carefully read. But I have ultimately arrived at a con-

clusion unfavourable to the prospects of the adventure, and favourable to the pleas of the pursuers. I think the joint adventure was not properly an initiatory adventure, not a speculation for searching and ascertaining the existence of chromate. The mineral was believed to be, and stated by the defender to be, in the land, and it indeed was so to some extent. The object of the speculation was to develope it, and work it, and dispose of it profitably. Taking that view of the speculation, I think the result of the proof is that there is not in the land mentioned in this lease, and in the joint adventure, such mineral of the kind specified as can be worked with any reasonable hope of profit.

The speculation has up to the present time proved a failure, and nothing but a great outlay and a new and unexpected discovery can make it otherwise. This is the opinion of the pursuers. But not only so, I think it is a reasonable opinion so far as the truth has been or can at present be ascertained. Amid the conflicting evidence I cannot refuse to attach weight to the opinion of Professor Heddle and to the testimony of Mr W. G. Mowat.

Mr Walker says he is, and I do not doubt that he really is, of a different opinion. He is very sanguine as to the result. If he is right he will now get the whole adventure into his own hands, and then it is hoped he may find it as profitable as he anticipates. But since the date of the joint adventure nothing has occurred to justify this prospect of success.

Taking this view of the evidence, and construing fairly the missives which express the agreement of 22d March 1872, I am of opinion that, looking to the ascertained character and position of the minerals, and having regard to the fair ends and objects of the joint adventure, one of the parties cannot insist on continuing the connection and partnership against the wish of the other party, and apparently against the interests of both. The eager and sanguine disposition of Mr Walker may sustain his own efforts amid discouragements, but cannot justify the Court in compelling the pursuers to continue a hazardous speculation, which they, apparently not without some reason, expect to be disastrous.

Lord Mure concurred with the Lord President.

The Court pronounced this interlocutor:—"Adhere to the said interlocutor so far as it disposes of the reductive conclusions of the summons: *Quoad ultra* recall the said interlocutor: Find that according to the sound construction of the contract of joint adventure between the pursuers and defender, dated the 22d March 1872, the defender guaranteed that the mine which forms the subject of the joint adventure should within a few years yield profits amounting to at least £2000, which sum was to be applied to repayment of the loan of £2000 obtained by the defender from the pursuers: Find that the said mine has not hitherto yielded any profit, and that there is no reasonable prospect of profits being realised in the future: Find that in these circumstances the pursuers are entitled to put an end to the joint adventure, and to call upon the defender to fulfil his guarantee: Therefore find, decern, and declare that the said contract of joint adventure has come to an end, and in respect it is admitted that the pursuers have retired with their own funds the bills for said advance of £2000, decern and ordain the defender to make payment to the pursuers of £2000, with interest from the date of citation: Assoilzie the defender from the 4th and 5th conclusions of the summons, and decern: Declare and decern in terms of the 6th conclusion; but

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in respect the sum of £139, 3s. 8½d. has not been advanced and paid by the pursuers, but only credited to the defender as an item in an unsettled account, dismiss the action *quoad* the 7th conclusion, and decern: Find no expenses due to or by either party."

DRUMMOND & REID, W.S.—GEORGE ANDREW, S.S.C.—Agents.

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Dec. 16, 1875. Anderson v. Garson.

THOMAS ANDERSON, Pursuer.—*Trayner.*
WILLIAM ROSS GARSON, Defender.—*Mackintosh.*

Process—Reponing—Decree by default.—The reponing of a party against whom decree by default has gone out is a matter for the discretion of the Court. Circumstances in which a defender was reponed upon payment of the previous expenses incurred by the pursuer.

1ST DIVISION. Ld. Craighill. M.

THOMAS ANDERSON, builder in Leith, and a trustee and member of the "Imperial Building Association," raised an action against the individual partners of that association for payment of £420 and interest, being the amount contained in a bill signed by him and the other trustees of the association on behalf of and for the behoof of the association. Anderson had been compelled, in the first place, to retire the bill under a threat of personal diligence.

All the members of the association, with the exception of William Ross Garson, S.S.C., and a Mr M'All, allowed decree in absence to go out against them on 24th February 1875. Garson and M'All lodged defences, Garson acting as agent for both. The case was put out in the procedure-roll on 18th May, and again on 1st, 8th, and 15th June. On 12th June the trustee upon the estate of M'All, who had become bankrupt, allowed decree to go by default. On 15th June, the Lord Ordinary, in respect of no appearance for Garson, decerned against him in terms of the conclusions of the libel.

On 6th July Garson lodged a reclaiming note against this interlocutor.

It was explained for him at the bar that he had not observed the case in the rolls, and, in consequence, his not being represented before the Lord Ordinary was due to an oversight. He therefore prayed to be reponed against the Lord Ordinary's interlocutor. The undernoted cases were referred to.[1]

LORD PRESIDENT.—There can be no doubt that this is not a decree in absence but one by default, and I am not disposed to depart from anything I said in the case of Arthur v. Bell. It is always a matter in the discretion of the Court (1) whether a party against whom a decree by default has gone out is to be reponed at all; and (2) if so, upon what conditions it is to be done. We have reason to believe that decrees by default go out in cases where the parties or their agents are greatly to blame, and that is no light matter.

[1] Wilson v. Stevenson, June 20, 1835, 13 S. 962; Wilson v. Stark, Feb. 17, 1844, 6 D. 692, 16 Scot. Jur. 605; Anderson v. Brown, Jan. 20, 1854, 16 D. 367, 26 Scot. Jur. 175; M'Lay v. Keir, Feb. 24, 1854, 16 D. 658, 26 Scot. Jur. 309; Hamilton v. Christie, March 11, 1857, 19 D. 712, 29 Scot. Jur. 330; M'Laren v. Robertson, May 29, 1857, 19 D. 769, 29 Scot. Jur. 348; Mather v. Smith, Nov. 23, 1858, 21 D. 24, 31 Scot. Jur. 11; Young v. Mackenzie, July 19, 1859, 21 D. 1358, 31 Scot. Jur. 744; Boak v. Watson, July 14, 1860, 22 D. 1468, 32 Scot. Jur. 666; Arthur v. Bell, June 16, 1866, 4 Macph. 841, 38 Scot. Jur. 440; Shand's Prac. 961; A. S. July 11, 1828 (M'Laren's Proc. Acts, 547).

I think this defender should only be reponed upon paying the pre[illegible] penses incurred by the pursuer, including those incurred in connec[illegible] this reclaiming note.

An[illegible] Garson.

LORD DEAS, LORD ARDMILLAN, and LORD MURE concurred.

THIS interlocutor was pronounced:—"Remit to the Lord Ordinary to repone the said defender on payment by him of the expenses incurred by the pursuer in the cause up to this date."

A. DUNCAN & G. V. MANN, S.S.C.—W. R. GARSON, S.S.C.—Agents.

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Dec. 16, 1875.

Kidd v. Byrne. Byrne v. Johnson.

WILLIAM KIDD, Pursuer.—*Pattison—Rhind.*
JOHN WILLIAM BYRNE, Defender.—*Fraser—Scott.*

JOHN WILLIAM BYRNE, Pursuer.—*Fraser—Scott.*
ROBERT JOHNSON, Defender.—*D.-F. Watson—Keir.*

Lease—Reparation—Game—Rabbits—Game Tenant—Relief.—An agricultural lease reserved to the landlord the sole right to the game and rabbits, with power to himself and his game tenant to shoot and sport on the farm without liability for damages. The landlord let the game to a tenant without express limitation of the amount of game and rabbits to be kept on the lands.

In an action by the agricultural tenant against the landlord, *held* that the landlord was liable for damage to crops arising from an excessive stock of rabbits.

In an action of relief by the landlord against the game tenant, *held* that it was an implied condition of the contract between him and the landlord that he should not keep more than a fair stock of rabbits for the purposes of sport, and that he was therefore bound to relieve the landlord of the damages found due to the agricultural tenant in the other action, and of the whole expenses incurred or found due by the landlord in that action down to the date of judgment in the Inner-House.

Observed that the liability of the landlord to his agricultural tenant and the liability of the game tenant to the landlord depended in each case on the contract, express or implied, between the respective parties, and that where the game tenant did not come individually into contact with the agricultural tenant there could be no direct right of action by the latter against the former in respect of injuries by game or rabbits.

2D DIVISION. Ld. Craighill. R.

IN 1864 Mr Byrne of Elshieshields let to William Kidd the farm of Chapelcroft on that estate for fifteen years from 1864. The lease contained the following clause:—"Reserving also to the proprietor the sole right to the whole game of every kind, rabbits and hares, and to all the fish in the rivers, burns, lakes, and ponds within the lands hereby let, with full power to himself and to those having his permission, or to the tenant of the game and rabbits, to hunt, shoot, or fish and sport on the farm without liability in damages; and the tenant shall be bound to preserve game of all kinds to the utmost of his power, to interrupt poachers and all unqualified persons, and to give information of them to the proprietor or those acting for him; and the tenant shall not be entitled to keep game dogs of any description, and he shall only be entitled to keep dogs for herding cattle; but no dogs of any kind shall be allowed to go into the plantation or into the ground kept in permanent pasture on which the plantation formerly grew."

By lease dated November 1872 Mr Byrne let to Mr R. Johnson, for five years, the mansion-house, &c. of Elshieshields, "together with the exclusive right of hunting and shooting, sporting, killing game and rabbits, and traversing the said estate and that of Templand and Reidhall

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in search or pursuit of game, rabbits, wild ducks, or snipe, or for preserving the game and rabbits, and to kill vermin." Mr Johnson bound himself "to maintain on said lands during the currency of this lease a fair stock of game and rabbits, and to exercise the right of shooting in a sportsmanlike manner, and at the end of the lease to leave on said lands a fair stock of game and rabbits, and not to extirpate them; the said John William Byrne, on the other hand, promising his hearty co-operation in the preservation of the game by preventing the tenants on the property from infringing on the terms of their leases in relation to same."

In December 1874 Kidd raised an action against his landlord, Mr Byrne, concluding for £200 of damages for injuries done by rabbits to his crops during the years 1873 and 1874. He averred that during these years, in which Mr Johnson was lessee of the shootings of Elshieshields, the rabbits had increased to an unreasonable extent.

Mr Byrne, in defence, stated that he was willing to admit damage to the extent allowed by Mr Johnson, to whom he looked for relief.

Mr Johnson having repudiated liability, Mr Byrne raised an action against him for relief of the action at Kidd's instance, and of all costs of the same.

He pleaded;—(2) The defender, the game tenant, is bound to relieve the pursuer from the conclusions of the action raised at the instance of the agricultural tenant for damages caused to his crops by the excessive stock of rabbits kept by the defender, and also to relieve the pursuer of all costs, and to pay the expenses of the present action.

Mr Johnson pleaded in defence to the action of relief;—(2) The defender being under no obligation to relieve the pursuer of claims by tenants for damage by game or rabbits, the action cannot be maintained.

The Lord Ordinary allowed a proof in both actions, which was taken upon the same day. (The actions were not conjoined.) The following facts appeared:—

Until 1873 the stock of rabbits on the estate of Elshieshields was small, but soon after Mr Johnson took possession of the shootings (towards the close of 1872) the rabbits began to increase. During the year 1873 Mr Johnson made frequent complaints to Mr Byrne and his agents of the scarcity of game on the estate, and of Kidd and another tenant named Gillespie shooting rabbits. By threat of legal proceedings he compelled Mr Byrne, in July 1873, to apply for an interdict against Kidd and Gillespie killing rabbits. Interdict was accordingly granted by the Sheriff. From this time the rabbits were allowed to increase to a very large extent, notwithstanding complaints on the part of the agricultural tenants, and remonstrances on the part of Mr Byrne's agents. At length, in the spring of 1874, Mr Johnson took active steps to reduce the stock of rabbits, and large numbers were killed by trapping and netting. In a letter to Mr Byrne's agents, dated 30th April 1874, Mr Johnson stated that the rabbits had come in upon him like a flood.

The rent paid by Mr Johnson for the house and shootings was £164 per annum, and it was in evidence that between £120 and £130 was a fair rent for the house alone.

On 25th June 1875 the Lord Ordinary pronounced these interlocutors:—

(1) In the action at the instance of Kidd against Byrne:—"Finds, in the first place, as matter of law, that though by the lease, of which No. 11 of process is a copy, the farm of Chapelcroft, on the estate of Elshieshields, was let by the defender to the pursuer under reservation of 'the sole right to the game of every kind and of the rabbits and hares upon the lands' thereby set, and though the pursuer is by the said lease taken bound to preserve the game to the utmost of his power, the defender was not en-

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titled so to manage the game and rabbits as to have an excessive stock upon the said farm, and the pursuer is not barred from suing for reparation of injury alleged to result from the violation of this implied condition of the contract: Finds, in the second place, as matters of fact (1) that both in 1873 and in 1874, though to a smaller extent in the former than in the latter year, the stock of rabbits on the said farm of Chapelcroft was excessive, the consequence being that serious injury was caused to the pursuer's crops of all kind upon the ground; and (2) that the damage thus done to the pursuer in 1873 was not less than £50, and in 1874 was not less than £60, these two sums amounting together to £110: Therefore repels the defences, and decerns against the defender for the said sum of £110, with interest at the rate of five per cent per annum from 17th December 1874, the date of the citation following on the summons, till payment, in terms of the conclusions of the summons: Finds the pursuer entitled to expenses," &c.*

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* "NOTE.—The pursuer is tenant of the farm of Chapelcroft, on the estate of Elshieshields, and the defender is his landlord. The farm extends, inclusive of pasture land, to more than 300 acres, and the rent is £326. By the lease the defender reserved 'the sole right to the game of every kind, and to the rabbits and hares on the lands,' and he also reserved to himself and those having his permission, or to the tenant for the time being of the game and rabbits, power to hunt, shoot, or sport on the farm without being liable in damages. The pursuer, moreover, was taken bound to preserve the game to the utmost of his power. From 1864, when the lease began, till 1873, neither game nor rabbits were a cause of complaint to the pursuer; but early in 1873 the rabbits began to increase in numbers, the injuries to the crops became greater and more manifest, and both rabbits and injuries went on increasing, as the pursuer says, till after the harvest of 1874, when things became so bad that the present action for reparation was instituted. It appears that in the autumn of 1872 the game and rabbits on Elshieshields were let with the mansion-house to a Mr Johnson, and the increase in the number of rabbits may have been caused by his adoption of a course of management different from that practised by the defender when the game and rabbits were in his own hands. Whether this is or is not the true explanation of the increased number of the rabbits in 1873 and in 1874 is, however, really immaterial on the present occasion, because the defender could not, by letting the game and rabbits, shake off or diminish his responsibility to the pursuer, the agricultural tenant of the farm.

"The first question for consideration is whether there was any responsibility incumbent on the defender for depredations committed by game on the crops of the pursuer. Both were reserved to the defender: the power of hunting and killing both was also reserved without the defender being held liable in damages. What is the effect of this provision? Does it imply that game or rabbits may be preserved to any extent, that depredations on the estate may be committed to any extent, and yet that there should be no redress? This was a view that was hardly presented on the part of the defender. Both principle and the authorities are against it; and consequently the Lord Ordinary has felt no difficulty in coming to the conclusion that the reservation and the power might be abused in violation of the lease, and that for the abuse, should it be established, the defender must answer to the pursuer.

"This brings the controversy to an issue not of law but of fact. Was there an abuse of the exclusive right to game and rabbits which was reserved by the defender? In other words, were game or rabbits permitted so to increase in number that the injury done to the crops was greater than was compatible with the return which the pursuer might reasonably expect from the cultivation of his farm as let by the defender? That some injury was to be calculated on is certain. Game and rabbits were reserved, and these could not be present without committing some depredation. The difficulty is in determining when the point is reached at which the stock ceases to be fair and becomes excessive. No

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(2) In the relative action of relief at the instance of Byrne against Johnson:—"Finds, as matter of law, that the defender, as game tenant on Elshieshields under the lease set forth in the record is not entitled to keep on Elshieshields, or on any of the farms of that estate, more than a fair average stock of rabbits; and, on the contrary, that it is an implied condition of the said lease that should the defender keep more than a fair average stock of rabbits on the said estate, or on any of the farms thereof, and the pursuer in consequence be subjected in damages for injury caused to the crops of his tenants or others by this excess, the defender is bound to relieve the pursuer of these damages: In the second place, finds, as matter of fact (1) That in 1873 and in 1874, though to a less extent in the former than in the latter year, the stock of rabbits on the farm of Chapelcroft, part of Elshieshields, of which farm William Kidd senior is tenant, was not a fair average stock, but on the contrary was an excessive stock of rabbits, the consequence being that serious injury was done to the crops of all kinds upon the ground of that farm in these years; (2) That in an action at the instance of the said William Kidd senior against the present pursuer for damages on account of injury done by rabbits to his crops in 1873 and in 1874, now depending in Court, it has been found by interlocutor dated 25th June current, following on a proof, at the leading of which the present defender by arrangement was present and took part, that the damages in which the present

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general rule can be laid down for all cases, and the result in each case, therefore, as it occurs, must be governed by the facts which are established. Here the Lord Ordinary thinks that an excess in the stock of rabbits has been proved, and he is of this opinion, in the first place, because of the numbers which were upon the farm in 1873 and in 1874, as compared with the stock between 1864 and 1872, and, in the second place, because the depredations on the crops in 1873 and in 1874 were so great as naturally if not necessarily to suggest that the interests of the agricultural tenant had been neither fairly or reasonably regarded. On the part of the defender it was maintained that if the stock of rabbits became too large, this circumstance was at least in part to be ascribed to neglect on the part of the pursuer. He, it was said, might have killed the rabbits, and thus have kept the numbers down; his lease, while imposing upon him the obligation to preserve the game, imposing no obligation on him to preserve the rabbits upon the farm. This construction of the lease is, however, contradicted by the right previously asserted by the defender. In July 1873 he obtained an interdict in the Sheriff Court, by which the pursuer was prevented from killing, not only game, but rabbits, and therefore it seems vain for the defender now to argue that rabbits might have been killed by the pursuer, and that thus the injuries which were suffered might have been prevented.

"The only evidence as to the pecuniary amount of the pursuer's loss is that which has been afforded by the witnesses for the pursuer. They agree generally in the view that the sum sued for is not greater than is required for reparation of the injuries sustained, but the Lord Ordinary thinks that the sum to be allowed must be reduced below their estimation. In the first place, the witnesses are of a class who naturally sympathise with the pursuer, and who, while speaking with perfect honesty, may, nevertheless, unconsciously fall into some exaggeration. Some allowance must therefore be made upon this account. In the second place, the injury which would be caused by rabbits, even if the stock had not been excessive, must also be taken into account, and this the Lord Ordinary thinks is a consideration which has been overlooked. Making the best use he could of the materials afforded, the Lord Ordinary considers that £50 for 1873 and £60 for 1874 is a reasonable assessment of the damage to which, according to his view of the law and of the facts, the pursuer is entitled, and £110 accordingly is the sum for which decree has been given by the foregoing interlocutor."

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pursuer is liable for injury done in 1873 and in 1874 to the crops on Chapelcroft by the excess in the stock of rabbits beyond a fair average stock, is £110, and decree for this sum has been given against the present pursuer, with interest at the rate of 5 per cent per annum from 17th December 1874, the date of citation following on the summons in said action, till payment; and (3) That in the said action the present pursuer has also been found liable to the said William Kidd senior in the expenses of process: Therefore, repels the defences, and decerns the defender to make payment to the present pursuer of the said sum of £110, with interest at the rate of 5 per centum per annum from said 17th December 1874 till payment; or otherwise to make payment of the said sum and interest to the said William Kidd senior, that the pursuer may thereby be relieved of the decree pronounced against him as aforesaid: Further, finds the defender liable to the pursuer in payment or relief (1) of the expenses incurred by the pursuer in defending the said action at the instance of the said William Kidd senior; and (2) of the expenses found due by the pursuer to the said William Kidd senior in the said action, all in terms of the conclusions of the present summons, and decerns: Finds the pursuer entitled to his expenses in the present action, of which, as well as of the expenses incurred by the pursuer in defending the said action at the instance of the said William Kidd senior, allows accounts to be given in, and remits these accounts," &c.*

* "NOTE.—The defender is game tenant of Elshieshields, and is now sued by his landlord for relief of the damages claimed from the latter by Kidd and Gillespie, two of his agricultural tenants. The question is, whether the present defender is answerable for the consequences of the alleged injuries to the tenants' crops even on the assumption that damages must be rendered by the landlord. The answer, as the Lord Ordinary thinks, depends, in the first place, on the view to be taken of the defender's rights as game tenant,—Can he increase or preserve rabbits to any extent, whatever may be the consequences to the landlord? Or is his right, so far as it can be exercised without responsibility to the landlord for the consequences, subject to an implied condition that the stock one year or one period with another shall not exceed a fair average stock? The latter is the view which the Lord Ordinary has adopted, and upon which the finding as to the law of the case in the foregoing interlocutor has been pronounced. The answer to the cardinal question depends, secondly, on whether the stock of rabbits on Chapelcroft, as well as on the Holm farm of Elshieshields (Gillespie), the tenant of which is also suing his landlord for damages, was only a fair average stock, and not an excessive stock in 1873 and in 1874. As to this a long proof has been led. Kidd and Gillespie, the pursuers of the actions for damages, the present pursuer, who is defender in these actions, and the present defender, were all present and took part, and the conclusion to which the Lord Ordinary has been brought is, that the stock was far in excess of that which was a fair average stock. There may be cases in which it is necessary to guage what is a fair average stock as between a landlord and his agricultural tenants as compared with that which is a fair average stock as between that same landlord and his game tenant. But the present, as the Lord Ordinary thinks, is not one in which such a necessity exists; because, in his opinion, the stock of rabbits exceeded such a fair average stock as either landlord or game tenant was entitled to maintain without answering for the consequences. Probably it is not necessary, but nevertheless it may be right, for the Lord Ordinary to explain that his attention was called, and has been directed, to the cases that have been decided, and especially to the decision in Inglis v. Moir and Gunnis, 7th December 1871, 10 Macph. 204. The Lord Ordinary thinks that his view of the law, as set forth in the first finding of his interlocutor, is neither contradicted nor foreclosed by anything which was said or done in the case just mentioned, or in any other decision. Had he thought otherwise, the judgment he has given would not have been pronounced."

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In each action the defender reclaimed.*

Argued for Johnson (the game tenant);—(1) Kidd was not entitled to damages against his landlord, and therefore the claim of relief fell. From the terms of the agricultural leases it was evident that a considerable amount of game, and the existence of a game tenant, were contemplated, and must be presumed to have been taken into account in adjusting the rent. The game clause in the lease, if it meant anything, must have the effect of disentitling the tenant to a claim of damages which otherwise would have been competent to him. To get over such a clause he must establish a case amounting to bad faith on the part of the landlord. The case was precisely similar to that of Morton v. Graham, in which the tenant was found not entitled to damages.[1] (2) In any view Mr Johnson could not be made responsible. He entered into no contract with the agricultural tenant. The increase of rabbits arose from natural causes. He was not bound to kill them for the benefit of the farmer.[2] Mr Byrne might have stipulated that the game tenant should relieve him of all claims at the instance of the farmer. But this was not done. On the contrary, instead of binding him to keep down the rabbits, Mr Byrne bound him to keep up a fair stock of rabbits. The measure of liability of Mr Johnson to Mr Byrne was therefore clearly not the same as the measure of liability of Mr Byrne to his agricultural tenant. The minimum number of rabbits which Mr Johnson was obliged to maintain was a fair stock, *i.e.*, the maximum number which Mr Byrne was entitled to keep in a question with his agricultural tenant.

Argued for Byrne;—(1) The expression "a fair stock" in the game lease meant a fair stock for the purposes of sport, not of profit. The rent paid by Mr Johnson was only £30 or £40 more than would have been got for the mansion-house alone, shewing that the shootings were regarded as a mere privilege or adjunct of the mansion-house. The right communicated to Mr Johnson was the right reserved by the landlord to himself in the agricultural lease, and therefore whatever claim the agricultural tenant had against the landlord he had the same claim against the game tenant. (2) Further, in giving the right to the game and rabbits to a game tenant Mr Byrne cannot be held to have authorised an unreasonable and oppressive exercise of that right. If, therefore, Mr Johnson had unreasonably increased the stock of rabbits, he and not the landlord was directly liable to the agricultural tenant. *Culpa tenet suos auctores.*[3]

Argued for Kidd;—It was proved that the rabbits had been increased to an extravagant extent, beyond anything which could have been in con-

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* A similar action of damages, raised against Mr Byrne by Gilbert Gillespie, tenant of the Holm Farm of Elshieshields, and a relative action of relief, raised by Mr Byrne against Mr Johnson, were heard at the same time, and were disposed of in the same way, both by the Lord Ordinary and by the Second Division.

[1] Drysdale v. Jameson, Nov. 30, 1832, 11 S. 147, 5 Scot. Jur. 134 (Lord Glenlee's opinion); Morton v. Graham, Nov. 30, 1867, 6 Macph. 71, 40 Scot. Jur. 37 (Lord President's opinion); Broadwood v. Hunter, July 19, 1855, 17 D. 1139; Wilson v. Wemyss, Dec. 2, 1847, 10 D. 194, 20 Scot. Jur. 51 (Lord Fullerton's opinion).

[2] Inglis v. Moir's Tutors and Gunnis, Dec. 7, 1871, 10 Macph. 204, 44 Scot. Jur. 123.

[3] Tassie v. Magistrates of Glasgow, June 18, 1822, 1 S. 503; Weston and Sons v. Tailors of Potterrow, July 10, 1839, 1 D. 1218, 11 Scot. Jur. 597; Caledonian Railway Co. v. Greenock Sacking Co., May 13, 1875, *ante*, vol. ii. p. 671.

templation of the parties to the contract when his (Kidd's) lease was entered into. Whatever relief he might have, the landlord was the person with whom he had contracted, and who was therefore liable to him. No. 47. Dec. 16, 1875. Kidd v. Byrne. Byrne v. Johnson.

LORD JUSTICE-CLERK.—In regard to the actions by the agricultural tenants against the landlord I think that as long as the landlord or his game tenant kept no more than a fair sporting stock of rabbits the agricultural tenants were not, under the special terms of their leases, entitled to complain. Such is the effect I should give to the reservation contained in those instruments. But I am perfectly satisfied that in the latter part of 1873 and in 1874 the stock of rabbits was unreasonable. It was not a sporting stock. It had to be kept down by trapping and netting (which are not sport), and this was done by the orders of Mr Johnson, who says that they came in upon him like a flood. It is impossible to say that such a stock was not largely in excess of anything in contemplation of the parties to the leases.

It has been argued for the landlord that the right of the agricultural tenants to redress is against the game tenant, in respect that he has gone beyond the terms of his lease. No plea to this effect is stated on record, and I think the argument unsound. It is enough to say that the liability of the game tenant must arise on his own contract, and that he has no contract with the agricultural tenant. The principle, which applies to cases of delict committed by the wrongful exercise of powers derived from another, has no application. Accordingly, in the question between the landlord and the agricultural tenants the Lord Ordinary's judgment is right. There might remain some question as to the amount of damages, but I think we must regard the Lord Ordinary's judgment as to the amount as the verdict of a jury, not to be disturbed, unless manifestly wrong.

The question of relief between the landlord and the game tenant is very important. We have no case between the agricultural tenants and the game tenant. The question is between the landlord who let the shooting for purposes of sport, and the game tenant, who took the lease. I adhere entirely to the views which I expressed in the case of Inglis v. Moir's Trustees: When the game tenant does not individually come into contact with the agricultural tenant, he has nothing to do with the arrangements between the agricultural tenant and the landlord. He is not bound to know anything of the terms of the agricultural tenant's lease, whether it be prior or posterior to his own. His rights and liabilities must be discovered from his own contract with the landlord.

This case is remarkably different in its circumstances from that of Inglis v. Moir. In that case the agricultural tenant had right to kill rabbits on his farm. The real mischief was caused by the landlord having exercised a reserved right of planting, and the rabbits came from plantations reserved in the lease. The game tenant pleaded, successfully, that he was no more bound to protect the agricultural tenant from rabbits than the agricultural tenant was bound to protect him. We found that he had not prevented the agricultural tenant from killing rabbits, and we held that the mere fact of his being in possession of the shootings was not sufficient to make him liable.

Here the circumstances are very different. Mr Johnson acquired the right of excluding the agricultural tenants from killing rabbits, and exercised that right by obtaining interdict against them. Having done that, he allowed the rabbits to increase to an enormous extent. Now, his liabilty must be judged of upon the

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terms of his own lease. If he was making a fair and reasonable use of the subject let to him, that is enough to protect him. If his use of the subject was beyond reason, it is clear that he is not entitled to embroil the landlord with his agricultural tenants, or subject him in a claim of damages at their instance, by a use of the subject which is beyond the contemplation of parties. At the same time I think it right to make two observations. I am unable to accept Mr Fraser's argument that where a landlord grants an agricultural lease and afterwards a game lease of the same subject, he takes the game tenant bound by all the stipulations in the agricultural lease. That would lead to the most extravagant results. Where there is no contract between the agricultural tenant and the game tenant it is as impossible to import the terms of the prior agricultural lease into the game lease as it would be to import the terms of the game lease into the agricultural lease if the game lease were the first in date. In the next place, I do not think that the obligation imposed on the game tenant to maintain a fair stock of game and rabbits implies an obligation to keep down their number to a fair stock. The object of the clause is to maintain the stock, not to diminish it. The obligation it imposes is to preserve, and not to destroy. The liability and obligation to keep down the stock must be looked for elsewhere. It is impossible to say that, if the game tenant chose to take his risk of having to relieve the landlord of a claim of damages by the agricultural tenant, the landlord could, under this clause, prevent him from increasing the stock of game and rabbits. Still, I think this throws some light upon the question. The landlord is bound to protect the sporting tenant to the extent of a fair sporting stock. He undertakes that up to the extent of a fair sporting stock he will be liable. The obligation on the game tenant to maintain a fair stock necessarily implies this. But will the landlord be liable for anything beyond this? It may be said, with some show of reason, that in going beyond this the game tenant proceeds at his own risk. But the true ground of liability here is the violation by the game tenant of the essential conditions of his right. Where the stock has been increased to such an extravagant extent as in the present case, far beyond anything required for sporting purposes, there is no difficulty in holding that this was not the use contemplated by the game lease, and that the maxim applies, *culpa tenet suos auctores.*

I believe that this increase of rabbits was more of an accident than anything else. Mr Johnson seems to have been afraid of having too few rabbits instead of too many, and thus was not alive to the danger of their increase. Still he must bear the consequences. The landlord repeatedly warned him of the claim which he was incurring. I think that the right of relief has been made out. The injuries suffered by the agricultural tenants have plainly been great, and with every desire to protect the reasonable rights, even of sporting tenants, it is impossible to justify what was done by Mr Johnson.

Lord Ormidale.—I have come to the same conclusion. There are two sets of actions here,—two at the instance of the agricultural tenants against their landlord, and corresponding actions of relief by the landlord against the game tenant.

First, as between the agricultural tenants and the landlord, the ground on which I arrive at the same result as the Lord Ordinary may be shortly stated. In the leases to the agricultural tenants the landlord reserves all right to the game and the rabbits. There are also in the leases sufficient indications that it was for the

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purpose of sport this reservation was made. I likewise take it to be clear that the landlord had it in his power to exercise the reserved right himself, or to transfer it to another. At the same time, I think it is implied in the agricultural leases that the preservation of game and rabbits was not to be carried beyond a reasonable extent. The landlord, or party in his right, could not, for example, convert the farms into rabbit warrens to the destruction of the proper rights of the agricultural tenants without being answerable in damages.

The next question is whether the agricultural tenants have suffered damage, and to what extent. I agree with your Lordships that in a matter of this kind we ought to deal with a Lord Ordinary's judgment very much as with the verdict of a jury, and adopt his conclusions, unless there is something plainly wrong in them. My own impression, on a consideration of the evidence, is that the Lord Ordinary has arrived at a very fair conclusion as to the amount of damages. Very considerable injury was undeniably sustained by the agricultural tenants. In giving their evidence, they as well as, perhaps, some of their witnesses may have spoken somewhat extravagantly as to their rights on the one hand, and the extent of the damage sustained by them on the other. Taking all this, however, into account, and making due allowance for it, I think the Lord Ordinary's assessment of the damages is not exposed to any well-founded objection.

Then as to the question of relief by the landlord against the game tenant to whom the right reserved in the agricultural leases was transferred, I think that there was an implied obligation or understanding in the game lease to the effect that the preservation of the game and rabbits was not to be carried to an excessive or unreasonable extent. The game tenant was expressly bound to keep up a fair average stock of game and rabbits, but although not expressly said, I cannot doubt that, according to the true meaning of his lease, he also came under an implied obligation not to increase the stock beyond a fair and reasonable amount, having regard to the rights of the agricultural tenants whose leases were prior in date to his. According to the evidence, however, he appears to me to have in this respect exceeded the just measure of his right, and on that ground to have subjected himself in damages to the same amount as that in which the landlord has been subjected to the agricultural tenants. The result is, that while the landlord is liable under his contract to his agricultural tenants, so is the game tenant under his contract liable to the landlord in relief.

These are shortly the grounds on which I am of opinion that the Lord Ordinary's judgment should be adhered to.

LORD GIFFORD.—I am of the same opinion. Delicate and difficult questions are sure to arise from the conflict of interests between the agricultural tenant who has one use of the surface, and the game tenant, who has another use of the surface. It is the interest of the one to have as little game as possible, and the interest of the other to have as much game as possible.

The agricultural tenants were fairly warned in their leases that a game interest was reserved, either to the landlord for his own behoof, or to any game tenant to whom he might give over the game rights. They must be held to have laid their account with having a game tenant beside them, or, at all events, with having to bear the loss and inconvenience which a reasonable and ordinary stock of game and rabbits might cause. In Kidd's lease it is expressly said that there may be a tenant, not only of the game proper, but of the rabbits. On the other hand, Mr Johnson, the game tenant, must be held to have known—indeed, he

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must have seen—that there were agricultural tenants on the ground, and therefore he must be held to have taken the burden, which a game tenant takes in such cases, that he will not preserve to an excessive degree. Similar principles apply to both cases. The agricultural tenants must bear a certain amount of loss inevitable from the presence of a reasonable and moderate amount of game and rabbits for the sport of the game tenant. And, in like manner, the game tenant must bear the damages, if by his act or negligence he makes the stock excessive. The Lord Ordinary has applied this principle. He uses the same phrase in the interlocutor finding the landlord liable to the agricultural tenant, and in the interlocutor finding the game tenant bound to relieve the landlord. The reason given is exactly the same, namely, that the stock of rabbits was excessive, and more than a reasonable stock for moderate sport over such farms as are here in question. As I read the proof and the Lord Ordinary's judgment he has not given the agricultural tenants full damages for all the loss which they have suffered. He has deducted what they were bound to bear. On the other hand, he has not subjected the game tenant in the full amount of damages caused by the rabbits. He has deducted the damage which was inevitable from the fact of a moderate stock of rabbits, and for which Mr Johnson was not liable from his position as a game tenant. Mr Johnson cannot complain of being found liable to the landlord for the excess of damages over what was reasonably in the contemplation of parties, for which excess the landlord has been found liable to the agricultural tenants.

Lord Neaves was absent.

Additional expenses having been allowed to the respondent in each reclaiming note, counsel for Mr Byrne moved that Mr Johnson should be found liable to him in relief of the expenses in Kidd's action, incurred and found due by him (Byrne) since the date of the Lord Ordinary's interlocutor.

Mr Johnson opposed the motion, on the ground that the reclaiming note for Mr Byrne was unnecessary.

The Court were of opinion that Mr Byrne would not have been in safety to have acquiesced in the interlocutor of the Lord Ordinary against him, that he was entitled to full indemnity, and therefore must be allowed the expenses in question.

These interlocutors were pronounced:—

(In the action at Kidd's instance against Byrne)—"Adhere to the interlocutor complained of, with additional expenses," &c.

(In the action of relief at the instance of Byrne against Johnson)—"Adhere to the interlocutor complained of: Find the defender (reclaimer) liable to the pursuer in payment or relief (1) of the additional expenses incurred by the present pursuer since the date of the Lord Ordinary's interlocutor in the reclaiming note for him in the action at the instance of William Kidd senior against him, and (2) of the expenses found due in said reclaiming note by the pursuer to the said William Kidd senior, and decern: Find the present pursuer also entitled to the additional expenses incurred by him in this action of relief since the date of the Lord Ordinary's interlocutor, and decern," &c.

R. P. Stevenson, S.S.C.—W. S. Stuart, S.S.C.—George Andrew, S.S.C.—Agents.

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AGNES STAFFORD OR M'LAURIN AND HUSBAND, Pursuers.—*D.-F. Watson—Asher.*
JANET M'LAURIN OR STAFFORD AND HUSBAND, Defenders.—*Balfour—J. P. B. Robertson.*

Issue—Reduction—Error.—A father and mother aged respectively seventy-eight and seventy-five years brought an action against a daughter and her husband to reduce an irrevocable disposition granted by the pursuers six months before, whereby, subject to the pursuers' liferents, and certain burdens, the parents' moveable estate, and a liferent of heritage, were conferred upon the daughter in consideration of her, in time coming, assisting the mother in the management of a hotel. The pursuers averred that the deed was executed under essential error on their part, they believing that the deed was a revocable testamentary deed making alterations upon a prior settlement in accordance with instructions given by them to their law-agent, while, in fact, it was irrevocable and not in accordance with these instructions; and further, that the error had been induced by the defenders in instructing the law-agent, and by the law-agent, or by one or other of them; and further, that the error had been fraudulently induced by these parties. The pursuers pleaded—(1) essential error, (2) essential error induced by the defenders, (3) fraudulent impetration. *Held* that besides an issue of fraud the pursuers were entitled to the issue "whether the pursuers in granting the disposition were under essential error as to the substance and effect of the said deed," without the addition of the words "induced by the defenders," as contended for by the defenders.

1ST DIVISION, with three consulted Judges. Lord Shand.

THIS action was raised in May 1875 by Mrs Agnes Ferguson or M'Laurin, wife of Ronald M'Laurin, sometime merchant in Oban, and residing there, and by her husband for his own interest, and as administrator-in-law for his wife, to reduce a disposition granted by Mrs M'Laurin, with consent of her husband, on 12th November 1874.

The pursuers called as defenders their daughter, Mrs Janet M'Laurin or Stafford, wife of John Francis Stafford, M.D., residing at Pollokshields, Glasgow, and her husband, and several other persons having an interest in the deed.

Dr and Mrs Stafford alone defended the action.

The grounds of action were set forth in the following plea:—The pursuers are entitled to decree of reduction as concluded for—(1) Because the said deed was signed by them under essential error. (2) Because in signing the said deed the pursuers were under essential error induced by the said Dr and Mrs Stafford and Robert Lawrence (the law-agent who prepared the deed), or one other of them. (3) Because the said deed was obtained from the pursuers by fraudulent concealment practised by the said Dr and Mrs Stafford and Robert Lawrence, or one or other of them. (4) Because the said deed was obtained from the pursuers by false and fraudulent representations as to its tenor and effect made by the said Dr and Mrs Stafford and Robert Lawrence, or one or other of them.

The pursuers averred—(Cond. 1) "The pursuer Mrs Agnes Ferguson or M'Laurin, and the pursuer Ronald M'Laurin, who are respectively seventy-five and seventy-eight years of age, were married in the year 1825. At that time Mr M'Laurin had a general store in Oban, and also acted as a carrier between Glasgow and Oban. He was able to read and write in Gaelic, but understood very little English. He was upwards of twenty-five years of age before he understood English at all, and, up to the present time, he has been much more familiar with Gaelic. His hearing has been defective for a number of years. Mrs M'Laurin cannot write, never having been taught."

The pursuers further stated that after their marriage Mrs M'Laurin took the management of the store till about 1845, when she left it to the

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care of her husband, and, having bought the old Woodside Hotel, Oban, commenced the business of hotel keeping. (Cond. 3) "About fifteen years after the Woodside Hotel was acquired Mrs M'Laurin proposed to her husband to feu a piece of ground in Oban for the purpose of building a larger hotel upon it. He had taken no part in the management of the Woodside Hotel, and was against the proposal, so that Mrs M'Laurin feued the ground in her own name, and built upon it, and furnished the hotel now known as the 'Craig-ard.' A number of years thereafter Mrs M'Laurin bought for £750 an adjoining piece of ground, with a villa upon it, called Braehead, and upon which she borrowed money to the extent of £600. She also furnished this villa, and used it as an adjunct to the hotel. The money spent in building and furnishing Craig-ard Hotel and Braehead belonged to Mr M'Laurin. Mrs M'Laurin had none of her own, and there never was any marriage-contract between her and her husband. The bond over Braehead, as well as those taken over Craig-ard, were granted by Mr M'Laurin. Mrs M'Laurin was an active person, and Mr M'Laurin rarely interfered with anything she did." (Cond. 4) "Craig-ard Hotel (upon which there was taken a bond for £500) is worth about £3000, and the furniture, &c. in it is worth about £4000 more. Braehead was worth about £150 over the bond for £600, and the furniture in it would be worth about £300." . . .

Cond. 5 set forth that besides a son and daughter who died without issue the pursuers had the following children—(1) Mrs Catherine M'Laurin or Hunter, wife of John C Hunter, storekeeper, United States, who had seven children; (2) Mrs Agnes M'Laurin or Fleming, wife of Daniel Fleming, clothier, Glasgow, who had no children; (3) Lauchlin M'Laurin, storekeeper, United States, who had two children; (4) Ronald M'Laurin, who died about three years ago, leaving a widow, Mrs Elizabeth Ferguson or M'Laurin (who was a cousin of his own), and two children; and (5) the defender, Mrs Janet M'Laurin or Stafford, who was married in November 1869 to her present husband, who was then a medical student, and had no children. At the time of their marriage Dr Stafford was about twenty-three years of age and his wife about thirty-six. (Cond. 6) "The defender, Mrs Stafford, assisted her mother in the hotel business up to the date of her marriage, as her other daughters had done, until they were married. She also assisted her in the following season. The pursuers' son Ronald also assisted in the hotel from 1870 up to the time of his death in 1872, and his wife has assisted in the hotel since the spring of 1871, and continues still to do so. The pursuers were very much opposed to the marriage of the defender with Mr Stafford."

(Cond. 8) "In July 1872 the pursuers' son Ronald died. Before his death, and of this date (May 2, 1872) the pursuer, Mrs M'Laurin, with consent of her husband, made a settlement, by which she gave to Ronald and his wife, and the survivor of them (after the death of herself and husband, and subject to her husband's liferent), the liferent of the Craig-ard Hotel and plenishing, and the fee to their children, but subject (1) to an annuity to the defender, Mrs Stafford, of £80 a-year for ten years and £100 a-year for two years longer, and (2) to an annuity of £20 a-year for ten years to Mrs Catherine M'Laurin or Hunter. This settlement only dealt with the Craig-ard Hotel and its plenishing, and as Ronald and his wife were substantially managing the business of the hotel, the intention of the pursuers was that they should continue the business after their (the pursuers') death, subject to the annuities before mentioned. The terms of this settlement were made known to the defender, Mrs Stafford, in the summer of 1872, and the pursuers' other children resident in Scotland were also made aware of its terms." (Cond. 9) "In the same year

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(1872) and after the death of the pursuers' son Ronald, the defender, Mrs Stafford, who knew that Braehead stood in name of her mother, induced her mother to bequeath it and its contents to her, and on 14th October 1872 her mother executed a disposition and settlement, by which Braehead, with its furnishing and plenishing, was left to her. The pursuer, Mr M'Laurin, was not asked to consent to this deed, as he had been displeased at Mrs Stafford getting so much under the settlement made in May preceding." (Cond. 10) "On 14th August 1873 the pursuer, Mrs M'Laurin, with consent of her husband, the other pursuer, conveyed Braehead absolutely to the defender, Mrs Stafford, by disposition of that date. The defender, Mrs Stafford, had pressed for such a conveyance, saying that the deed of 14th October 1872 had not been properly prepared; and the pursuer yielded, and got her husband to concur."

The following were the pursuers' averments in regard to the deed under reduction:—(Cond. 11) "The defender, Mrs Stafford, also pressed on her mother to alter the testamentary settlement made by her, with consent of her husband, in May 1872. Mrs M'Laurin agreed to make certain alterations on this deed. These alterations were to the effect that after Mrs M'Laurin's death the defender, Mrs Stafford, should come in to manage the hotel along with Mrs Ronald M'Laurin junior, and divide the profits between them. Mrs Ronald M'Laurin junior was to continue at Craig-ard so long as she remained unmarried. Ronald's two children (now aged 7 and 5 years) were to get Craig-ard and the furniture in it when they came of age. The existing burdens were to be paid up during their minority as far as possible. The addition to Craig-ard was to be built principally from the price of Braehead. Mrs M'Laurin accordingly instructed Mr Lawrence, writer, Oban, her ordinary law-agent, to prepare a deed making the foregoing alterations on the settlement of 1872;" and (Cond. 12) "Thereafter the deed under reduction was prepared by Mr Lawrence, writer, Oban, on the instructions of the defenders, Dr and Mrs Stafford, and signed by or for the pursuers."*

* The deed bore,—"I, Mrs Agnes Ferguson or M'Laurin, . . . and I, the said Ronald M'Laurin, ... for the love and affection which we have and bear to Janet M'Laurin or Stafford, our daughter, wife of John Francis Stafford, physician and surgeon, residing at Pollokshields, near Glasgow, and in order to secure her assistance in the management of the business of the Craig-ard Hotel, Oban, during the remainder of our lives, do hereby, but under burden of our own liferent of the premises, give, grant, assign, and dispone from us, our heirs and successors, to and in favour of the said Janet M'Laurin or Stafford—In the first place, All and Whole," &c. (the pursuers' heritable property), "declaring that the said subjects before disponed shall, after the death of the longest liver of us, be held by the said Janet M'Laurin or Stafford in trust for her own liferent use allenarly, and after her death for Ronald M'Laurin junior, and Margaret M'Arthur M'Laurin, our grandchildren, children of the deceased Ronald M'Laurin, our son, equally between them; whom failing, our other grandchildren, the children of our son Lachlan M'Laurin, and of our other daughters Catherine M'Laurin or Hunter, Agnes M'Laurin or Fleming, and the said Janet M'Laurin or Stafford, equally among the said grandchildren in fee; and further declaring, that the before-written disposition in favour of our said daughter, Janet M'Laurin or Stafford shall be burdened, as we hereby burden the same, with payment of the following provisions to our other children, namely, to the said Catherine M'Laurin or Hunter, £200 sterling; to the said Agnes M'Laurin or Fleming, £100 sterling; to the said Lachlan M'Laurin, £100 sterling; and the same shall also be burdened, as we hereby burden it, with payment of £200 sterling to our daughter-in-law Elizabeth Ferguson or M'Laurin, widow of our said son, Ronald M'Laurin; which provisions shall be payable to the parties before named in five yearly instalments, commencing at the first term of Whitsunday or Martinmas which shall happen twelve months after the death of the longest liver of us, and shall

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(Cond. 15) "At the time when the said deed was signed by the pursuers, although it was read over in their presence, as this was done rapidly and without explanation, neither of the pursuers understood its import. Mr Lawrence, who prepared the said deed, was the ordinary law-agent of the pursuers, and they relied upon his having taken care as their agent that the said deed was in strict accordance with the instructions which Mrs M'Laurin had given him. The pursuers had no idea that Mr Lawrence had been taking any instructions (as was the fact) from Dr and Mrs Stafford as to the preparation of the said deed. The defenders, Dr and Mrs Stafford, and Mr Lawrence, or one or other of them, falsely and fraudulently represented to the pursuers that the deed was merely an alteration of the testamentary settlement of May 1872 of the nature agreed to by Mrs M'Laurin as above mentioned, and the pursuers signed it in this

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be in full to our said children before named of their legitim, bairns' part of gear, and all they can ask or claim by and through the death of us or either of us; and the same shall likewise be burdened, as we hereby burden it, with payment of the sums of £300 sterling to the said Ronald M'Laurin junior, and £2000 to the said Margaret M'Arthur or M'Laurin, which sums shall be payable on the younger of them attaining the age of twenty-one years complete; . . . . and in the event of both dying before the said term of payment without leaving issue, the said provisions shall lapse and become void; and we hereby entrust the said Janet M'Laurin or Stafford with the maintenanee, education, and upbringing of the said Ronald M'Laurin junior, and Margaret M'Arthur M'Laurin, after our death, and until the arrival of the before-mentioned period, for payment of their provision to them, with power to her, in the event of her death, to appoint trustees or guardians to manage the said subjects, to which they will then succeed, until the arrival of the said period; and in respect it is our wish that she should have the custody and entire control of them, and defray, as by acceptance hereof she obliges herself to defray, the whole cost of their maintenance, education, and upbringing after our death, we hereby declare and provide that should their mother, the said Elizabeth Ferguson or M'Laurin, remove, or attempt to remove the said children from the custody of the said Janet M'Laurin or Stafford, and from under her control and management, the said provision of £200 in her favour, or the instalments thereof which may remain unpaid, shall be forfeited, and she shall have no claim thereto; and we hereby reserve to ourselves and to the survivor power to diminish the provisions before conceived in favour of our said children, daughter-in-law, and grandchildren, or to deduct from one and add to another, or to cancel and withdraw them entirely, but not so as that the total amount thereof, with which the said Janet M'Laurin or Stafford and the said subjects before disponed are burdened, shall be increased beyond the sum of £1100 sterling; and in view of its being necessary or expedient to enlarge Craig-ard Hotel, which is built upon the subjects before disponed, we reserve to ourselves power, during our joint lives, or the life of the survivor, to enlarge it, and to borrow money and grant heritable security in common form over the said subjects for the cost of the said enlargement to an extent not exceeding the sum of £2000: Declaring that after the death of the survivor of us it shall be in the power of the said Janet M'Laurin or Stafford in like manner to enlarge the said hotel, and to borrow money and grant heritable security over the said subjects for the cost thereof to the extent foresaid; and further we, the said Agnes Ferguson or M'Laurin, and Ronald M'Laurin, do hereby, but under burden of our own liferent of the premises, assign, convey, and make over to the said Janet M'Laurin or Stafford, her heirs and assignees, the whole furniture and plenishing of every kind in Craig-ard Hotel, Oban, as the same belongs to us or either of us, and that as her absolute property; but reserving to us and each of us our liferent use and enjoyment of the same; and we resign the said pieces of ground before disponed for new infeftment," &c. The deed was signed by Mr M'Laurin, and by a notary for Mrs M'Laurin, on the ground that she could not write, "never having been taught to do so."

belief. If the pursuers had known the terms of the deed, and that it was irrevocable, they would not have signed it. They never intended to execute, and never gave any authority for the preparation of an irrevocable deed; they never intended to dispose of their property in the manner set forth in said deed; they never proposed to entrust the upbringing of their grandchildren to Mrs Stafford, but, on the contrary, would have been strongly opposed to any such course; and they never desired to secure her assistance in the management of the hotel during their lives, as is falsely stated in the narrative of said deed, the business having been always conducted to their satisfaction by Mrs Ronald M'Laurin jun." (Cond. 16) "The said deed was subscribed by or for the pursuers without any consideration being granted therefor, and under essential error as to its tenor, meaning, and effect, as above set forth. The pursuers signed the said deed under essential error as aforesaid, induced by the said Dr and Mrs Stafford and Mr Lawrence, or one or other of them. They knew that the pursuers, when they subscribed the said deed, or caused it to be subscribed, did not know its tenor, meaning, or effect, and that they never authorised its delivery." (Cond. 17) "The said deed was impetrated from the pursuers by fraudulent concealment practised by the said Dr and Mrs Stafford and Mr Lawrence, or one or other of them, they well knowing that the pursuers were not aware of the tenor, meaning, and effect of the said deed, and that they would not have signed the said deed if they had been aware of its tenor, meaning, and effect. The said deed was impetrated from the pursuers by false and fraudulent representations as to the tenor, meaning, and effect of the said deed, made to them by the said Dr and Mrs Stafford and Mr Lawrence, or one or other of them, as above set forth; or otherwise Mr Lawrence, in consequence of misunderstanding Mrs M'Laurin's said instructions, or being misled by communications to him on the subject from the defenders, made under the profession that they were authorised by Mrs M'Laurin, prepared the said deed in the terms in which it was afterwards executed, under the error in fact that it was in accordance with Mrs M'Laurin's instructions, and that it gave effect to the pursuers' wishes in regard to the disposal of the estate therein mentioned, and thereafter Mr Lawrence induced the pursuers to sign the said deed under the same error in fact on his part." (Cond. 18) "After the said deed was signed by the pursuers it was taken away by Mr Lawrence, and, without any authority from the pursuers, it was put by him on the Register of Sasines on behalf of Mrs Stafford. Upon this recently coming to the knowledge of the pursuers, they became apprehensive that the deed which they had signed was of a different nature from what they had understood it to be. They thereupon took legal advice on the matter, and became aware for the first time that they had granted a *de præsenti* deed of gift in favour of Mrs Stafford. As she has refused to allow the deed to be cancelled, and insists upon her rights as proprietrix of the subjects therein conveyed, the present action has become necessary."

The defenders denied the whole material averments of the pursuers, and the following issues were, after discussion, approved of by the Lord Ordinary for the trial of the cause:—"Whether the pursuers, in granting the disposition dated on or about the 12th day of November 1874, of which No. 7 of process is an extract, were under essential error as to the tenor and effect of the said deed? Whether the pursuers were induced to grant the said deed by fraudulent concealment practised by the said Doctor and Mrs Stafford, and Robert Lawrence, or one or other of them; or false or fraudulent representations made by them, or one or other of them, as to the tenor and effect of the said deed?"

The defenders reclaimed, and after hearing before the First Division,

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the Lord President intimated that the Judges were divided in opinion whether the words "induced by the defenders" should be inserted in the first issue, as contended for by the defenders, or not. In these circumstances the case was ordered to be argued on this point before seven Judges.

The case was heard before the First Division, along with the Lord Justice-Clerk, Lord Ormidale, and Lord Gifford.

Argued for the defenders;—It was necessary for the pursuers not only to prove error, but that the error was "induced by the defenders." A mere mistake on the part of a person *sciens et prudens* would not warrant reduction. The kind of error was also generally inserted in the issue. It was different where the error was such as the party could not guard against; in that case a general issue was allowable. In the present case, if the pursuers did not know the contents of the deed they signed it was their own fault. Their own error was no reason for setting aside their deed of gift.[1]

The pursuers argued;—This was a case of pure essential error. In such a case, the deed being gratuitous, there was a case of error apart from inducement or concealment. If an agent made a mistake as to the meaning of his clients, that error would entitle them to have reduction. On the matter of "error," with the exception of the rule as to *onus*, English law was the same as our law. When the deed depended upon no antecedent obligation, but was merely derived from the granter's wish, and the granter shewed that he never intended to grant the deed, it might be voided.[2]

At advising,—

LORD PRESIDENT.—The Court are of opinion in this case that the first issue proposed by the pursuers should be approved of without the variation proposed by the defenders.

The other Judges concurred.

THE First Division pronounced an interlocutor approving of the following issues:—"Whether the pursuers, in granting the disposition dated on or about the 12th day of November 1874, of which No. 7 of process is an extract, were under essential error as to the substance and effect of the said deed? Whether the pursuers were induced to grant the said deed by fraudulent representation or fraudulent concealment practised by the defenders and Robert Lawrence, solicitor in Oban, or one or other of them?"

HAMILTON, KINNEAR, & BEATSON, W.S.—THOMAS WHITE, S.S.C.—Agents.

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[1] Maclagan v. Dixon, Dec. 4, 1832, 11 S. 165, 5 Scot. Jur. 140; Conston v. Miller, Feb. 26, 1862, 24 D. 607, 34 Scot. Jur. 302; Alexander v. Alexander, Jan. 12, 1866, 4 Macph. 291; Ritchie v. Ritchie's Trustees, Jan. 13, 1866, 4 Macph. 292; Purdon v. Rowatt's Trustees, Dec. 19, 1856, 19 D. 206, 29 Scot. Jur. 99; Munro v. Strain, Feb. 14, 1874, *ante*, i., 522; Hogg v. Campbell, March 12, 1864, 2 Macph. 848, 36 Scot. Jur. 428; Harris v. Robertson, Feb. 16, 1864, 2 Macph. 664, 36 Scot. Jur. 333; Lord Wemyss v. Campbell, June 6, 1858, 20 D. 1090, 30 Scot. Jur. 537; Waddell v. Waddell, March 17, 1863, 1 Macph. 635, 35 Scot. Jur. 337.

[2] Dickson v. Halbert, Feb. 17, 1854, 16 D. 586, 26 Scot. Jur. 266; M'Conechy v. M'Indoe, Dec. 23, 1853, 16 D. 315, 26 Scot. Jur. 145; Johnston v. Johnston, March 11, 1857, 19 D. 706, 29 Scot. Jur. 320, H. L., Feb. 10, 1860, 3 Macqueen, 619, 32 Scot. Jur. 286; Wilson v. Caledonian Railway Co., July 6, 1860, 22 D. 1408, 32 Scot. Jur. 639; Adamson v. Glasgow Water-Works Commissioners, June 23, 1859, 21 D. 1012, 31 Scot. Jur. 558; Murray v. Murray, Feb. 12, 1839, 1 D. 484, 11 Scot. Jur. 328; Gibson v. Jeyes, July 9, 1801, 6 Vesey, 276; Cooke v. Lamotte, Nov. 21, 1851, 15 Beavan, 234.

JOHN SAWYER AND OTHERS, Petitioners.—*Gloag.*
ALEXANDER SLOAN, Respondent.—*M'Laren.*

No. 49.

Dec. 17, 1875.

Sawyer, &c. v. Sloan.

Curator Bonis—Foreign Lunatic—Recall of Appointment.—A *curator bonis* was appointed to a lunatic domiciled in England in order to grant discharges of her aliment to a judicial factor on a Scotch estate. Thereafter the brother of the lunatic obtained a commission of lunacy in the Court of Chancery in England, under which committees of the person and estate were appointed to the lunatic. Upon the application of the committees of the person and estate the Court recognised their title and recalled the curator's appointment.

1st DIVISION. B.

ON 10th January 1871 Alexander Sloan, C.A., Glasgow, was appointed by the Court *curator bonis* on the estate of Miss Caroline Rae, who was a lunatic and resident in England. The petition under which Mr Sloan was appointed was presented by Miss Rae's eldest brother, since deceased, and one of her sisters. The ground of the appointment was, *inter alia*, that the sole means of maintenance of the lunatic was a sum, limited to £150 a-year, which had been bequeathed to her in liferent out of the residue of a mixed heritable and moveable estate in Scotland under the management of a judicial factor who had come in place of trustees, and that this judicial factor declined to pay over her share of the liferent of the estate on the ground that she was insane and could not grant a discharge. This petition had also contained a prayer for the appointment of a *curator bonis* to Miss Caroline Rae's sister, Miss Harriet Rae, who was also insane, and had also a right to a share of the liferent of the same estate, but that part of the prayer had been refused, because the Court of Chancery had already appointed a sister-in-law, Mrs Julia Rae, wife of the Misses Rae's brother, Alfred Rae, committee of the person to Miss Harriet Rae, and John Sawyer, public accountant, London, committee of her estate.

On 11th December 1871 Alfred Rae applied in the Court of Chancery for the appointment of committees of the person and estate of Miss Caroline Rae, as a person of unsound mind, and on 22d December Mrs Julia Rae, Alfred Rae's wife, was appointed committee of the person, and John Sawyer committee of the estate. Mr Sawyer called upon Mr Sloan, the *curator bonis*, to pay over the income of Miss Caroline Rae's share of the trust-estate to him as committee of her estate, but this Mr Sloan refused to do. Mr Sawyer then, with consent of Mrs Julia Rae, the committee of the person of Miss Caroline Rae, presented this petition to the First Division of the Court of Session on 19th November 1875, praying for the recall of Mr Sloan's appointment as *curator bonis* as being now superfluous and unnecessary. In addition to the facts above set forth the petition contained statements that Miss Caroline Rae was of English parentage and a domiciled Englishwoman, and had always resided in England, and that according to the law of England the committees of her person and estate entirely represented her.

Mr Sloan, the *curator bonis*, lodged answers to the petition, in which he admitted that the lunatic was domiciled in England, but pleaded that his appointment being prior in date to that of the petitioners in the Court of Chancery, and having been made by a Court having jurisdiction to appoint an administrator of Miss Rae's estate in Scotland, was not liable to be recalled on such grounds as were set forth in the petition; and prayed that, as the estate could be most economically managed by a continuance of the present arrangement, the prayer of the petition be refused.

Argued for the petitioners;—The *curator bonis* had only been appointed as a person who could give a valid discharge to the judicial factor for the

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lunatic's liferent income. The committees of the person and estate were now in a position to grant such discharges, and the existence of the curatory was no longer necessary. Scotch and English Courts mutually regarded Scotch and English guardianships,[1] and this English guardianship, being of a fuller and more complete description than the Scotch curatory, should be respected by the Scotch Court. The *curator bonis* had no power over the lunatic's person, whereas the committee of the person had.[2]

Argued for the *curator bonis*;—The *curator bonis* having been first appointed, and by a competent Court, and there being no averments of bad management on his part, the original appointment should stand. The only question was as to who was to administer the estate. There was nothing about personal guardianship raised in the case, so the domicile of the lunatic was of no importance. Domicile might rule in questions of succession, but the question of administration should be settled by the situation of the property.[3]

At advising,—

LORD PRESIDENT.—The appointment of *curator bonis*, which under this petition is sought to be recalled, was made on 10th January 1871, on a petition at the instance of relations, and it prayed for the appointment of a *curator bonis*, not only on the estate of Caroline but also on that of Harriet Rae, their only means being a trust-estate situated and administered in Scotland. The Court in disposing of that petition made a distinction between the cases of the two sisters. They appointed Mr Sloan as *curator bonis* to Caroline Rae, but refused to make any such appointment in the case of Harriet, the reason being that Harriet had already a guardian appointed by the Court of Chancery. It seems to me that that distinction was a proper one, and that the Court did right both in the appointment which they made and in that which they refused to make. As regards Caroline, she had not been cognosced in this country, nor made a ward of Chancery in England, and there was no one therefore to manage her affairs, so that a *curator bonis* in her case was obviously necessary. Harriet, on the other hand, had a guardian appointed by the Court of Chancery, and with a title perfectly sufficient to entitle him to take charge of her affairs. I do not think the principle of international law admits of any doubt. It is quite unnecessary that a fresh guardian should be appointed to manage personal estate, even when situated in another country. The case of heritage of course is different. Now, since Mr Sloan was appointed, Caroline Rae has come to be in the same position as her sister; she is now a ward of Chancery, and has had a personal guardian appointed to her, and in these circumstances I think the prayer of the petition must be granted. I cannot imagine any necessity for keeping up a double machinery for managing this estate. Mr Sawyer has a perfectly good

[1] Scott v. Bentley, Feb. 20, 1855, 1 Kay and Johnson, 281; Bayne v. Sutherland, June 21, 1749, M. 4595, H. L. Feb. 13, 1750, 1 Pat. App. 454; Nasmith v. Nasmith, Nov. 12, 1624, M. 4046; Rose v. Grant, June 9, 1835, 7 Scot. Jur. 403; Accountant of Court v. Geddes, June 29, 1858, 20 D. 1174; Laing v. Robertson, June 21, 1859, 31 Scot. Jur. 554; Murray v. Baillie, Feb. 24, 1849, 11 D. 710, 21 Scot. Jur. 239; Johnstone v. Beattie, Jan. 29, 1856, 18 D. 343, 28 Scot. Jur. 161.

[2] Bryce v. Grahame, Jan. 25, 1828, 6 S. 425.

[3] Preston v. Melville, March 29, 1841, 2 Rob. App. 88; Buchan v. Harvey, Dec. 21, 1839, 2 D. 275; Hay, Petitioner, July 16, 1861, 23 D. 1291, 33 Scot. Jur. 648; Stuart v. Moore, Feb. 27, 1861, 23 D. 446, 33 Scot. Jur. 445.

title, and we are bound to recognise it in this country. I am therefore for granting the prayer of the petition. No. 49. Dec. 17, 1875. Sawyer, &c. v. Sloan.

LORD DEAS, LORD ARDMILLAN, and LORD MURE concurred.

THE COURT pronounced this interlocutor:—"Recall the appointment of the said curator, and decern; and remit to the Junior Lord Ordinary to proceed farther in the matter of the petition: Find the curator entitled to his expenses in these proceedings out of the lunatic's estate: Remit to the Auditor," &c.

RONALD, RITCHIE, & ELLIS, W.S.—MACANDREW & WRIGHT, W.S.—Agents.

WILLIAM PITT DUNDAS (Registrar-General), Petitioner.—*Sol.-Gen. Watson —J. P. B. Robertson.* No. 50. Dec. 17, 1875. Dundas.

Process—17 *and* 18 *Vict. cap.* 80, *sec.* 55—*Burnt Registers.*—Procedure followed in restoring parish registers which had been destroyed.

1ST DIVISION. B.

THE manse of Glenrinnes, occupied by the Rev. Charles Bruce, the registrar of the parish, was burned down on 25th September 1875, and the whole of the registers, thirty-six in number, pertaining to births, deaths, and marriages, were destroyed, and also a register of corrected entries.

Duplicates of twenty-four registers and of the register of corrected entries were in the General Register House at Edinburgh, but the duplicates of the other twelve were in the custody of the registrar of the parish at the date of the fire, and were destroyed. The six registers pertaining to 1874 were awaiting collation by the examiner, and the six pertaining to 1875 were the current registers in the course of formation.

The Registrar-General for Scotland presented a petition to the First Division of the Court of Session under the 55th section of the Registration (Scotland) Act, 1854.*

The prayer of the petition was as follows:—"May it therefore please your Lordships to order this petition to be intimated on the walls and in the Minute-book, and thereafter, on being satisfied of the accuracy of the statements made in this petition in regard to the destruction of the said twenty-four registers, and the said register of corrected entries, to authorise new duplicates of them to be made at the sight of the petitioner, and to direct that each of the said new duplicate registers be authenticated by the signature of the petitioner; and to declare that when so authenticated they shall thereupon become, in all respects, of the same force and

* 17 and 18 Vict. cap. 80, sec. 55, enacts that "if any duplicate register in the custody of the registrar shall be lost, destroyed, or mutilated, or shall have become illegible in whole or in part, such fact shall be forthwith communicated by the registrar to the Registrar-General, who shall require the registrar immediately to transmit to him the duplicate register which shall have been mutilated or become illegible; and the Registrar-General shall thereupon present a petition to one of the Divisions of the Court of Session, setting forth the fact of the loss, destruction, mutilation, or total or partial illegibility, as the case may be, of such duplicate register, and the date of the discovery of such loss, destruction, mutilation, or total or partial illegibility of such duplicate; and the Court, on being satisfied regarding the same, and after such intimation as they may think proper, shall order such register to be corrected or completed, or a new duplicate to be made, at the sight of the Registrar-General, and such corrected or completed duplicate, or new duplicate, authenticated by the signature of the Registrar-General, shall thereupon become in all respects of the same force and validity as the original duplicate."

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validity as the originals; and with regard to the remaining twelve registers, to remit to a proper and qualified person to make inquiry, and report as above set forth, and, if satisfied with such report, your Lordships to authorise new register books to be supplied by the petitioner to the said Charles Bruce, or the registrar for the time being, who shall engross therein, in the ordinary way, the particulars of all the entries referred to in such report; and to direct that each of the said new registers be thereafter authenticated by the signature of the petitioner; and to declare that, when so authenticated, they shall have the same force and validity as the originals."

Intimation was ordered on 19th October 1875, and on 30th October the portion of the prayer in favour of holding the twenty-four new registers of the same force as the original ones was granted. On 2d November the petitioner presented a minute setting forth, "that it is proposed that the party appointed by the Court to inquire what entries the above named registers contained should (1) ascertain the actual number of events that were recorded, by communicating in person with the registrar, session-clerk, medical practitioners, sexton, and such other parties as may be found likely to possess information; (2) extract from suitable informants and documents, and insert in appropriate schedules, if possible, all the particulars required to be registered; and (3) report the result, setting forth the sources of information in each case, and transmitting such schedules to the Court."

The Court granted commission to Mr G. S. Dundas, advocate, to take evidence, and report.

Mr Dundas reported on 4th December, and on that day the petitioner was ordered to prepare new registers in duplicate from the materials furnished by his report.

On 17th December the new registers were presented to the Court, and

THIS interlocutor was pronounced:—"The Lords having resumed consideration of the petition and proceedings with the new registers prepared and presented to the Court in terms of the last interlocutor, declare that the said new registers, which are signed as relative to this interlocutor, shall have the same force and effect as the original registers for the period to which they relate, and decern."

J. AULDJO JAMIESON, W.S., Crown Agent.

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JAMES STEWART ROBERTSON, First Party.—*D.-F. Watson—Kinnear.*
JAMES STEWART ROBERTSON Junior, Second Party.—*Balfour—Asher.*
JAMES STEWART ROBERTSON AND OTHERS (Hepburn's Trustees), Third Parties.—*Mackay.*

Trust—Entail—Institute.—A testator conveyed his whole property to trustees, directing them to continue the trust during the life of his widow, and for at least ten years after his own death, and "after the death of my said wife, and while the trust shall continue to subsist," to pay an annuity to "the heir who would then be entitled to succeed to my lands [of A] under the destination after contained." The trustees were directed to entail the lands of A, and the destination was to the heirs whomsoever of the testator's body, whom failing, to J. R. and the heirs of his body, whom failing, to other substitutes. The testator further directed that, considering that J. R. was heir of entail presumptive to the lands of C, now in possession of the testator's wife, and that it was his intention that the estate of A should be held by a series of heirs different from those entitled to the estate of C, his trustees should insert in the deed of entail of A a condition

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to secure that, in the event of the succession to A opening to an heir who should be at the time proprietor of C, the right of such heir under the deed of entail to be executed should lapse as if he were naturally dead. J. R. succeeded to C by the death of the testator's wife, two years after the death of the testator. *Held* that he was thereby disqualified from claiming the annuity, and that it was payable to his eldest son as the heir entitled to succeed to A.

1ST DIVISION. B.

JOHN STEWART HEPBURN died in 1872, without issue, leaving the estate of Colquhalzie, and other landed property and personal property of considerable amount. The deceased left a trust-disposition and settlement dated in 1865, with codicils of various dates.

By the trust-disposition he conveyed his whole property, heritable and moveable, to trustees. After directions as to paying debts, &c., the sixth purpose of the trust directed that the "trustees shall make payment of the whole free income of the trust-estate to my said wife in the event of her surviving me, and that during all the days of her life;" and the seventh purpose, that the "trustees shall continue the trust hereby created during the life of my said wife, and for at least ten years after my death, although her death may occur within that time, and shall have power thereafter to continue the same for such longer period as in their own discretion they may deem expedient."

By the eighth purpose of the said trust-disposition and settlement the truster directed that, "after the death of my said wife, and while the said trust hereby created shall continue to subsist, my trustees shall apply the free rents of my lands of Colquhalzie, and, if necessary, a part of the annual produce of the other trust-estate, towards the education, maintenance, and upbringing of the heir who would then be entitled to succeed to my said lands under the destination after contained, if in minority; . . . and in the event of the heir who at the death of my said wife would be entitled to succeed to the said lands under the destination before referred to being major, or on the heir then in minority as aforesaid attaining majority, such heir, or any other heir who during the subsistence of the said trust shall for the time being be the heir entitled to succeed as aforesaid, and shall be of full age, shall be entitled to be paid by my trustees, while the said trust continues, at the rate of £200, or £250, or £300 per annum, according to their own discretion, and their judgment of his or her capacity for prudent management; . . . . and I also give power to my trustees, if satisfied of the prudence of such heir, to allow him or her the produce of the said lands of Colquhalzie, and the actual possession of the mansion-house," &c.

By the last purpose of the said trust-disposition and settlement it was provided, *inter alia*, that "on the whole of the foregoing purposes of the trust being fulfilled, the whole debts due by me or by my trustees, and the legacies bequeathed by me and by my said wife, so far as payable from my estate as aforesaid, being paid, the trust having subsisted for not less than ten years after my death, the heir for the time being entitled to succeed to my lands under the said deed of entail being major, and my trustees seeing no necessity or expediency for longer continuing the trust, then my trustees shall, as soon as convenient, divest themselves thereof as follows, viz.:—(First), My trustees shall execute a deed of strict entail of the said lands of Colquhalzie" and others in favour of the heirs whomsoever of the testator's body, whom failing, to a series of heirs.

By codicil dated in 1868 the truster (who was then in his eighty-sixth year) recalled the prior destination, and directed his trustees "to execute the said deed of entail (when the time for doing so shall arrive) to and in favour of the following series of heirs, viz., to the heirs whomsoever of my

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body, whom failing, to James Stewart Robertson of Edradynate, my second paternal cousin, and the heirs-male of his body, whom failing, to the heirs whatsoever of his body," whom failing, to the other heirs and substitutes therein specified.

The codicil also contained the following provision:—"Farther, considering that the said James Stewart Robertson is heir of entail presumptive to the lands of Cluny and others now in possession of Mrs Helen Stewart Hepburn, my wife, in virtue of a deed of entail executed by Adam Stewart of Cluny, her father, under which the heir of entail in possession thereof bears the name and title of Stewart of Cluny, and that it is my intention that the foresaid estate of Colquhalzie and others shall be held by a series of heirs different from those succeeding to the said estate of Cluny, and with the name and title of Stewart Hepburn of Colquhalzie, therefore I direct my trustees to insert in the said deed of entail to be executed by them a condition in such terms as shall in their opinion effectually provide and secure that in the event of the succession to my said lands and others opening to an heir who shall be at the time proprietor or heir of entail in possession of the said lands of Cluny and others, or of the succession to the said lands of Cluny and others opening to an heir who shall at the time be proprietor or heir of entail in possession of my said lands and others in virtue of the said deed of entail to be executed by my trustees, the right of such heir under the said last mentioned deed of entail to succession to or possession of my said lands and others shall lapse or cease and determine to the same effect as if such heir were naturally dead, and that if such heir shall be in possession of my said lands and others he shall be bound forthwith to denude himself thereof in favour of the heir who in accordance with the destination before specified would be entitled to succeed thereto as if the heir so bound to denude were then dead."

Mrs Helen Stewart Hepburn died without issue on the 21st April 1874.

On her death James Stewart Robertson succeeded to the entailed estate of Cluny.

This case was presented by him (first party), his only son, James Stewart Robertson junior (second party), and Mr Hepburn's trustees (third parties).

On behalf of the said James Stewart Robertson it was maintained that he was the party in whose favour, as institute or disponee, should he survive, the trustees would be bound to execute the entail directed to be made, and that as such he was now, and during the subsistence of the trust, entitled to all the provisions and benefits conferred by the eighth purpose of the trust-disposition and settlement of 16th August 1865, on the person, being major, who would be entitled to succeed to or acquire the truster's lands in virtue of the deed of entail to be executed as aforesaid.

On the other hand, the said James Stewart Robertson junior maintained that on a proper construction of the settlements of the said John Stewart Hepburn, before narrated, the said James Stewart Robertson junior was the party in whose favour, should he survive, the trustees would be bound to execute the deed of entail and assignation and conveyance directed to be made, and that he was now, and during the subsistence of the trust, entitled, by the eighth purpose of the trust-disposition and settlement of 16th August 1865 to all the benefits and provisions conferred upon the heir entitled to succeed to or acquire the truster's estates in virtue of the deed of entail to be executed as aforesaid.

The following questions of law were therefore submitted to the Court:—"(1) Whether the said James Stewart Robertson is, during the subsist-

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ence of the trust and his survivance, entitled to the provisions and benefits conferred by the eighth purpose of the trust-disposition and settlement of 16th August 1865? (2) Or whether the said James Stewart Robertson junior is at present entitled to the provisions and benefits conferred by the eighth purpose of the said trust-disposition and settlement and codicil?"

Argued for first party;—From the advanced age of the truster at the time of making the trust-disposition the words "to the heirs whomsoever of my body" must be taken as merely formal. James Stewart Robertson, the first party, was evidently the *persona prædilecta* and nominatim institute in the deed of entail to be executed; and the clause of exclusion or devolution which was applied to "heirs" did not apply to him. If it did he must be excluded in any event, for he could never take Colquhalzie while Mrs Hepburn was alive, and the moment she died he necessarily succeeded to Cluny. This was not a reasonable construction when the evident intention was to favour the said James Stewart Robertson.[1] Further, the question whether the first party could take or hold Colquhalzie could not arise till 1882, and no disqualification could operate against him till that date. He being therefore the person who was called first under the destination, was entitled till then to reap the intermediate benefits conferred by the eighth purpose of the trust.

Argued for the second party;—The leading purpose of the trust was to prevent the lands of Colquhalzie and Cluny being held by the same person. It was not correct to describe James Stewart Robertson as the institute, for the words "heirs whomsoever of my body" cannot be taken as meaning nothing. The term "heirs" here included the institute, being in a trust-deed and not in a deed of entail. From other portions of the deed the truster obviously so used the term.

At advising,—

LORD PRESIDENT.—The question raised by this special case is, whether MR James Stewart Robertson of Edradynate or his son is entitled to a certain provision contained in the 8th purpose of the trust-disposition and settlement of the late John Stewart Hepburn of Colquhalzie. One object of that trust-deed was to provide for the execution by the trustees of a deed of entail of the lands of Colquhalzie and others in favour of a series of heirs originally contained in the deed of trust itself, but afterwards altered by a codicil. In the codicil, which, of course, is now the ruling deed in regard to the destination, the trustees are directed to make the entail in favour of "the heirs whomsoever of my body, whom failing, to James Stewart Robertson of Edradynate, my second paternal cousin, and the heirs-male of his body, whom failing," to certain other heirs. The entailer inserted in the same codicil a clause which has given rise to the difficulty intended to be solved by the judgment in this special case. "Considering that the said James Stewart Robertson is heir of entail presumptive to the lands of Cluny and others, now in possession of Mrs Helen Stewart Hepburn, my wife, in virtue of a deed of entail executed by Adam Stewart of Cluny, her father, under which the heir of entail in possession thereof bears the name and title of Stewart of Cluny, and that it is my intention that the foresaid estate of Colquhalzie and others shall be held by a series of heirs different from those succeeding to the said estate of Cluny, and with the name and title of Stewart Hepburn of Colquhalzie, therefore I direct my trustees to insert in the said deed of

[1] Hutchison v. Hutchison, Dec. 20, 1872, 11 Macph. 229, 45 Scot. Jur. 156.

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entail to be executed by them a condition in such terms as shall in their opinion effectually provide and secure that, in the event of the succession to my said lands and others opening to an heir who shall be at the time proprietor or heir of entail in possession of the said lands of Cluny and others, or of the succession to the said lands of Cluny and others opening to an heir who shall at the time be proprietor or heir of entail in possession of my said lands and others, in virtue of the said deed of entail to be executed by my trustees, the right of such heir under the said last mentioned deed of entail to succession to or possession of my said lands and others shall lapse or cease and determine to the same effect as if such heir were naturally dead, and that if such heir shall be in possession of my said lands and others, he shall be bound forthwith to denude himself in favour of the heir who, in accordance with the destination before specified, would be entitled to succeed thereto, as if the heir so bound to denude were then dead."

Now, when the testator died, Mr Robertson of Edradynate was the heir first entitled to succeed, the testator having died without issue of his body. But when the widow, Mrs Helen Stewart Hepburn, died, Mr Stewart Robertson succeeded by that event to the estate of Cluny, and the consequence was, that under this clause he became disqualified from holding the estate of Colquhalzie. In consequence of the provision of the trust-deed, to which I am about to refer, he never was the heir in possession of the estate of Colquhalzie, and therefore he had no occasion to denude of that estate. His disqualification arose before he could take, in any view, the estate of Colquhalzie; and having become Stewart of Cluny, he thereby became absolutely disqualified from being Stewart Hepburn of Colquhalzie. The two characters are, by the will of this testator, absolutely incompatible. It is said, indeed, that Mr Stewart Robertson is not affected by this clause, because he is the institute of tailzie in the deed directed to be made,—the deed of entail of Colquhalzie, and the institute is not named in this clause of exclusion. Now, upon the construction of the clause itself, I should not have the least difficulty in holding that the institute is intended to be included. In the first place, this is not a question of the construction of a deed of entail, and therefore such authorities as the Duntreath case[1] and the long series of cases that followed upon it, have no application whatever. We are here upon the construction of a deed of trust directing trustees how they are to make an entail, and it is impossible to read this clause without seeing that it is the *enixa voluntas testatoris* that no man, be he who he may, shall combine in his own person the two irreconcileable characters of Stewart of Cluny and Hepburn of Colquhalzie. He will not have it at any time or under any circumstances; and giving effect to the intention of the testator, as we are quite entitled to do, dealing with a deed of trust like this, the result is not at all doubtful. But there is another reason why this argument cannot prevail, which I shall mention by-and-bye, when I come to the construction of the eighth purpose of the testator's trust, with which we are more immediately concerned. In the first place, it is necessary to look at the seventh purpose in order to make the eighth perfectly intelligible. The seventh is,—"That my trustees shall continue the trust hereby created during the life of my said wife, and for at least ten years after my death, although her death may occur within that time, and shall have power thereafter to continue the same for such longer period as, in their own discretion, they may deem expedient; and after the decease of my said wife they shall pay such

[1] Edmonstone v. Edmonstone, 1771, 2 Pat. 255.

legacies as she may bequeath by a writing under her hand, so far as the personal estate left by her may be insufficient for that purpose, but the payment thereof from my estate not to exceed in all £1000." And the eighth is,—"After the death of my said wife, and while the said trust hereby created shall continue to subsist, my trustees shall apply the free rents of my lands of Colquhalzie, and, if necessary, a part of the annual produce of the other trust-estate, towards the education, maintenance, and upbringing of the heir who would then be entitled to succeed to my said lands under the destination after contained, if in minority, it being my wish that the education of such heir shall include a professional education if required," &c.; and farther on he proceeds, "And in the event of the heir who at the death of my said wife would be entitled to succeed to the said lands under the destination referred to being major, or on the heir then in minority as aforesaid attaining majority, such heir, or any other heir who during the subsistence of the said trust shall for the time being be the heir entitled to succeed as aforesaid, and shall be of full age, shall be entitled to be paid by my trustees, while the said trust continues, at the rate of £200, or £250, or £300 per annum, according to their own discretion and judgment of his or her capacity for prudent management;" and then there is an alternative in the event of the heir being married, which it is not necessary to refer to. Now, it is quite plain that the person who is intended to be favoured under this eighth purpose is the heir who would be entitled to succeed at a particular time in the history of the trust—the heir who would be entitled to succeed to the estate of Colquhalzie at a particular time there fixed. The first observation that occurs here is, that if Mr Stewart Robertson is institute in the sense of not being an heir within the meaning of this trust-deed, he can take nothing under this clause, for there is nobody favoured by this clause except heirs; and, therefore, that, I apprehend, independent of all other arguments, puts an end to his contention that he is institute of tailzie, for the moment that that is affirmed he is out of Court.

But the next point for consideration is, what is the point of time in the mind of the testator at which we are to determine who is the heir who will then be entitled to succeed? Now, I do not think that is difficult to fix. It is at the death of the widow, while the trust still subsists. The death of the widow, standing the trust, is the *punctum temporis inspiciendi*. Now, what is to be ascertained then? The thing to be ascertained then is, who is the heir who would at that time be entitled to succeed under the destination after-mentioned; or, in other words, who is the heir who, "at the death of my said wife, would be entitled to succeed," for that is another form of expression contained in the clause; or again, another form of expression that is used, "who for the time being is the heir entitled to succeed as aforesaid." Now, I apprehend that under this trust-deed, with the codicil, an heir cannot be entitled to succeed, within the meaning of this clause, at the death of the widow and while the trust still exists, because, until the trust is brought to an end and the deed of entail executed, no heir can succeed—that is to say, he cannot take the estate. And, therefore, the meaning of the various expressions here used is plainly this: supposing that, at the death of the wife, the trust were to come to an end, in whose favour would the deed of entail fall to be executed in the first instance? In other words, who would be the disponee under the deed of entail supposing it to be executed at the date of the wife's death? Now, can it be maintained, under that clause of exclusion to which I have referred in the codicil that Mr

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Stewart Robertson, the father, is in that position that he could require the trustees, if the trust were then at an end, to make the deed of entail in favour of him as disponee? Upon the death of the widow he has succeeded to the estate of Cluny, and by succeeding to the estate of Cluny he is debarred for ever from taking the estate of Colquhalzie; and the plain answer, therefore, is, that he can neither demand, nor can the trustees comply with the demand, that they should execute a deed of entail in his favour. If the deed of entail fell to be executed at that point of time—viz., at the death of the wife—it would plainly fall to be executed in favour of his son, as the next heir called to the succession under the destination, and not in favour of the father. I am, therefore, for answering the first question in the negative, and the second question in the affirmative.

LORD DEAS, LORD ARDMILLAN, and LORD MURE concurred.

THIS interlocutor was pronounced:—"Find and declare that the first party is not, in the circumstances stated in the case, entitled to the provisions and benefits conferred by the eighth purpose of the trust-disposition and settlement of 16th August 1865, appended to the case: And find and declare that the second party is entitled to the provisions and benefits conferred by the eighth purpose of the said trust-disposition and settlement, and decern."

ADAM, KIRK, & ROBERTSON, W.S.—PEARSON, ROBERTSON, & FINLAY, W.S.—LINDSAY, HOWE, TYTLER, & Co., W.S.—Agents.

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Jan. 4, 1876.
Grant v. Grant's Trustees.

MRS EMILIA BAILLIE OR GRANT, First Party.—*Mackintosh.*
MISS MARIA GRANT AND OTHERS (Children of the Marriage between the late Patrick Grant and Mrs Emilia Baillie or Grant), Second Parties.—*A. J. Young.*
PATRICK GRANT AND OTHERS (Mr and Mrs Grant's Marriage-Contract Trustees), Third Parties.—*Campbell Smith.*

2D DIVISION. R.

Marriage-Contract—Trustees found bound to Denude in favour of the Primary Creditors upon Liferentrix renouncing her interest.—By antenuptial contract between Mr Patrick Grant, W.S., and his wife, the marriage-contract trustees were directed to pay to Mrs Grant, in the event of her surviving her husband, the yearly proceeds of certain funds, which, it was declared, "shall be paid to the child or children of the said intended marriage after the death of the said Emilia Baillie (Mrs Grant), in such proportions as the said Patrick Grant and Emilia Baillie may direct by any joint deed under their hand, and failing thereof the same shall be divided equally among the said children; declaring always that if any child or children of the said marriage shall die before the said sum provided to him, her, or them under these presents, or the exercise of the said power of division, shall be paid or become payable, leaving lawful issue of his, her, or their bodies, the said issue shall have right to the share of such deceasing child or children in the same manner as if such parent had received payment, or the same had become payable during the parent's lifetime."

Mr Grant predeceased his wife, leaving three children of the marriage. No deed of apportionment was executed. Mrs Grant and her children (who had all reached majority and were unmarried), being the whole parties in existence interested in the marriage-contract trust, were desirous of having the trust brought to an end, and offered to discharge the trustees for their respective interests. The trustees maintained that they were bound to keep up the trust until the arrival of the period fixed in the marriage-contract for the division of the fee of the estate. In a special

case presented by the parties, *held*, in accordance with Pretty v. Newbigging, March 2, 1854, 16 D. 667 (26 Scot. Jur. 338), that the trustees were "bound now to denude of the trust, and pay over the proceeds of the trust-estate" to Mrs Grant and her children, "on receiving a full discharge from Mrs Grant and her family for their respective interests of the whole of their intromissions and actings in usual form."

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ADAM & SANG, W.S.—HORNE, HORNE, & LYELL, W.S.—Agents.

SMITH, LAING, AND COMPANY, Pursuers.—*Balfour—Keir.*
Rear-Admiral LEWIS MAITLAND AND ANOTHER, Defenders.—*D.-F. Watson—Rutherfurd.*

No. 53.
Jan. 7, 1876.
Smith, Laing, and Co. v. Maitland, &c.

Superior and Vassal—Obligation—Relief—Public Burden—Landlord and Tenant.—A feu-charter dated in 1814 contained the following clause:—"During the existence of the present feu-right all public and parochial burdens or taxes imposed or to be imposed shall be paid by the superior and vassal as if the former was proprietor and landlord and as if the latter was tenant under him." *Held*, in an action by the vassal for relief of all poor-rates payable in respect of property, that the superior was only bound to relieve the vassal of poor-rates on the annual value of the feu-duty.

Observations (*per* Lord President and Lord Deas) as to the competency of looking behind a feu-charter at other and prior documents with a view to construing the charter.

Expenses—A. S. Dec. 19, 1835.—A Lord Ordinary ordered a minute to be lodged with regard to a branch of a case, and to a certain extent based his judgment upon matters contained in it. The Court adhered, but not upon the same grounds. The Auditor disallowed the expenses of the minute to the successful party. *Held* that he was entitled to his full expenses.

1st DIVISION. Lord Shand.

ON 5th May 1814 Charles Maitland of Rankeilour granted a feu-charter of certain subjects called Russell Mill and lands to George Moon, designed as "yarn-spinner at Russell Mill," to be held "of and under me, the said Charles Maitland, and my heirs and successors," for an annual payment of £36, 15s. in name of feu-farm duty. The charter, in addition to the usual feudal clauses, contained a provision giving the vassal full power to erect houses, mills, and machinery on the lands, and the precept of sasine was qualified with the following declarations:—"First, That the vassal for the time being shall keep the mill-dam and mill-lead always in good order, and buildings at all times on the lands hereby disponed of the value of £150 sterling; and in case of the irritancy of the present feu-right, in any manner whatever, the vassal shall put the whole houses, mills, and others, standing at the period of his removal, although exceeding in value the foresaid sum of £150 sterling, in a tenantable order and condition. Secondly, That if two full years' feu-duty shall remain unpaid after the term of payment thereof, then this present feu-right shall, in the option of the superior, cease and determine without any process of declarator for that effect, and it shall not be lawful to purge this irritancy at the bar. Thirdly, That during the existence of the present feu-right, all public and parochial burdens or taxes imposed or to be imposed shall be paid by the superior and vassal, as if the former was proprietor and landlord, and as if the latter was tenant under him. Fourth, That these declarations shall be inserted in the infeftment to follow hereon, as well as in every subsequent precept of sasine and infeftment that may be granted of and taken over the said mills, lands, and others, otherways such precept and infeftments, and deeds following thereon, shall be null, void, and of no effect."

Mr Moon was infeft on this feu-charter, and in 1864 disponed the sub-

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jects, along with two separate pendicles adjoining, to Messrs Smith, Laing, and Company, flax-spinners, who had since 1856 been in possession of the mill and lands, under agreement with him. The vassals under the feu-charter regularly paid the feu-duty of £36, 15s. up to 1871, when, having taken the view that the superior was bound, in virtue of the third declaration in the charter given above to relieve them of all poor-rates levied on the subjects in respect of property, they withheld payment of the feu-duty. The superior refused to recognise any obligation on him to relieve his vassals of proprietor's poor-rates, excepting upon £36, 15s.

In September 1874 the vassals raised an action in the Court of Session, concluding (1) for declarator that the superior was bound to relieve them of "all poor-rates imposed on or paid by the pursuers from and after 15th October 1856, or to be imposed on or to be payable by them in respect of the property of the subjects at Russell Mill belonging to and possessed by them." They also concluded for decree against the superior for payment of £143, 17s. 11d., being the amount they alleged they had paid in poor-rates in respect of property since 15th October 1856, subject, however, to deduction of the feu-duties which they had withheld.

The late James Maitland of Lindores was the then superior of the subjects, and lodged defences. He died while the action was still pending, and his heir, Rear-Admiral Lewis Maitland, and his executor and sole trustee, Mr D. M. Govan, were sisted as defenders in his place.

It was stated for the defenders, that although the annual value of the subjects at the date of the charter did not exceed £36, 15s., owing to the extensive works, &c., which had been since erected, the annual value had been increased to £480.

The Lord Ordinary, after having heard parties, appointed the defenders to lodge a minute, stating in detail the nature and value of the subjects at the date of the charter and at the present date, the pursuer to answer in eight days.

In the minute which the defenders lodged in compliance with this interlocutor they narrated the history of the feu-charter. It appeared that the authors of George Moon (the original vassal) were in possession of a tack of the subjects for 999 years from Martinmas 1803 at a rental of £36, 15s., and that of even date with the feu-charter in 1814 Moon executed a renunciation of this tack, and that the charter was granted without any payment or valuable consideration. The tack and renunciation were produced in process. The parties were at issue as to the exact annual value of the subjects, but the pursuers admitted that the value in 1873-4 was £480.

The Lord Ordinary, on 24th June, pronounced this interlocutor:—"Having considered the cause, finds that the defenders are not liable to pay to the pursuers the sums sued for beyond the proportion thereof, of which payment has been offered, in terms of the answer to article sixth of the condescendence: Therefore assoilzies the defenders from the conclusions of the action, and decerns: Finds them entitled to expenses, and remits," &c.*

* "NOTE.—The pursuers are the proprietors of Russell Mill flax-mill, Cupar-Fife, and adjoining ground, in virtue of a feu-charter granted by the late Charles Maitland, younger of Rankeilour, in 1814, in favour of the late George Moon, and titles following, and they occupy the mill and property in carrying on their business. Having paid poor-rates since they acquired the property in 1856, both as proprietors and tenants and occupants, it seems to have lately occurred to them that they had a claim of relief against the superior for the proprietor's or owner's half of these rates. Accordingly, since Whitsunday 1871, they have withheld payment of their feu-duties, and by this action they seek to have the

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The pursuers reclaimed, and argued;—The obligation undertaken was to relieve the vassal of all landlord's taxes in all time coming, and the superior found liable to relieve them of the half of the poor-rates leviable in respect of ownership since 1856, amounting, according to the state, No. 28 of process, to £143, 17s. 11d. The defender, the late James Maitland (now represented by his heir and executor, who have both sisted themselves as defenders) objected to the claim entirely for the period prior to March 1865, on the ground that Lady Maitland, who had a liferent of the superiority from 1840 till her death in 1865, drew the feu-duty annually from the pursuers, granting them receipts for the amount, and that the claim, if to be made, was a proper charge against Lady Maitland, and should have been deducted from the feu-duties paid to her. In regard to the period since March 1865, the defender offered to pay a proportion of the owner's or landlord's share of the rates effeiring to a rent of £36, 15s., being the amount of the feu-duty, and disputed his liability beyond this. The pursuers' claim is founded on a clause in the feu-charter of the property in the following terms:—'Thirdly, that during the existence of the present feu-right, all public and parochial burdens or taxes, imposed or to be imposed, shall be paid by the superior and vassal, as if the former was proprietor and landlord, and as if the latter was tenant under him.'

"This clause is expressed in unusual and peculiar terms. The vassals, as owners of the property, are of course assessed for all owner's taxes, and being occupants as well as owners, they are assessed for the full amount of all taxes, including those in respect of tenancy or occupancy to which the property is liable; but they claim relief under the clause now quoted of all owner's rates.

"In ascertaining the sound construction of the clause it is plainly competent, and it is desirable, to look at the circumstances in which the parties to the feu-contract were placed when it was entered into; for the language of the deed ought to receive the effect which the parties then intended it should receive, if in the light of the surrounding circumstances it fairly bears the meaning which will give it that effect.

"The history of the property, as appearing from the deeds produced, is this. It was let by the proprietor, Charles Maitland, Esq., younger of Rankeilour, in 1801, for 999 years from Martinmas 1803, at the rent of £36, 15s. The tenant's right belonged in 1814 to the late Mr Moon, who had purchased the tack and subjects in 1811, but without having completed his title. In 1814, the parties having the title to the lease, by renunciation dated 5th May of that year, on the narrative that 'the said George Moon has been in possession of the said mills and others since Martinmas 1811, and that it has been judged expedient to change the nature of the tenure by which the said possession is held from a tack to a feu-right, and which the proprietor has been so obliging to grant the said George Moon, therefore, to enable him to do so, and relieve the property of the said original tack,' the renunciation follows. The feu-right was granted on the same day. It thus appears that the feu-right of 1814 was merely a different form of title substituted for the previous 999 years' lease, which the proprietor agreed to grant as a favour to the tenant, without consideration or advantage. The feu-duty was the same as the old rent, viz., £36, 15s. Keeping this in view, there appears to me to be no doubt as to the true construction of the clause of relief as to public burdens. These burdens are to be divided, or, in other words, the vassal is to have relief, as if the superior 'was proprietor and landlord,' and as if the vassal 'was tenant under him,'—that is, so far as burdens are concerned, as if the relation which existed between the parties under the lease still continued, and the vassal were paying a rent of £36, 15s. in place of a feu-duty of that amount.

"Such clauses of relief are strictly construed. The pursuers must shew that the relief they ask is distinctly given by the language used. Even without the light furnished by the previous history of the property derived from the deeds produced, I do not think the clause would fairly bear the construction put on it by the pursuers, that the superior should relieve them of all owner's taxes. If that had been the agreement, it admitted of being expressed in very simple

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defenders were therefore bound to pay such taxes irrespective of the relation they might bear to the amount of the feu-duty. It could not be said that the parties to the charter had not contemplated the increase in value of the subjects, as it was expressly stated that the vassal might erect buildings and improve the subjects. Owing to the state of taxation at the time when this obligation was entered into it amounted to total relief except from one-half of the schoolmaster's salary.[1]

The Lord Ordinary had formed his judgment upon documents which he was not entitled to look at. The feu-charter was the only document which set forth the concluded contract between the parties, and it alone was to be construed.[2]

Argued for the defenders;—The true reading of this clause was, looking to the other provisions of the charter, many of which resembled those in a lease more than a feu-charter, and to the fact that at the date of the charter the parties occupied the position of landlord and tenant, that the superior was to pay landlord's taxes on £36, 15s. per annum. It was competent to read another deed not with a view to ascertaining the intention of the parties but so as to extract reliable information as to the knowledge of the parties which might assist to clear up an ambiguity.[3] The words used were not speculative, they had reference to a contract existing between the parties at the time. In all the cases cited for the pursuer the clause of relief was absolute, and had been fully intended. Here the intention had been only to divide the taxes upon £36, 15s. between the superior and vassal as if they had been landlord and tenant.

At advising,—

Lord President.—The pursuers of this action are the vassals in a feu-charter dated 5th May 1814, and they bring the action against their superior for the purpose of having it found and declared that the superior is bound to free and relieve them of all poor-rates imposed on or paid by them from and after 15th

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terms, without any reference to the relation of landlord and tenant. The superior is to relieve the vassal as if he were landlord and the vassal tenant. The relation of landlord and tenant necessarily implies a fixed rent, and the feu-duty supplies the measure of the rent. The clause must, I think, be read as if the words followed at its close 'at the rent herein stipulated as feu-duty;' for the feu-duty is as it were the rent which the parties had in view. The matter is, however, in my opinion made clear when regard is had to the circumstances in which the feu-right was granted, and which quite explain, not only why so peculiar an obligation was undertaken, but give material aid, if that be needed, in the construction of the clause.

"I am farther of opinion that as the pursuers recognised Lady Maitland's rights to the liferent income from the superiority, they were bound to retain the poor-rates in making their payment to her, if they intended to enforce such a claim. The right of liferent only gave a claim to the free income or feu-duties, and the pursuers were not entitled to pay more than they owed, and come upon the superior with a claim for sums which were proper deductions to be made annually from the feu-duty."

[1] Hunter v. Chalmers, July 16, 1858, 20 D. 1311, 30 Scot. Jur. 767; Lees v. Mackinlay, Nov. 11, 1857, 20 D. 6, 30 Scot. Jur. 10; Paterson's Trustees v. Hunter, Dec. 10, 1863, 2 Macph. 234, 36 Scot. Jur. 115; Nisbet v. Lees, June 15, 1869, 7 Macph. 881, 41 Scot. Jur. 502; Preston v. Magistrates of Edinburgh, Feb. 4, 1870, 8 Macph. 502, 42 Scot Jur. 232; Traquair's Trustees v. Heritors of Innerleithen, Dec. 13, 1870, 9 Macph. 234, 43 Scot. Jur. 121.

[2] Stewart's Trustees v. Hart, Dec. 2, 1875, *supra*, p. 192.

[3] Forlong v. Hossack, April 3, 1838, 3 Sh. and M'L. App. 177; Davidson v. Magistrates of Anstruther-Easter, Jan. 28, 1845, 7 D. 342.

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October 1856, or to be imposed in respect of the property of certain subjects at Russell Mill, possessed by them under the feu-charter.

The feu-charter is in many respects quite in common form. It feus out to the original grantee subjects called corn, barley, and lint mills, converted into a flax spinning mill, with the ground adjoining, consisting of about two acres, and the haugh, all as sometime possessed by George Moon, with the water power from the river Eden, and with full power and privilege to the grantee to erect houses, mills, and every other kind of buildings on the ground and river feued.

The subjects are to be holden "of and under me, the said Charles Maitland, and my heirs and successors whomsoever, in feu-farm, fee, and heritage for ever," and the reddendo is the sum of £36, 15s. in name of feu-farm duty. So far there is nothing remarkable in the feu-charter, and nothing bearing on the question to be decided in this action. The only part of importance is the power which is given to erect houses and every kind of buildings on the ground, which is certainly a very superfluous clause in such a charter as we are considering, as the grantee has undoubtedly the right. The peculiar part is in the later portion of the deed. After the usual feudal clauses comes a proviso that sasine is only to be given under three particular declarations, which are to be inserted in the infeftment and in every subsequent precept of sasine, and to be a real burden on the right of property. These declarations are certainly very unusual and remarkable. The first is, "that the vassal for the time being shall keep the mill-dam and mill lead always in good order, and buildings at all times on the lands hereby disponed of the value of £150 sterling, and in case of the irritancy of the present feu-right, in any manner whatever, the vassal shall put the whole houses, mills, and others, standing at the period of his removal, although exceeding in value the foresaid sum of £150 sterling, in a tenantable order and condition." This certainly is a very peculiar provision. As far as the first part is concerned it is usual, but when it is contemplated that the right may come to an end, and if the vassal be removed from the subjects he shall be bound to put them into a tenantable condition, one cannot help thinking that we are reading a lease; and when we look at the second declaration, which is "that if two full years' feu-duty shall remain unpaid after the term of payment thereof, then this present feu-right shall, in the option of the superior, cease and determine without any process of declarator for that effect, and it shall not be lawful to purge this irritancy at the bar," we seem to be dealing again with the terms of a lease. The third declaration, which provides "that during the existence of the present feu-right, all public and parochial burdens or taxes, imposed or to be imposed, shall be paid by the superior and vassal, as if the former was proprietor and landlord, and as if the latter was tenant under him," still more and more assimilates the charter to a lease, and the relations of parties to those of landlord and tenant.

It is with the third declaration that we have particularly to deal, but all of them must be taken together, because it is contended that this charter is to be read as a lease in so far as consistent with its being a feu. The right is intended to be permanent unless it be destroyed by an irritancy. As regards parochial burdens or taxes, the superior is to be considered as the landlord, and the vassal as the tenant—or otherwise, he is to pay tenant's taxes; but when these taxes come to be imposed, especially in the case of poor-rates, they are imposed, not on the annual value of the subjects to the superior, but on the annual value as

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they would let from year to year as possessed by the tenant. The pursuers—the tenants—maintain that the superior is bound to pay one half of these rates, but the defenders say the feu-charter is to be dealt with as if it were a lease in the matter of division of taxation, and the rent under that lease is £36, 15s., being the annual prestation from the tenant to the landlord. If it is to be treated as a lease with a rent stipulated to be paid, then the defender will be bound to relieve the vassal in so far as the tax on £36, 15s. will go, *i.e.*, he will just have to pay what he would have to pay if he were landlord under a lease with that as the rent. We have to decide between these two contentions.

The Lord Ordinary has found for the defender. I agree with the Lord Ordinary, but I do so on a construction of the feu-charter and without considering any of the other documents, of the competency of looking at which I have great doubts. We are told that there existed a lease of these subjects: that may be so, but the parties have departed from it. They agreed to put an end to it, and it no longer regulates their liabilities *inter se*.

The clauses in the feu-charter come to this, that, so far as consistent with the right being one in perpetuity, the superior and vassal are to stand in the same relation as if they were landlord and tenant in a lease in which the rent stipulated was £36, 15s. I think, therefore, that we should adhere.

Lord Deas.—As your Lordship has said, this is a very peculiar deed. I agree with your Lordship that some of the clauses which have been referred to are much more like clauses in a lease than in a feu-charter, and that these cannot be disregarded in its construction. In particular, I agree that in construing the third declaration as to the extent of public and parochial burdens and taxation which the vassal was to be relieved of we must calculate these as if the parties were under a lease with a rent of £36, 15s. That appears to me to be the fair and legal construction of the deed, and in coming to that conclusion I do not think we are at all interfering with what is laid down in the cases cited to us, including Lees v. Mackinlay in 1857, and the various cases that followed on that decision. I have read all these cases in considering what should be our judgment here, and I am of opinion that the fair and legal construction of this deed is what I have stated. I come to this conclusion upon the terms of the feu-charter itself, and not on the grounds assigned by the Lord Ordinary. Some of his views are, to say the least of them, doubtful in point of law, and, even if they were otherwise, they are not necessary to my view of the case.

Lord Ardmillan.—I concur in the result of the judgment of absolvitor pronounced by the Lord Ordinary, and I also agree in your Lordship's remarks.

I cannot rest my opinion on the terms of the previous lease, or on the renunciation, or on any of the documents referred to, apart from the feu-charter of 1814. The rule of law has long been authoritatively settled, that such writings, whether before or after the date of the charter, cannot be used for construction of the terms of the charter, which must speak for itself.

I do not think it necessary to express any opinion on another question in regard to the competency of ascertaining, as matter of fact, the relations of the parties to each other, and the condition of the parties relative to the subjects conveyed by the feu-charter.

It is enough for the decision of this case, to consider carefully the terms of the

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charter itself, wherein I think we can find all that is required as materials for judgment.

The structure and terms of the charter are very peculiar. Even apart from the particular clause which your Lordship has read, this deed has a dubious or mongrel aspect, combining strangely the language of a feu-right with the language of a lease. I need not again allude particularly to the stipulations in regard to buildings at removal, and to the numerous expressions and the numerous provisions and stipulations in the feu-charter, which are more appropriate and suitable to a lease than to a feu-right. Your Lordship and Lord Deas have already mentioned them.

But then, within this deed, which has already disclosed so many of the usual relations and usual stipulations of a lease, we find, on reading further, this express and very remarkable declaration,—"Thirdly, That during the existence of the present feu-right, all public and parochial burdens or taxes imposed or to be imposed shall be paid by the superior and vassal, as if the former was proprietor and landlord, and as if the latter was tenant under him." On no fair construction of this singular clause can I come to any other conclusion than that expressed by your Lordship, that, as regards public and parochial burdens or taxes, the parties have agreed that their rights and obligations shall be on the footing that the superior is dealt with as landlord, and the vassal dealt with as tenant under him, and of course that the writing which constitutes the relation between landlord and tenant, and which is called a feu-charter, is truly, *quoad* this question of the taxes, and liability for burdens, public and parochial, a species of lease. If the feu-duty of £36, 15s., payable at Whitsunday and Martinmas, is viewed as a rent, that will be in accordance with the obvious intention of the parties, gathering the intention entirely from the deed.

The superior is to relieve the vassal, as if he himself were landlord and the vassal were tenant. The relation of landlord and tenant requires and implies a rent, and here the £36, 15s. payable by the vassal as if he were tenant to the superior as if he were landlord is truly, in the meaning of the charter, and according to the intention of the parties, just a rent. I have no doubt that it was meant to be so, and I think we must hold it to be so. I think that the defenders' proposal to pay rates effeiring to a rent of £36, 15s. is a fair and equitable offer, and that the pursuers are not entitled to further relief.

LORD MURE concurred.

THE COURT adhered.

When the defenders' account of expenses came before the Auditor for taxation he disallowed all the expense incurred in connection with the above mentioned minute.[1] The defenders objected to this ruling, and on 17th February the Court sustained the objection, and allowed them the expense of the minute, on the ground that the Lord Ordinary was entitled to order the minute and answers, and had evidently taken it into consideration in forming his judgment. Moreover, the defenders had not failed in any point or branch of their case as stated on record.

WEBSTER & WILL, S.S.C.—LEBURN, HENDERSON, & WILSON, S.S.C.—Agents.

[1] A. S. Dec. 19, 1835, "General Rules in regard to the taxation of accounts."

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Jan. 8, 1876.
Roxburgh and Co. v. Barlas.

1st Division. Sheriff of Lanarkshire. M.

ROXBURGH AND COMPANY, Appellants.—*Scott—M'Laren.*
DAVID BARLAS (Young and Armstrong's Trustee), Respondents.—*Balfour.*

Process—Printing—Expenses.—In the sequestration of Young and Armstrong, spirit-merchants, Glasgow, a claim by Roxburgh and Company, creditors, having been rejected by the trustee, Mr Barlas, they appealed to the Sheriff, and afterwards from the Sheriff to the Court of Session.

When the case was called the print of the appeal, and especially the titles of the pleadings in the Sheriff Court, as printed, were found to be so imperfect that it did not appear from the print who the respondent was.

THE COURT pronounced this interlocutor:—"Having heard counsel on the note of appeal, appoint the appellants to amend the print by adding in manuscript on the margin the titles of the pleadings in the Sheriff Court, and for that purpose continue the cause till this day week: Find the appellants liable in the expenses of this day, which modify to £2, 2s. sterling, and for which sum decern against the appellants for payment to the respondent."

MORISON & KEITH, S.S.C.—FRASERS, STODART, & MACKENZIE, W.S.—Agents.

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Jan. 8, 1876.
Wilsons v. Waddell.

JOHN WILSON AND JAMES WILSON, Pursuers.—*D.-F. Watson—Lee—Harper.*
JAMES WADDELL, Defender.—*Balfour—Alison.*

Minerals—Property—Water—Mining Operations.—In an action brought by the tenants of a coal mine against the tenant of an adjoining mine belonging to the same proprietor for damage caused by water flowing into the pursuers' mine from the defender's workings, it was proved that the water consisted—(1) of the natural drainage of the defender's mine; and (2) of water collected on and diverted from the surface in consequence of the dislocation of drains and the subsidence of portions of the surface through the defender's mining operations. It was also proved that the pursuers had, with the landlord's permission, worked into and removed a natural barrier of coal between the mines, which would have prevented the flow of water complained of. *Held* that the pursuers had been in fault in destroying the barrier between the mines, and therefore that they were not entitled to recover damages from the defender.

Opinions (*per* the Lord Justice-Clerk, Lord Ormidale, and Lord Gifford), that the pursuers would not have been entitled to object to the flow of water from the defender's mine in so far as it consisted of the natural drainage of the mine when properly worked.

Opinions (*per* the Lord Justice-Clerk and Lord Ormidale), that the pursuers, if they had not been in fault, would have been entitled to damages for the injury caused by the surface water diverted from its former course by the defender's operations.

Opinion (*per* Lord Gifford) *contra*, on the ground that the defender's operations were in themselves proper, and that he was not bound to carry off the rainfall.

2d Division. Ld. Curriehill. I.

JOHN AND JAMES WILSON were tenants of a colliery at Overton, on the estate of Coltness, belonging to Mr Houldsworth, under a lease for nineteen years from Martinmas 1855. James Waddell was tenant of the adjoining colliery on the same estate for nineteen years from Martinmas 1866.

The coalfields worked by the pursuers and the defender were separated by the line of the Caledonian Railway which ran east and west. The defender's field was situated on the north side of the line and to the rise of

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the coal. That of the pursuer lay to the south of the line and to the dip of the coal.

The defender was prohibited by his lease from working the coal within five yards of the boundaries of the subjects let, and therefore within five yards of the ground belonging to the railway, which was about thirty yards broad.

The pursuers, on the other hand, were bound by their lease "not to work, without first obtaining the sanction of the proprietor, any of the coal within five yards of the boundaries of the subjects let to them, or of the Caledonian Railway."

In August 1870 the pursuers obtained the sanction of Mr Houldsworth to their working as much of the coal under the railway as was practicable, he having a reserved right to the coal and other minerals under the land belonging to the railway.

The pursuers and defender both worked the seam of coal called the "Ell" seam, which was nearest the surface, and also the "Main" seam, which was immediately below. The out-crop of the Ell seam occurred within the defender's workings. At the out-crop the Ell coal came very close to the surface of the ground. At the defender's No. 2 pit the seam was reached at a depth of 16 fathoms, and at his No. 1 pit, which was near the railway, at a depth of 46 fathoms. At the pursuers' pit the seam was not reached till a depth of 84 fathoms.

The defender was bound by the terms of his lease to work out the Ell seam to the out-crop.

The defender had worked the Ell seam by forming a large "dook" or waste adjoining the railway, whence he worked out the coal to the out-crop, removing the pillars and exhausting the coal as far as possible. On coming to the out-crop his workings caused great damage to the surface, which became much broken up into "sits" and holes. By arrangement with Mr Houldsworth these "sits" and holes were not filled up and the surface restored, as is usual in such cases, Mr Houldsworth and his mining engineer having come to the conclusion, from previous experience, that it was better for the estate, looking to the quality of the land, to plant it than to attempt to restore the surface for agricultural purposes.

The consequence of the defender's method of working out the Ell seam was, as alleged by the pursuers, that a great quantity of surface water entered the mine by the "sits" or openings in the surface, and, running down to the defender's waste at the railway, lodged there and worked its way through the barrier between the two coal-fields, and so passed into their workings, causing them great damage and inconvenience. Their averment was,—(Cond. 3) "The defender's operations in working out his said coals have caused the ground above the same to subside over an area of about five acres, and the said subsided ground forms a basin into which surface water from an area of about twenty acres falls; and the said water having no other escape, owing to the failure of the defender to make provision for its passing on, passes down through the said ground, by means of breaks, holes, or sits in the same, caused by its having subsided as aforesaid into the coal-workings or wastes of the defender, in which it collects, and thence through the barrier or wall foresaid into the foresaid mines or coal-workings of the pursuers. The said surface water consists to a large extent of water which, but for the said breaks, holes, or sits, would not come upon the said five acres. The defender has no right of servitude or otherwise in respect of which he is entitled to pass on the water as foresaid into the workings of the pursuers, and he is bound to provide for its passing over the surface of the said five acres, by making surface repairs, constructing surface drains, or other means,

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and providing pillars or other supports of the said surface in his mines. Further, the defender is bound, under the terms of his tenancy, to work out his coals as near the out-crop as can be done consistently with keeping up the surface, to work his pumps and bring them on air daily, so as to prevent as much as possible water coming through into the pursuers' workings, and to form and leave sufficient pillars under all water on the surface; and he has failed to implement his said obligations, and in consequence of his said failure the water foresaid comes into the said workings of the pursuers."

The pursuers accordingly raised this action against the defender concluding for £2000 in name of damages, and for decree ordaining the defender to repair and drain the surface of the ground under which he carried on his coal workings, in such a way "that surface water shall be carried off the said ground, and be thereby prevented passing through the same into the defender's workings foresaid or wastes therein, and thence into the pursuers' mines or coal-workings after-mentioned, and also so to carry on his said coal-workings that the ground foresaid, or any ditches or drains therein, shall not be so damaged, injured, or affected, as to permit surface water to pass down into the defender's said coal-workings or wastes foresaid, and thence into the pursuers' said mines or coal-workings; otherwise, in the event of said water passing through into the defender's said workings or wastes, he should be decerned and ordained, by decree of our said Lords, either to remove the same from his said workings or wastes, by pumping out or otherwise, or to prevent its passing thence into the mines or coal-workings of the pursuers."

The pursuers pleaded;—(1) The pursuers having suffered loss, injury, and damage through the fault of the defender, as condescended on, they are entitled to reparation. (3) The defender being bound to prevent the surface water in question coming into the mines or coal-workings of the pursuers, the pursuers are entitled to decree, in terms of one or other of the alternative conclusions of the libel.

In defence, the defender stated that he was entitled and bound, under his lease from Mr Houldsworth, the common landlord of the pursuers and the defender, to work out the Ell coal seam to the out-crop, and his whole mineral workings and relative operations were conducted in conformity with his lease, in the ordinary and proper mode, and with due and reasonable care, and that the true cause of the access of water into the pursuers' workings had been their own operations in working out the barrier of coal under the railway between the two coal fields, which admitted water not only from the defender's colliery, but from other collieries belonging to Mr Houldsworth situated to the rise of the pursuers' mineral field.

The defender pleaded;—(1) The pursuers' averments are not relevant or sufficient to support the conclusions of the summons. (2) The defender not having been in fault in reference to the matters complained of, he is entitled to be assoilzied. (3) The defender's operations having been conducted in the ordinary and proper mode, and with due and reasonable care, the action cannot be maintained. (5) The influx of water complained of being due to the pursuers' own operations, the defender is entitled to be assoilzied.

The Lord Ordinary, on 8th June 1875, allowed a proof before answer.*

* "NOTE— . . . The cause has been heard in the procedure roll upon the relevancy of the action, and, after hearing an able argument from the bar, I have come to be of opinion that, although the pursuers' averments are, notwithstanding the amendments which were allowed, still somewhat awanting in precision, they are nevertheless sufficient to entitle the pursuers to a proof before answer.

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The proof which was led established that the workings of the defender in the Ell seam had been regular and usual, except when working out the seam at the out-crop, at which place he had removed somewhat more of the pillars than was customary, and had, by special arrangement with the landlord, refrained from restoring the surface and filling up the sits, contrary to usual practice; that though the landlord had formed a catch-drain across the land draining into the area where the sits were, in order to intercept the drainage, it had been only partially successful, and that a considerable amount of surface water did get into the mine through the sits, estimated by the engineers examined at about six million gallons per annum; that the defender's pumps were only adapted for pumping the water from the Main seam, and that he had made no provision for letting the water of the Ell seam down into the Main seam for the purpose of reaching his pumps; that it all drained into his waste adjoining the railway, and there lodged against the barrier of coal between the two coal-fields, and found its way through to the pursuers' workings; that the defender had not been careful to preserve the five yards margin of coal along the railway as stipulated in his lease, but that the pursuers had, since 1870, when they received the landlord's sanction to do so, worked out the coal so far as practicable under the railway. The general bearing of the proof will also appear from the opinions of the Judges.

The Lord Ordinary pronounced this interlocutor:—"Assoilzies the defender from the conclusions of the summons, and decerns: Finds the defender entitled to expenses," &c.*

"The mutual rights and obligations of superior and inferior heritors as to the transmission and reception of water, whether flowing on the surface or underground, are not definitely fixed by the law. Each case depends very much on its own circumstances. The general rule is stated by Erskine as follows (ii. 9, sec. 2):—'Where two contiguous fields belong to two different proprietors, one of which stands upon higher ground than the other, nature itself may be said to constitute a servitude on the inferior tenement by which it is obliged to receive the water that flows from the superior. If the water, which would otherwise flow from the higher ground insensibly without hurting the inferior tenement, should be collected into one body by the owner of the superior in the natural use of his property for draining his lands or otherwise improving them, the owner of the inferior tenement, without the positive constitution of any servitude, is bound to receive that body of water on his property, though it should be damaged by it, but as this right may be overstretched in the use of it, without necessity, to the prejudice of the inferior ground, the question, how far it may be extended under peculiar circumstances, is arbitrary.' This statement of the law was referred to by the Lord Justice-Clerk (Inglis) in the case of Campbell v. Bryson, 16th December 1864, 3 Macph. 254, as expressing accurately the law of Scotland upon the subject, and it applies, in my opinion, to all water, whether superficial or subterraneous.

"The proof which is now allowed will shew whether the defender is, as the pursuers allege, violating the obligations imposed on him by his tenancy to prevent water from flowing into the pursuers' mines, or whether, and how far, the defender is overstretching the use of his right to pass on to the pursuers water which is collected in his own land in consequence of his use of the subject for mining operations.

"The proof is allowed before answer, so that all questions of relevancy are reserved."

* "NOTE.—The averments which the pursuers undertake to prove are contained in the third article of their condescendence as amended. The relevancy of these averments was discussed when the case was heard in the procedure roll, and before answer a proof was allowed. The proof has now been led, and the result, in my opinion, is, that the pursuers have failed to prove their averments, so that any decision as to their relevancy is unnecessary.

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The pursuers reclaimed.

Argued for them;—The right of the defender to work out the Ell coal to the out-crop was always under this limitation, that he must do so with

"Before considering the proof, it may be expedient to state what appears to me to be the general legal principles upon which cases like the present should be decided. No better exposition of the law can be found than in the passage from Erskine which is quoted in the note to the interlocutor of 8th June 1875. In the case of Campbell v. Bryson, also referred to in that note, the present Lord President (then Lord Justice-Clerk), in commenting upon the doctrine of Erskine, says,—'Now, I think we have here not only a statement of general doctrine applicable to the case in hand, but we have also a very careful statement of what is the proper qualification of that doctrine. In the last sentence of the passage that I have read he says that it must in every case be an arbitrary question how far this right is to be stretched under the particular circumstances. That is to say, if the inferior heritor complains that the superior heritor is unduly pressing his right and making the servitude intolerable to him, he will have the right to come to the Court with his complaint, and the Court will be entitled to regulate the matter between the two upon equitable terms. This is the true meaning, I apprehend, of the qualification which Mr Erskine adjects to the general statement of the doctrine, and to the doctrine with that qualification I unhesitatingly subscribe.' It may be that Erskine was dealing principally with questions of surface drainage; but there seems no reason why a principle applicable to surface water, and to operations upon the surface of land, should not be applied to operations under ground and to water which is found there. And, accordingly, I find that the principle has been adopted in several cases in England as the rule for decision. The first of these cases is Baird v. Williamson, 13th November 1863, 15 C. B. (N. E.), 376. There the defendant pumped water out of his mine, which was the upper mine, into a level trough, whence it flowed into the plaintiff's mine, which it never could have reached but for the pumping. In deciding the case, Erle, C. J., said,—'The owners of the higher mine have a right to work the whole mine in the usual and proper manner for the purpose of getting out any kind of mineral in any part of that mine; and they are not liable for any water which flows by gravitation into an adjoining mine from works so conducted. We think that the law was correctly laid down to that effect in Smith v. Kenrick.' Then he goes on to contrast that case with an operation of man made for the purpose of introducing foreign water on his own lands, and he goes on to say,—'The defendants, as occupiers of the higher mine, have no right to be active agents in sending water into the lower mine. The plaintiffs, as occupiers of the lower mine, are subject to no servitude of receiving water conducted by man from the higher mine. Each mine-owner has all rights of property in his mine, and among them the right to get all minerals therefrom, provided he works with skill and in the usual manner. And if, while the occupier of a higher mine exercises that right, nature causes water to flow to a lower mine, he is not responsible for this operation of nature.'

"Now, in the case of Smith v. Kenrick, 14th February 1849, 7 C. B., 515, which was thus adopted by the Court in Baird v. Williamson, an upper owner had worked out his coal, though he knew that the water from his workings must of necessity flow into his neighbour's through holes which his neighbour had made in his own coal. He was held entitled to do that; and Creswell, J., said,—'It would seem to be the natural right of each of the owners of two adjoining coal-mines, neither being subject to any servitude to the other, to work his own in the manner most convenient and beneficial to himself, although the natural consequence may be that some prejudice will accrue to the owner of the adjoining mine so long as that does not arise from the neglect or malicious conduct of the party.'

"Then, in Rylands v. Fletcher, July 1868, L. R., English and Irish App. (H. L.), vol. iii. p. 330, which contains the most authoritative exposition of the law, the defendant had made an artificial reservoir on his ground, and brought the water into his workings, whence it flowed into his neighbour's, and he was

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due regard to the interests of his underground neighbours. The evidence shewed that he had worked it out in an improper manner, that he had taken more out than was consistent with the safety of the surface, and

held responsible for that. In giving judgment Lord Chancellor Cairns said,—'The principles on which this case must be determined appear to me to be extremely simple. The defendants, treating them as the owners or occupiers of the close on which the reservoir was constructed, might lawfully have used that close for any purpose for which it might, in the ordinary course of the enjoyment of land, be used; and if, in what I may term the natural user of that land, there had been any accumulation of water, either on the surface or under ground, and if, by the operation of the laws of nature, that accumulation of water had passed off into the close occupied by the plaintiff, the plaintiff could not have complained that that result had taken place. If he had desired to guard himself against it, it would have lain upon him to have done so by leaving or by interposing some barrier between his close and the close of the defendants in order to have prevented that operation of the laws of nature.

"'As an illustration of that principle I may refer to a case which was cited in the argument before your Lordships—the case of Smith v. Kenrick, in the Court of Common Pleas.

"'On the other hand, if the defendants, not stopping at the natural use of their close, had desired to use it for any purpose, which I may term a non-natural use, for the purpose of introducing into the close that which, in its natural condition, was not in or upon it, for the purpose of introducing water, either above or below ground, in quantities and in a manner not the result of any work or operation on or under the land, and if, in consequence of their doing so, or in consequence of any imperfection in the mode of their doing so, the water came to escape, and so pass off into the close of the plaintiff, then it appears to me that that which the defendants were doing they were doing at their own peril, and if, in the course of their doing it, the evil arose to which I have referred—the evil, namely, of the escape of the water, and its passing away to the close of the plaintiff and injuring the plaintiff, then, for the consequence of that, in my opinion, the defendants would be liable. As the case of Smith v. Kenrick is an illustration of the first principle to which I have referred, so also the second principle to which I have referred is well illustrated by another case in the same Court—the case of Baird v. Williamson—which was also cited in the argument at the bar.'

"The next two cases (to which I do not think it necessary to refer more particularly, because they are merely illustrations of these principles) are Crompton v. Lee, 4th November 1874, L. R., 19 Equity Cases, 115; and Smith v. Fletcher, 11th February 1874, L. R., 9 Exchequer Cases, p. 64,—the question in the latter case being left to the jury whether what was done by the defendants was done by them in the ordinary, reasonable, and proper mode of working the mine.

"The main question, therefore, in the present case is, were the operations of the defender conducted by him in the usual reasonable and proper mode of working his mine? I think that after the evidence of Mr Landale, one of the witnesses for the pursuers—and the evidence, indeed, of all the witnesses—it is impossible to say that the workings of the Ell coal at the out-crop (because that is said by the pursuers to be the *origo mali*) were not done in the usual reasonable and proper—and, indeed, as Mr Landale says—in the necessary manner. It was an obligation imposed upon the defender in his lease that he should work out his coal to the out-crop; and Mr Landale, who superintends these matters for Mr Houldsworth, the landlord, seems to have gone with him to the ground, and arranged that it should be worked out in this particular manner, which he says was the usual manner of working it out. The object of both landlord and tenant was to get as much coal as possible, and the only way of doing so was by removing the pillars. Owing to the proximity of the out-crop of the coal to the surface, and the friable nature of the roof, it was impossible to take out every pillar—or at least to take out every pillar in its order—and the consequence was that some pillars remained while the ground crushed in round about them. That

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that he had made no attempt to restore the surface, and obviate the results of its subsidence. That result undoubtedly was, that during the last three or four years the pursuers' workings had been flooded with a

resulted in inequalities, and in some instances in holes, in the surface of the ground. I think the pursuers have undoubtedly proved that, through the sits thus occasioned, water to some extent found it way into the defender's mine. But I do not think it is proved that very much found its way there, and Mr Landale is clear that little or none of that water found its way into the pursuers' mines. Still I think that some of the water did find its way to the pursuers' mines, and the pursuers are entitled to the benefit of that consideration, whatever it may be worth. I think, however, that the pursuers have failed to prove that any water entered the sits except what fell upon the surface of the subsided ground in the shape of rain or snow. It therefore appears to me that, so far as regards the mining operations of the defender, they are proved to have been usual, reasonable, and necessary operations, and to have been performed in the usual and proper course of working this mine. There does not appear to me to be any proof whatever of anything like *æmulatio vicini* in his working, or of any undue interference with the rights of his neighbour, Mr Wilson. No doubt Mr Landale said it would have been more neighbourly if he had deferred the excavation of the pillars at the dook or lower part of the Ell coal waste, where the Caledonian Railway forms the barrier between the fields of the pursuers and defender, until a later period of his lease; but Mr Landale also admitted that there was no impropriety in working it out in that way, that it was a very tempting piece of coal to take out, and that he (Mr Landale), who regularly inspected the workings on behalf of Mr Houldsworth, the common landlord of the pursuers and defender, never objected to it, but, on the contrary, was quite satisfied with the way in which the defender had conducted the operations as tenant. I therefore think that the proof is in favour of the defender upon that matter. He has not, in my opinion, overstretched his rights; indeed, everything seems to have been done by the defender which he was bound to do—and even more, because he seems to have taken certain precautions to prevent, so far as possible, the surface water from higher ground from going down to the pursuers' coal-field. The catch-drain, to which many of the witnesses refer as having been made immediately above the sits at the out-crop of the Ell coal, appears, no doubt, to have been made by the landlord; but that, I suppose, was done by arrangement between the landlord and the defender. And it certainly prevented a great deal of water from flowing down which would naturally have flowed down into those sits, but which must have been carried away by the catch-drain, and so been kept out of the sits. But, besides that, I think there can be no doubt that a considerable part of the water in the defender's Ell workings, from whatever source it comes, is carried off into a lodgment which has been referred to at the side of the pit No. 1, and from that it finds its way down to the defender's Main coal, whence it is pumped up to the surface, and carried away entirely from the pursuers' mine.

"But even assuming that the whole of the surface water which finds its way through the sits into the defender's Ell workings is not so disposed of, and that a part, or even the whole, finds its way into the pursuers' coal-field, the question remains, Is there any duty upon the defender to do anything more? Is it his duty either to fill up the sits which have been made, or to take the water which enters by these sits into the bottom of his own works, and then pump it up again? Now, I do not see any duty incumbent upon him to fill up the sits. The object of filling up sits is, in the general case, to restore the surface so that it may be used again for agricultural purposes. But that is a matter in which the tenant of the coal has no interest, unless the landlord and the tenant of the surface require the restoration. In a coal-field adjoining the defender's, belonging to the same landlord, and tenanted by a person named Boyd, it has been proved that sits were filled up, but that the landlord and his mining engineer came to the conclusion that it was a mistake to do so, and that it was better for the sake of the estate to leave the ground as it had fallen in and to plant it.

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quantity of water which was not proper mine water, but which was water introduced from the surface into the defender's workings, and allowed to collect in his waste in such a manner as to force its way into the pursuers' workings, and put them to great inconvenience and expense. Undoubtedly a proprietor might give to a tenant whose lease was earlier in date greater privileges than to one whose lease was later. But, apart from special stipulations, the rights of conterminous tenants were just the same as those of conterminous and independent proprietors. Though the defender's lease was earlier in date than the pursuers', he could point to nothing in it which gave him any special privilege, except the obligation to work out the Ell coal to the out-crop, which, he contended, entitled him to do so to the injury of the pursuers. But his obligation so to work out the seam could give him no right which the proprietor himself had not—could not entitle him to work in an improper manner, to the injury of the inferior tenant. The question must therefore be dealt with as if it had occurred between two conterminous proprietors. Now, the rights and liabilities of superior and inferior heritor were the same below ground as on the surface. The superior tenant above ground was entitled to send down and the inferior heritor was bound to receive the natural run of surface water, whether from streams or from natural or agricultural drainage. So the superior heritor below ground was entitled to send down and the inferior heritor was bound to receive the natural run of underground water, even when arising from the drainage of mining operations. But there was no legal obligation on the inferior heritor below ground to receive the run of surface water, directed into his mine artificially or as the

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And accordingly they resolved that the sits on the defender's coal-field should not be filled up. But, apart from this, I can see no obligation upon the tenant of the coal-mine, who has done his duty under the lease in working his coal out to the out-crop, to do anything in the way of restoring the surface, if his landlord does not call upon him to do so; and if water finds its way in by the operations of nature—the water from the heavens, for really, I think, that is all that is proved to come in this particular case—if it finds its way into the inner workings in that manner, that is just the result of the proper working of the mine, and the defender is not to be held responsible for it. Nor do I see any reason for calling upon him to pump out water which does his own workings no harm, and does not interfere with his winning the coal. He does, as I have said, all that is necessary for his own purposes, and in the usual and proper manner, and that, I think, is all that he is bound to do.

"It is right to say that Mr Landale, whose testimony is entitled to great weight in this case, is of opinion that of the water which finds its way from the defender's Ell workings into the pursuers' coal-field a very small quantity is surface water, and that the bulk of it is the natural product of the coal and surrounding strata, and that he attributes the influx of water not to the sits at the out-crop, which the pursuers blame, but to the removal of the pillars in the defender's waste at the dip of the Ell workings, 46 fathoms under ground, an operation which the defender was quite entitled to perform. It is, further, not immaterial to observe that the alleged increase of water in the pursuers' mine was contemporaneous not only with the sits caused by the defender working out his Ell coal at the out-crop, but also with the pursuers' own operations, by which they excavated a large portion of the coal under the Caledonian Railway, which by their lease was intended to form a barrier between their coal-field and that of the defender. Mr Landale, no doubt, thinks that enough coal was left to form a sufficient barrier, but very many of the other witnesses are satisfied that if the pursuers had not wrought out the coal under the railway little or no water would have permeated to their mine.

"On the whole, I think that the pursuers have failed to prove their averments, and that the defender must be assoilzied, with expenses."

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result of improper and negligent working. That was a burden which the law did not impose on him. If the defender's contention was sustained, there was nothing which could prevent him interrupting the course of a surface stream or river and letting its volume into the pursuers' mine, to the entire destruction of his workings. None of the authorities referred to on the other side touched the case. They all dealt with surface water running on the surface, or with underground water running underground.[1]

Argued for the defender;—He was bound by his lease to take out the Ell coal to the out-crop. His lease was prior in date to the pursuers', and the pursuers, in taking their lease, must be held to have undertaken the risk of injury to the subject let to them from operations which the superior tenant was already bound to the common landlord to perform. At any rate, if they had any claim it was not against the defender, but against the common landlord. But there was nothing in the evidence to shew that the working of the defender in the Ell seam, from his commencement at the waste adjoining the railway to the out-crop, had not been proper, regular, and usual. The filling up of sits which must necessarily occur is not an invariable practice, and the proprietor, from having tried it with no good effect in adjoining coal-fields, had desired that it should not be done, as he believed it to be a mere waste of time and labour. Further, the inferior proprietor or tenant underground was bound to receive all water that came down to him as the drainage of superior workings properly carried on. That was all the burden which, in the present case, the pursuers had to bear. The water which came down to them was just the drainage which resulted from the proper working of the defender's mine. That some portion of the water, and that must be a very small one, came more directly from the surface, made no matter. The pursuers had no grounds for their distinction between surface and underground water. All water was the same; its atoms were going in a perpetual circle. They were drawn up to the heavens and again descended on the surface of the earth, whence they found their way by percolation to the strata below ground. It made no difference that the water dripped in through crevices in the surface, instead of gradually percolating through. But there was another point to be considered: Even on the assumption that injury had occurred to the pursuers through the fault of the defender, the pursuers had themselves materially contributed to that injury by working away the barrier between the two coal-fields. Had they left the barrier of the coal beneath the railway and five yards on either side, which was contemplated by all parties when the leases of 1855 and 1860 were entered into, there would have been sufficient to keep out the water of which the pursuers were now complaining, and to retain it in the defender's waste. They were therefore guilty of contributory fault, without

[1] Stair, 2, 7, 8; Ersk. 2, 9, 2; Dig. 39, 3, 1 (13); Campbell v. Bryson, Dec. 16, 1864, 3 Macph. 254, 37 Scot. Jur. 121; Baird v. Williamson, Nov. 13, 1863, 15 Scott's C. B. Rep. (new ser.) 376; Fletcher v. Rylands, May 14, 1866, L. R., 1 Ex. 265, and July 17, 1868, L. R., 3 Eng. and Ir. Ap. 330; Smith v. Fletcher, Feb. 11, 1874, L. R., 9 Ex. 64; Crompton v. Lea, Nov. 25, 1874, L. R., 19 Eq. 115; Samuel v. Edinburgh and Glasgow Railway Co., Dec. 12, 1850, 13 D. 312, 23 Scot. Jur. 125; Cowan v. Lord Kinnaird, Dec. 15, 1865, 4 Macph. 236, 38 Scot. Jur. 131; Bald v. Alloa Coal Co. and E. of Mar, May 30, 1854, 16 D. 870, 26 Scot. Jur. 437; Irvine v. Leadhills Mining Co., March 11, 1856, 18 D. 833 (*vide* p. 841); Blair v. Hunter, Finlay, and Co., Nov. 29, 1870, 9 Macph. 204, 43 Scot. Jur. 169; Mackenzie v. Woddrop, Jan. 24, 1854, 16 D. 381, 26 Scot. Jur. 180; Hamilton v. Turner and Monklands Iron Co., July 19, 1867, 5 Macph. 1086, 39 Scot. Jur. 621; Brand v. Bell's Trustees, Nov. 6, 1872, 11 Macph. 42, 45 Scot. Jur. 34.

which the injury complained of would not have been suffered. They were therefore barred from recovering in this action.[1]

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At advising—

LORD ORMIDALE.—In this case some questions of importance have been raised in relation to the respective rights of the pursuers and the defender as coterminous lessees of different parts of the same coal-field.

The leases of both parties are held from Mr Houldsworth of Coltness. The defender's lease is considerably earlier in date than the pursuers', being for nineteen years from Martinmas 1855, while the pursuers' is for nineteen years from Martinmas 1860.

The defender's workings are situated on the north to the rise, and the pursuers' on the south to the dip. The Caledonian railway passes between them, from west to east.

The pursuers are expressly taken bound by their lease "not to work, without first obtaining the sanction of the landlord, any of the coal within five yards of the boundary of the subjects let or of the Caledonian railway." In like manner the defender is bound by one of the conditions of his lease "not to work any of the minerals within five yards of the boundaries of the subjects let." Having regard to these boundaries and to the explanations given at the debate in connection with plans and other evidence, the barrier or ground contemplated to exist between the two collieries in question extended in breadth to at least 40 yards.

The pursuers conclude against the defender, *inter alia*, for £2000 of damages; and the grounds of their action, as stated in the third article of their condescendence, are to the effect that "the defender's operations in working out his said coals have caused the ground above the same to subside over an area of five acres, and the said subsided ground forms a basin into which surface water from an area of about twenty acres falls; and the said water having no other escape, owing to the failure of the defender to make provision for its passing on, passes down through the said ground, by means of breaks, holes, or sits in the same, caused by its having subsided as aforesaid, into the coal workings or wastes of the defender, in which it collects, and thence through the barrier or wall into the mines or workings of the pursuers." On the other hand, the defender, while he generally denies the pursuers' statements, and maintains that his own workings have been regular and proper, avers, in his answer to the second article of the condescendence, "that the pursuers, whose mineral field lies along the line of the railway on the south or south-west side thereof, have at various times and in different localities worked out the barrier stipulated under their lease to be left unwrought, namely, the coal under the ground occupied by the railway, the result of which operations has been to admit of the access of water to the pursuers' workings, not only from the workings of the defender, but also from those occupied by the Coltness Iron Company and those formerly occupied by William Boyd and G. Simpson, mineral tenants of Mr Houldsworth, all situated to

[1] Smith v. Kenrick, Feb. 14, 1849, 7 Scott's C. B. Rep. 515; Chasemore v. Richards, July 27, 1859, 7 Clark's H. of L. Rep. 349 (Lord Ch. Chelmsford's judgment); Rawstron v. Taylor, June 23, 1855, 11 Hurl. and Gor. Ex. Rep. 369; Acton v. Blundell, 1843, 12 Mee. and Wels. 324; Aitken v. Dewar, 1734, Elch. *voce* Property, 1, and 2 Bell's Ill. 119; Broadbent v. Ramsbotham, Jan. 12, 1856, 11 Hurl. and Gor. Ex. Rep. 602.

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the rise of the pursuers' mineral field." And, in reference to this statement, the defender's fifth plea is, that "the influx of water complained of being due to the pursuers' own operations, the defender is entitled to absolvitor."

How far the respective statements of the parties have been established depends on the view that may be taken of the proof. Without deeming it necessary to enter into a minute examination or analysis of the proof, I think it sufficiently shews, 1st, that in consequence of the defender's operations to the rise at the out-crop of the Ell coal, a considerable subsidence of the ground and numerous sits or holes occurred; 2d, that the defender took no means, or, at any rate, no effectual means, for filling up or securing the sits or holes so caused; and 3d, that the consequence was the coming down into his workings of a larger quantity of surface water, which, finding its way through the division barrier, passed on into the pursuers' workings, to their loss and damage. If the case had rested there I should have been disposed to adopt a different view from that of the Lord Ordinary, and to have held that the defender was liable in reparation to the pursuers. But in saying so I do not feel that I require to question the general principle of law upon which the Lord Ordinary proceeds. On the contrary, I concur with him in holding that, as a general principle, every one is entitled to use and enjoy his own property in every lawful way he pleases. This principle is not, however, to be taken as of universal or unqualified application. On the contrary, while every one is, as a general rule, entitled to use and enjoy his own property in every lawful way he pleases, he can only do so subject to the qualification that he does not unnecessarily, and by operations of an unusual and improper description, injure his neighbours or their property. As stated by Mr Bell (Prin., sec. 964), the absolute use of property is subject to many well known and well established limitations. While, therefore, an upper heritor is entitled, in the usual and proper cultivation of his lands, to collect into drains the water arising thereon and pass it down upon the lands of another situated at a lower level, as illustrated by the recent case of Campbell v. Bryson, Dec. 16, 1864, 3 Macph. 254, he is not entitled so to construct works as to collect the water on his property into a large and unusual quantity, and then, either purposely or owing to its not having been sufficiently secured or safely carried away, to allow it to overflow on adjoining lands, to the injury and damage of the owner or occupier thereof, as illustrated by the case of Samuel v. The Edinburgh and Glasgow Railway Company, March 3, 1849, 11 D. 968, and Dec. 12, 1850, 13 D. 312. Accordingly, in the present instance, I cannot hold that the defender, as long as he confined his operations within the boundaries of his own portion of the coal-field, and so long as these operations were in themselves of a usual, reasonable, and proper character, could be made answerable for loss or damage arising to the pursuers as lessees of that portion of the coal-field situated at a lower level in consequence of water coming down into it from his (the defender's) mineral field situated above, providing that the water so coming down was only the natural and necessary product of the higher field. But if the water so coming down and causing loss and damage to the pursuers, as lessees of the minerals situated at the lower level, was not the natural product of and did not arise in the defender's mine, but was foreign water, so to speak, introduced into his mine from the surface, through operations of the defender carried on in an unusual, unreasonable, and improper manner, and thence passed into the pursuers' workings, I should hold it clear that the defender would be liable in the consequences. The case of Smith v. Fletcher and others, Feb. 11, 1874, Law

Reports, 9 Exch. Cases, p. 64, is an authority in point, for in that case, which was very similar in its circumstances to the present, it was held by the Court that the question for the jury was, "whether what was done by the defendants was done by them in the ordinary reasonable and proper mode of working the mine."

Applying the principles to which I have now adverted to the present case it appears to me, on the proof, that there was negligence and blame imputable to the defender in allowing the sits or holes in the ground which, in consequence of his operations, had subsided at the surface, to remain open and unsecured so as to admit large quantities of water, not the natural product of his mine, into his workings, and thence to pass on into the workings of the pursuers, to their loss and damage; or, in other words, I think the proof shews that, in not filling up and securing the sits or holes, his operations were not usual, reasonable, or proper. Mr Robertson, the pursuers' engineer, says:—"I observed that the defender's workings at and near the out-crop of the Ell seam had caused the ground to subside in a very irregular manner. There were large holes in it. The irregularity had been caused by the Ell pillars underneath having been taken out in an irregular manner." And he then proceeds to explain how, in consequence, a very large quantity of water entered the defender's mine which would not otherwise have been there, and thence passed through the barrier into the pursuers' workings. And he afterwards states:—"In practice, it is contrary to regular and good working to allow irregular sits or holes to remain at the out-crop." And—"So far as I saw, there had been nothing unusual or improper in the defender's working of the coal; but, with regard to the crop working and leaving these open sits, it had been decidedly improper." And afterwards—"The object in filling up sits is to keep the surface water out, so as to prevent it interfering with the working of contiguous collieries." Mr Landale, the landlord's engineer, as I read his evidence, substantially corroborates Mr Robertson, and I would especially refer to what he says. When asked if it is "consistent with usage that surface water should be introduced into mines," he answers, "No." Mr David Rankine, another engineer, says—"The rain water that gets into these pits goes into Waddell's (the defender's) Ell coal workings. I have frequently seen ground pitted, not so bad as this, however, but I never saw ground allowed to remain in such a state. It is generally filled up." There is more evidence to the same effect, and there is no direct or sufficient contradiction of it anywhere that I can discover.

I am not, however, to be understood as saying that the defender was not entitled to work out the whole coal of his field to the very out-crop, and, in the course of his operations for that purpose, to create sits or holes, and thereby introduce, irrespective of the pursuers or their interests, into his own mine, any quantity of water he pleased, provided he secured it there, and prevented it passing down into the pursuers' workings; but not having done this, I could have entertained very little doubt, having regard to the authorities which were referred to at the debate, that, if the case had been left there, he would have been liable to the pursuers for the injurious consequences thereby sustained by them. Thus, in the case of Fletcher v. Rylands and another, as decided in the Exchequer Chamber (Law Reports, 1 Ex. Cases, p. 265), and House of Lords (Law Reports, 3 English and Irish Appeals, p. 330), it was held (1) that where the owner of land, without wilfulness or negligence, uses his land in the ordinary manner of its use, though mischief should thereby be occasioned to his neighbour, he will

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not be held liable in damages; but (2) that if he brings upon his land anything which would not naturally come upon it, and which is in itself dangerous and may become mischievous if not kept under proper control, though in doing so he may act without personal wilfulness or negligence, he will be liable in damages for any mischief thereby occasioned; and (3) that on these principles the owner of a mill situated above mine workings who, on constructing a reservoir on his own ground, by neglecting to secure and fill up certain old shafts or openings, allowed a quantity of water to go down into the mine below, was held liable in the damages thereby occasioned. The ground upon which this liability was found is explained by the Lord Chancellor, where he says that if the defendants, not stopping at the natural use of their close, had desired to use it for the purpose of introducing water which in its natural condition was not in or upon it, "and if, in consequence of their doing so, or in consequence of any imperfection in the mode of their doing so, the water came to escape and to pass off into the close of the plaintiff, then it appears to me that that which the defendants were doing they were doing at their own peril; and if, in the course of their doing it, the evil arose to which I have referred—the evil, namely, of the escape of water, and its passing away to the close of the plaintiff, and injuring the plaintiff—then for the consequences of that, in my opinion, the defendants would be liable."

The principle of decision in that case applies, I think, to the circumstances of the present. Here, as in it, what may be called foreign water—that is, water which did not naturally arise in or was the natural product of the defender's mine—accumulated on the ground above, which had subsided, and in which there were openings or sits caused by his operations, in the conduct of which he had neglected the usual reasonable and proper precautions, was introduced or allowed to come into his mine, and thence to pass into the pursuers', to their loss and damage. For that loss and damage, therefore, I would have been disposed to hold the defender liable were it not for the pursuers' own acts, now to be noticed, which appear to me to have been of such a description as to bar and preclude their claim for reparation.

It has been clearly proved, I think, that the pursuers, in place of keeping within the boundaries of their own coal-field, and leaving the barrier betwixt it and the coal-field of the defender intact and untouched, which if they had done no loss or damage would have arisen to them, not only encroached on that barrier, but in the course of their operations worked nearly through and destroyed it. On this point it might be sufficient to refer to the evidence of the engineer, William Robertson, their own witness, who says, in answer to a question from the Court, "If a barrier had been left between the coal-fields of the pursuers and defender of the full width of the railway and five yards on each side, I think it would have kept the water pretty well out. I do not think the pursuers would have been troubled with water in that case. I was in the pursuers' workings immediately to the south of the railway. According to the plan the five yards barrier upon their side has not been left. It is all out, and, besides that, the coal under the railway has been cut into from the pursuers' side. There has also been similar working from the defender's side. The plans shew that the barrier mentioned in the leases has been disregarded by both parties. Through the barrier being reduced in this way the passage of water is very much facilitated." Mr Telfer, the pursuers' manager, and also a witness called and examined for them, says,—"I do not know of any agreement by which the pur-

suers wrought out some of the coal under the railway, but I remember working out coal there. We wrought out the coal under the railway opposite the defender's waste north-westwards from the Waterloo Road, which crosses the railway between Benthead and Overtown. We finished our workings under the railway opposite the defender's waste a few months ago." And although this witness, the pursuers' own manager, goes on afterwards to state that the coming in of water from the defender's waste did not increase through the encroachment on the barrier, I must, from the nature of such an operation, as well as from the evidence of other witnesses, hold he is mistaken in this. Mr Landale the engineer, also called as a witness for the pursuers, removes indeed any doubt that could be entertained on the subject.

I cannot therefore have any hesitation in holding that the pursuers seriously encroached upon the barrier that ought to have been left between them and the defender's mine, and that such encroachment was, to a great extent, if not entirely, the cause of the inroad of water upon them, of which they complain. And if so, they must be held to have brought the mischief upon themselves, and are consequently barred in law from maintaining the claim for damages now concluded for by them in the present action. Nor do I think it of any consequence that the defender also encroached on the barrier, of which there is some evidence, although scarcely enough to be altogether relied on, for beyond all question the pursuers, if they were not the sole transgressors in this respect, were so to by far the greater extent, and cannot, therefore, maintain a claim for loss or damage resulting from their own contributory fault.

It was argued, however, for the pursuers that as they, by separate agreement dated 16th August 1870 with their landlord, obtained his permission to work out the coal under the railway, their doing so cannot be any fault on their part. I am unable to concur in this view. The landlord's permission may be a good answer by the pursuers to any claim of damages against them at his instance, but I am unable to see how it can avail them in the present dispute with the defender, who was no party to the alleged agreement. It was, besides, entered into by the pursuers and their landlord long subsequent to the defender's lease, and after a great deal of water had, in the knowledge of the pursuers, accumulated in his waste. It must therefore, I think, be considered, as in a question with the defender and in reference to his rights and interests, a reckless and improper proceeding on the part of the pursuers, with or without the permission of their landlord, to interfere, as they did, with the barrier between their and the defender's workings.

The result is that in my opinion the interlocutor of the Lord Ordinary ought to be adhered to, although not for the reasons assigned by him.

LORD GIFFORD.—I have come to the same conclusion, although perhaps on somewhat wider grounds, and I agree that the interlocutor of the Lord Ordinary, assoilzieing the defenders from the conclusions of the summons, must be affirmed.

I agree with the opinion just expressed by Lord Ormidale, that the pursuers have failed to prove that the loss and injury which they have sustained on account of the water which has flowed into the pursuers' workings from the workings of the defender, which are at a higher level, has been occasioned by the fault of the defender. The pursuers were bound to trace the damage complained of directly to the defender's fault,—that is, to shew that the damage was occasioned solely and directly by the illegal conduct of the defender,—and, I

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think, the pursuers have failed to do this. On the contrary, I agree in thinking that to some extent at least the pursuers have themselves contributed to or facilitated the flow of water of which they complain. Instead of leaving the broad barrier below the railway, which naturally separates the upper part of the coal from the lower, and leaving 5 yards in addition of unwrought mineral, probably making in all a barrier of from 30 to 40 yards, the pursuers have chosen, under special bargain with the landlord, to work out the whole, or nearly the whole, barrier under the railway, and it is impossible to doubt that there being now no barrier or only a very thin barrier from the rise to the dip portions of the seam, water from the upper portion must flow directly and freely into the pursuers' workings.

But I am prepared to rest the judgment upon a broader ground. I think that the defender in everything he did in working the upper seams, that is, the seams to the rise from the railway, has acted legally, and that although the consequence of such legal working may be that additional water finds its way into the workings to the dip from the railway the defender is not answerable for this, and not liable in damages to the pursuers.

Admittedly where a dipping seam or seams of coal belong to different proprietors or are let to different tenants without any special stipulation as to water the lower part of the seam must receive all the water that flows naturally into it from the upper part, and if the proprietor or tenant of the upper part works out the whole coal therein he may do so without leaving pillars or without making any provision whatever for the water which may naturally accumulate in or flow through the wastes. If the whole coal is taken out either by the longwall system or by finally removing the pillars this will cause subsidence and dislocate the upper strata to a greater or less degree, so as to occasion a much greater percolation of water, which will necessarily find its way to the lower workings, than would have been the case had the coal been left unwrought, or if the wastes had been supported by pillars. Still this is just one of the natural burdens which lower coal workings must sustain. They must take the water that comes in the course of ordinary legal working, be it more or less, and no claim will arise though the quantity of water be increased by the workings of the upper coal owner.

Accordingly, in the present case, it was ultimately conceded in argument, and, whether conceded or not, I think it is quite clear in law, that the pursuers have no claim whatever against the defender on account of the defender having first taken out the coal in the dook, and then removed the dook pillars. It is plain, on the evidence, that this operation largely increased the flow of water into the pursuers' workings, chiefly by dislocating the superjacent strata, and also by creating a reservoir, as it were, a great accumulation of water, with great pressure of the water, which ultimately forced its way through the barrier. Still, the defender's workings being legitimate, no claim for damage can result.

In like manner the other workings of the defender seems to me to have been equally legal, equally within the powers and rights as mineral tenant, and equally incapable of founding a claim of damages at the pursuers' instance. I think this is the result of the evidence. The defender did nothing that he could have been interdicted from doing—nothing unusual or improper, so far as merely working the minerals is concerned.

Ultimately the point chiefly relied on by the pursuers was that the defender, in working out his coal to or very near the surface, broke up the surface of the

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ground so as not only to destroy the whole agricultural drains but so as to leave deep pits or gullies, or, as they are sometimes called in the evidence, plumps or ditches, over a considerable extent of surface—that the defender failed to repair the drainage, and failed to fill up these pits or gullies, plumps or ditches, so that the rain water falling in or near the fields where the surface was so destroyed found its way into the coal workings of the defender, and from thence into the inferior coal workings of the pursuers.

It is of this water, this surface water flowing in through the sits or plumps, that the pursuers complain, and on account of this they claim damages. I am of opinion that this claim is not well founded.

It was hardly contended,—I think it cannot successfully be contended,—that the defender was not entitled to break down the surface, or to crack and rend it by taking out the coal at or near the out-crop. I think it is clear that the defender was entitled to take out every ounce of coal to the very surface,—that is, to the very out-crop,—however much this operation might injure the surface. With the question of surface or agricultural damage the pursuers have nothing to do. Now, according to the evidence, the coal at the out-crop could not be taken out without producing serious injury to the surface to a greater or less degree, and ultimately the pursuers' contention was that after these pits or gullies were made the defender was bound to have filled them up again so as to prevent rain water from flowing into them, and from them into the workings.

Now, I cannot find grounds in law sufficient to lay this obligation on the defender. I take the matter in steps. Thus: Suppose the surface at and near the out-crop had never been drained at all, that is, had no agricultural drains constructed. Of course it can never be maintained that a proprietor is bound, or could be compelled to make agricultural drains in his own ground for the sole benefit or behoof of a neighbouring mineral owner. In like manner, and as the next step, suppose that the previously existing agricultural drains have been cracked or destroyed by the subsidence from the mineral workings below: an adjoining mineral owner could never compel the replacement or repair of these agricultural drains if the proprietors of the injured surface refused to do so. Now, this failure or declinature to repair the agricultural drains is really part of what the pursuers complain of in the present case. The agricultural drains near the out-crop were broken and dislocated, and were not repaired. No doubt it is usual to repair such drains, and this is the ordinary practice, but then this is done for the benefit of the surface, or of the farmer, and not in the least in the interest of an adjoining mineral owner. The adjoining mineral owner has nothing to do with this, although, if the drains were repaired, he would derive benefit by water being carried off that would otherwise reach his workings.

Now, to take the last step, is the case different when, by means of legal mineral workings, not only are the agricultural drains destroyed, but besides cracks and rents, it may be of considerable size, are made in the surface of the ground: Can a neighbouring mineral owner who has no right either to that surface or to the minerals immediately below it, insist that these cracks and rents shall be filled up at the expense of the miner who made them, or of his landlord? I think not. They may increase the water which reaches the neighbouring mines, and which would otherwise flow somewhere else over the surface, but this is an accidental burden which the inferior mine-owner must bear.

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For,—and this is the essential point,—no water goes down these sits or cracks but the natural rain water of the field where they are situated. This seems to me to be the cardinal distinction. If the defender, by breaking up his own surface, had tapped a river or a streamlet, or any established flow of water coming from a distance, the case would have been otherwise. So, if the defender had tapped a lake, a pond, or a reservoir, he would have been bound to keep it from entering his pits, if by so doing it would reach the pursuers' workings. But there is no such rule with the raindrops which fall on the surface above the defender's own workings. There is no obligation to carry these raindrops—the natural rainfall of that surface—anywhere else. In the sense of this argument the rainfall of the defender's surface, that is, the surface above the mines, is not "foreign water" wrongfully introduced. It is natural water belonging to the surface, and which the defender is under no obligation to prevent from percolating below. In the present case there is no question regarding any other water than the natural rainfall of the field at the out-crop. The defender and his landlord have arranged, for their own benefit, to leave that field with disturbed and unrestored surface,—in short, to sacrifice the surface, as it is called, as that surface agriculturally is not worth the restoration. I think they are entitled to do so without being liable in damages to the pursuers.

LORD JUSTICE-CLERK.—I concur in the first ground of judgment stated by Lord Gifford. My opinion is the same as that of Lord Ormidale. I could not hold that the working of the defender has been entirely regular. On the contrary, there is a good deal of evidence tending to shew that it has not been in accordance with ordinary custom. But the pursuers have failed to trace the damage they have sustained to the defender's conduct; and besides, I think they themselves are to blame for a great portion of it, by reason of the way in which they have dealt with the coal barrier at the railway.

LORD NEAVES was absent.

THE COURT adhered.

HENRY BUCHAN, S.S.C.—JOHN GILL, S.S.C.—Agents.

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Houldsworth v. Brand's Trustees.

JAMES HOULDSWORTH, Pursuer.—*D.-F. Watson—Balfour—Mackintosh.* WILLIAM BAIN AND OTHERS (Alexander Brand's Trustees), Defenders.—*Asher—Moncreiff.*

Landlord and Tenant—Lease—Minerals—Refusal to remove—Violent profits—Bona fide consumption—Reparation—Damages.—It was agreed between the landlord and tenant of a colliery that in the event of the tenant's death during the currency of the lease the landlord should be entitled to resume possession of the colliery, "if he should at any time be dissatisfied with the working thereof by the representatives" of the tenant. The tenant having died, the landlord, twelve months thereafter, intimated by letter to his representatives that he was dissatisfied with their working of the colliery, and had resolved to resume possession thereof in terms of the agreement. The tenant's representatives refused to cede possession, and defended an action raised against them by the landlord, on the grounds (1) that the landlord was bound to prove a reasonable cause of dissatisfaction with their working; (2) that in point of fact no reasonable cause for dissatisfaction existed; and (3) that the landlord's expression of dissatisfaction was not made *in bona fide*. The Lord Ordinary

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gave judgment against the representatives of the tenant, and, on their reclaiming, his interlocutor was adhered to by the Inner-House. In a second action at the instance of the landlord against the tenant's representatives concluding for a sum of £10,000 in respect that having wrongfully retained possession they were liable in violent profits, and, *separatim*, that the landlord having suffered loss by their wrongful retention of possession they were liable to him in damages, *held* (1) that the landlord's remedy against the defenders was not a claim for violent profits but for damages for breach of contract in not removing in terms of the agreement, and (2) that in the circumstances he was entitled to damages.

Bona fide Consumption.—*Observed* (*per* Lord Justice-Clerk) that the rules as to *bona fide* possession and consumption, as a defence against a claim for violent profits, to be deduced from the judgments of the House of Lords in regard to the Queensberry leases (2 Shaw's App. p. 43, *et seq.*), and from the series of decisions which have followed, were, first, that where the possession has commenced in good faith, it lies with the true owner to shew when it ceases to be in good faith before the right to demand violent profits can prevail; second, that when possession has been continued during a litigation regarding the title of the possessor, it is sufficient to support the possessor's plea of *bona fides* that he had a *probabilis causa litigandi*; and third, that these principles are equally applicable whether the possession be challenged in respect of want of title in the possessor's author, or in respect of the nature and conditions of his own right.

2D DIVISION. Ld. Curriehill. I.

SEQUEL of case reported May 18, 1875, *ante*, vol. ii. p. 683.

The late Robert Brand was tenant under the pursuer, James Houldsworth of Coltness, of the Greenhead Ell coal and fire-clay in a portion of the estate of Coltness. The rights of the parties were defined by lease dated 9th and 28th November 1867 and minute of agreement dated 5th October 1869, to which the pursuer's father, Henry Houldsworth, and Robert Brand were parties. This latter deed provided,—"First, that on the event of the death of the said Robert Brand during the currency of the lease the landlord is hereby empowered, if he so wishes, to enter on and resume possession of the colliery and other subjects of the lease, at a valuation as afterwards provided for, if he should at any time be dissatisfied with the working thereof by the representatives of the said Robert Brand."

Robert Brand died on 26th January 1873, having conveyed his whole means and estate to trustees for behoof of his son, Robert Brand junior.

Robert Brand junior died on 3d July 1873, a minor and unmarried, leaving a trust-disposition and settlement. The lease of the colliery was, however, claimed by his uncle, Alexander Brand, the immediate younger brother of Robert Brand senior, as being heritage, and therefore not carried by the settlement of Robert Brand junior.

Alexander Brand died on 5th November 1873, leaving a trust-disposition and settlement, whereby he conveyed his whole means and estate to the defenders, William Bain and others, as trustees.

On 19th January 1874 the colliery, which had been, since the death of Robert Brand senior on 26th January 1873, managed by his trustees, was handed over, by agreement among the parties interested, to the trustees of Alexander Brand, who thereafter worked it for behoof of the trust-estate under their management.

On 3d February 1874 the pursuer, James Houldsworth, by his agents, Messrs Murray, Beith, and Murray, W.S., addressed to each of the defenders the following letter:—"Sir, We beg leave to intimate to you, as one of the trustees of the late Alexander Brand, miner, residing in Wishaw, that Mr Houldsworth of Coltness is dissatisfied with the working of the Greenhead Colliery by the representatives of the late Mr Robert Brand, and has resolved to resume possession thereof, in accordance with

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the power to that effect contained in the minute of agreement entered into between himself and the late Mr Robert Brand, dated 5th October 1869.

"You are aware that Mr David Landale, M.E., Edinburgh, on the part of Mr Houldsworth, and Mr John Mackenzie, M.E., Glasgow, on the part of Mr Brand's representatives, are, by the minute of agreement, appointed arbiters for valuing the pits, plant, and others, connected with the said colliery, and we have to intimate that we have placed the principal minute of agreement in the hands of Mr Landale, and a copy of it in the hands of Mr Mackenzie, and have asked them to name an oversman in case of their differing in opinion, and also to fix an early day for proceeding with the valuation.—Yours, &c."

The defenders disputed Mr Houldsworth's right to resume possession, and accordingly Mr Houldsworth, on 25th April 1874, raised an action to have his right to enter on and resume possession of the minerals declared, and to have the defenders ordained to concur in having a valuation of the colliery plant, as provided for in the agreement of 5th October 1869, proceeded with, and to remove. To this action the defenders entered appearance, and lodged defences, in which they maintained (1) that according to the legal effect and construction of the clause in the minute of agreement founded on by Mr Houldsworth he was bound to prove a reasonable cause of dissatisfaction; (2) that in point of fact there was no reasonable cause for dissatisfaction; and (3) that the dissatisfaction expressed by Mr Houldsworth was not in reality and *bona fide* entertained by him, but was only assumed for his own purposes.

After a proof the Lord Ordinary (Shand), on 15th January 1875, pronounced this interlocutor:—"Finds that by minute of agreement dated 5th October 1869, entered into between the pursuer, proprietor of the estate of Coltness, and the late Robert Brand, coalmaster, Wishaw, with reference to the lease of Greenhead Colliery, then current, and which had been granted to the said Robert Brand, and Jonathan Hyslop, coalmaster, Wishaw, it was provided, *inter alia*, that in the event of the death of the said Robert Brand, the pursuer was thereby empowered, if he so wished, to enter on and resume possession of the colliery, and other subjects of the said lease of the Greenhead Colliery at a valuation as therein provided for, if he should at any time thereafter be dissatisfied with the working of the colliery: Finds that the said Robert Brand died on 26th January 1873: Finds that, in exercise of the powers conferred on him by said minute of agreement, the pursuer, by letter dated 3d February 1874, sent by his directions and authority by his agents to the defenders, intimated that he was dissatisfied with the working of the said colliery by the representatives of the said Robert Brand, and had resolved to resume possession of the colliery in accordance with the power to that effect contained in said minute of agreement: Finds that the defenders have failed to instruct that the pursuer was not at the date of the said notice truly dissatisfied with the working of said colliery by the representatives of the said Robert Brand, and that the said notice was not given by the pursuer *in bona fide*: Therefore decerns in terms of the declaratory conclusions of the summons, ordains the defenders to concur with the pursuer in taking steps for having a valuation of the plant and machinery connected with the colliery, including waggons, if any, ascertained, in terms of the said minute of agreement, and decerns *ad interim*: Finds the pursuer entitled to expenses," &c.

The defenders reclaimed, but on 18th May 1875 the Second Division refused their reclaiming note, and adhered to the Lord Ordinary's interlocutor, and remitted the cause back to him.

The present action was raised on 25th May 1875 by James Houlds-

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worth of Coltness, with consent and concurrence of Mrs Jessie Robertson or Brand, widow of Robert Brand senior, to whom, at the date of the intimation of 3d February 1874, he had agreed to let the colliery, against the defenders, Alexander Brand's trustees, concluding that they should be decerned to make payment to him of £10,000.

In support of the conclusion of this action the pursuer stated;—(Cond. 15) "The retention by the defenders of possession of the said colliery subsequent to the pursuer's said notice of 3d February 1874 was wrongful and without right or title. By and through their said retention of possession the defenders have been enabled to make large profits by the working of the said colliery. The said profits are violent profits, and amount to not less than the sum of £10,000. The pursuer has sustained loss, injury, and damage not less than is represented by that amount, by and through the said wrongful proceedings of the defenders." *

The pursuer pleaded;—(1) The defenders having wrongfully retained possession of the said colliery after their right to do so had ceased, and after being duly called upon to cede possession to the pursuer, are liable for violent profits to the amount sued for. (2) *Separatim*, the pursuer having suffered loss and damage to the amount sued for by the defenders' wrongful retention of possession, he is entitled to decree, as concluded for.

The defenders denied that they were liable either for violent profits or damages, and averred that they had "acted throughout with perfect *bona fides*, believing that there were no grounds for dissatisfaction on the part of the landlord, and that he was not entitled to put an end to the lease."

The defenders pleaded;—(2) The question of the pursuer's right to terminate said lease having been one attended with difficulty, and the defenders having retained possession of the subjects let in the *bona fide* belief that the lease could not be terminated without their consent, the defenders should be assoilzied.

The Lord Ordinary, on 26th July 1875, pronounced this interlocutor:—"Finds that from and after the 15th day of January 1875, being the date of the judgment of the Lord Ordinary, Shand, decerning in terms of the declaratory conclusions in the action of declarator and removing at the instance of the pursuer against the present defenders and others, the defenders have wrongfully retained possession of the pursuer's colliery of which they were the tenants: Finds that the defenders are liable for violent profits in respect of the retention of possession as aforesaid from the said 15th January 1875 to the day of their removal, due allowance being made in estimating such profits for the time occupied by the valuation of the plant and machinery, in terms of said interlocutor of Lord Shand, provided the valuation has not been or shall not be unduly protracted or obstructed on the part of the defenders; and before further answer appoints the cause to be enrolled for further procedure, reserving in the meantime all questions of expenses; grants leave to both parties or either of them to reclaim against this interlocutor if so advised." †

* After the judgment of the Second Division on 18th May 1875 in the former action at Mr Houldsworth's instance the defenders intimated that they were ready to remove from the colliery so soon as the valuation of the plant and machinery had been completed, and the amount thereof paid to them, as provided for in the minute of 5th October 1869. The necessary steps for having the valuation proceeded with were taken, and the valuation was in course of being made while the present action was proceeding, but the valuation had not been completed, nor had the defenders removed from the colliery at the date of this judgment.

† NOTE.— . . . . . "In the present action the pursuer sues the defenders

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The pursuer reclaimed.

Argued for him;—(1) This was not a lease of an agricultural subject yielding fruits. It was rather a sale than a lease, under which the grantee was entitled not merely to use and enjoy the subject *salva rei substantia*, but to consume and carry away what was *pars soli*. There was no case which dealt with violent profits in relation to a case of this sort except that of the Duchess of Roxburgh (Feb. 17, 1815, F.C.), which was decided in very special circumstances. And in a case like this the grantee must be much more strictly dealt with, else the granter may lose not only the enjoyment of his subject for a period, but the very subject itself.[1] (2) The defenders had no *probabilis causa litigandi* in opposing the pursuer's

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for £10,000, which, he says, represents the amount due by the defenders as violent profits from the date of the notice on 3d February 1874, or as damages caused by the wrongous retention of possession since that time. The defenders plead that their opposition to the action of declarator and removing was made and continued in the *bona fide* belief that the lease could not be put an end to without their consent; and that as the questions raised were attended with difficulty, their retention was not wrongous, and they are not liable either for violent profits or for damages.

"The authorities referred to both by the pursuer and by the defenders are the well-known cases of the Queensberry leases and the Durris leases, and one or two others of similar character, which are all cited in a note to Mr Nicolson's edition of Erskine, ii. vi., sec. 54. The result of these cases appears to be that the liability of a tenant for violent profits depends upon his *bona fides*, and is always a question of circumstances; and in such questions it is not material whether the validity or subsistence of the case depends upon the title of the landlord to grant the lease, or upon the construction of the lease itself. See the opinion of the Lord Chancellor in the case of Carnegie v. Scott, 9th December 1830, 4 W. and S., 431.

"The rule which seems to have been applied in all these cases was, that where the judgment of the Court of Session sustaining the leases was appealed to the House of Lords and reversed, the liability for violent profits did not begin till the date of the judgment of the House of Lords; but where the Court of Session had reduced the leases, and their judgment was affirmed by the House of Lords, the liability was held to begin at the date of the judgment of the Court of Session. I can see no good reason why a similar rule should not be applied to cases like the present, where the Lord Ordinary has decided that the landlord was entitled to terminate the lease, and the Inner-House have affirmed the judgment. I am therefore of opinion that the *bona fides* of the defenders must be held to have ceased at the date of the adverse interlocutor of the Lord Ordinary on 15th January 1875, and that they are liable for violent profits—in other words, for damages for wrongous retention of possession from that date. On the other hand, I do not think that, in the circumstances of this case, the pursuer is entitled to claim violent profits from the date of his notice in February 1874. The Lord Ordinary who decided the declarator found considerable difficulty in giving the pursuer the decree he asked; and I think the defenders, in their fiduciary and tutorial capacities, were fairly entitled to try the question, but they were not bound to carry the litigation into the Inner-House. What shall be held to be the amount due by the defenders as violent profits or damages must be the subject of proof, and I think that in fixing the amount the time occupied by the valuation, if conducted without unreasonable delay or obstruction on the part of the defenders, must be taken into account. I do not think that the defenders are bound to cede possession until the plant and machinery are valued and paid for, and accordingly decree of removing has not been pronounced by Lord Shand; but, on the other hand, they are not entitled to be unnecessarily tardy in proceeding with the valuation."

[1] Wardlaw v. Wardlaw's Trustees, Jan. 23, 1875, *ante*, vol. ii. 368; Cairns v. Howden, Dec. 15, 1870, 9 Macph. 284, 43 Scot. Jur. 134.

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former action. They had full means of knowledge, and could not help knowing that the pursuer had good ground of dissatisfaction. There was no question of construction on which they were entitled to a judgment. (3) It therefore came to this, that in order to set up their own *bona fides* the defenders were obliged to prove the pursuer's *mala fides*. Now, they had failed even to throw suspicion upon the pursuer's *bona fides* in the matter, as was clear from the opinions of the Court in the former action. They were liable therefore in violent profits from the date of the notice of 3d February 1874, or at least from the date of the summons in the former action. They had been held wrong throughout, and it was only in cases where the defender had succeeded in getting at least one judgment in his favour that liability for violent profits had ever been postponed.[1]

Argued for the defenders;—Before finding the defenders liable in violent profits the Court must be satisfied that they were *in mala fide* in continuing possession,—that there was *conscientia rei alienæ*.[2] If, and so long as, they had *probabilis causa litigandi*, they were entitled to continue possession. Now, at the date of the pursuer's notice, 3d February 1874, and at the date of raising the summons in the former action, 25th April 1874, the defenders clearly had a *probabilis causa litigandi*. It was one thing to hold a possessor who has no title, whose title was intrinsically null, and another thing to find a possessor whose title is voidable merely, liable in violent profits. In this case the question whether the defenders' title was voidable depended upon a question of construction of documents, and a question of construction was in the same position as an extrinsic objection to title.[3] The objector's interpretation must be established to be correct. Now, the grounds on which the defenders resisted the pursuer's objection were that he was bound to shew reasonable grounds for his expressed dissatisfaction, that no such reasonable grounds existed in fact, and that he did not really entertain any *bona fide* dissatisfaction. The conduct of the pursuer and his correspondence, produced in the first action, gave the defenders good grounds for believing that the pursuer really had nothing to object to in their working, and was not *in bona fide* in expressing dissatisfaction. The remaining point was whether under the agreement of 1869 he was bound to shew reasonable grounds for his expressed dissatisfaction or not. This was a fair question to try. It was one which, the Lord Ordinary had admitted, was attended with difficulty, and on which he gave his judgment with evident hesitation. Not only therefore were the defenders, in their capacity as trustees, entitled but bound to take the judgment of the Lord Ordinary and also of the Inner-House before they ceded possession of a valuable portion of the estate entrusted to them. Until the judgment of the Inner-House on 18th May 1875, therefore, they could not be held *in mala fide* or liable in violent profits, and immediately after that date, namely, on 25th May 1875, they had offered to cede possession as soon as the requisite valuations, &c., stipulated in the deed of 1869, could be completed.

At advising,—

LORD JUSTICE-CLERK.—This is a case which is the sequel of a former one, in which we found that the defenders, as mineral tenants under the pursuer, were bound to remove in terms of a minute of agreement entered into between the

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[1] Innes v. Duke of Gordon's Executors, Nov. 10, 1830, 4 W. and S. 305.

[2] Duke of Queensberry's Executors v. Symington, March 10, 1824, 2 S. App. 80 (Lord Chancellor's opinion, p. 90); Hunter, vol. ii. p. 493.

[3] Carnegie v. Scott, Dec. 9, 1830, 4 W. and S. 431.

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pursuer's father and the defenders' author. We held that the pursuer, as landlord, had exercised his right legally and effectually. Mr Houldsworth now concludes against the defenders for £10,000. He does not say in his summons precisely on what grounds his demand is made. But in his pleas in law he says that the defenders having wrongfully retained possession are liable in violent profits to the amount sued for; and *separatim*, that, having suffered damage to the amount sued for by reason of the defenders' wrongful retention of possession, he is entitled to decree as concluded for. The Lord Ordinary has found the defenders liable in violent profits from the date of the Lord Ordinary's interlocutor in the former action at Mr Houldsworth's instance, but not before that date.

The question is attended with considerable difficulty. I find myself in the position of agreeing entirely in the exposition of the law contained in the note of the Lord Ordinary, and even in his application of it to the defence here stated, in some of its aspects, and yet being unable to concur in the result at which he has arrived.

The doctrine by which one who has no right to possess is protected by his reasonable and honest belief in the validity of his right, from a demand by the true owner for fruits reaped and consumed, is primarily applicable to rights in land, and the produce of the soil. "Bona fide possessor fructus facit perceptos et consumptos suos" is the expression of the rule on which the doctrine proceeds, and it is obviously directed to fruits which are periodically produced, and which from their nature are consumed as they arise. The rule has, however, received a wide effect, but the branch of it which we are here considering is the application of it as a defence by a possessor, against a demand by an owner, for violent profits,—that is, a claim at the instance of the owner for a penal accounting for fruits reaped and profits obtained by a possessor who has refused or failed to remove at his stipulated term, or who has possessed throughout without a valid title. Violent profits are profits acquired by violence—by an intruder without colour of law, who must account on the strictest footing. Since the well-known judgments of the House of Lords in the Queensberry leases, and the series of decisions which followed, there has really been no uncertainty as to the law on this subject, or the rules laid down by authority for our guidance. They may be stated thus,—First, when the possession has commenced in good faith it lies with the true owner to shew when it ceased to be so before the right to demand violent profits can prevail. Secondly, when possession has been continued during a litigation regarding the title of the possessor, it is sufficient to support the possessor's plea of *bona fides* that he had *probabilis causa litigandi*; and third, that the principle is equally applicable, whether the possession be challenged in respect of want of title in the possessor's author, or in respect of the nature and conditions of his own right. In regard to the first of these rules, as to the burden of proof, it was clearly announced by the House of Lords as the ground of decision in the cases regarding the Queensberry leases; and I cannot better express the rule itself, or the import of the judgment of the House of Lords as universally accepted, than by quoting the words of Lord Justice-Clerk Boyle in the case of Carnegie v. Scott in 1827. "None of your Lordships can doubt," he said, and with the entire acquiescence of the Court, "the general principle, now unalterably fixed by a series *rerum judicatarum* in this Court, and deliberately confirmed in the Queensberry and March cases (which proceeded on the general principle); and the party pursuing therefore must shew that his opponent was *in mala fide*." As to the second rule, it

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is laid down in specific terms by Erskine, that in a prosecution for violent profits the decree will be restricted to the yearly tack-duty, if the tenant has a *probabilis causa litigandi*, and this rule has been uniformly followed. In regard to the third of these rules a struggle was made in several cases which occurred shortly after the decisions in the Queensberry and March cases to limit the application of this principle of *bona fide* possession to cases in which the title of the tenant's author was challenged; but these attempts were uniformly unsuccessful, and the reverse has now been conclusively fixed by a uniform series of judgments, especially the case of Brisbane's Trustees v. Lead (7 S. 65) in 1828, and the judgment of Lord Brougham in the case of Carnegie in 1830, which has set the question at rest. The case of Brisbane is of itself conclusive, for the challenge there proceeded on a condition contained in the tenant's own tack, by which the landlord reserved right to feu portions of the farm, and the *bona fides* of the tenant was sustained to protect him from a demand for violent profits, although he had continued in possession six years after the challenge until the expiration of the tack. Lord Brougham's judgment in the case of Carnegie, however, leaves no room for question. He says, after speaking of objections to the author's title,—"But there is also another head on which the lease is not valid to convey the interest sought to be established by it, and that is, that the construction of the lease itself in point of law does not give the right contended for to the lessee; but I do not see, on principle, any distinction whatever between those sources of invalidity in the title of the lessee."—(4 W. and S. 440).

As regards the application of these principles to the plea of *bona fides* in this case, I see no reason whatever to doubt that the defenders had a *probabilis causa litigandi*. Their defence, although one in its result, consisted of three branches. First, they pleaded that the disputed clause in the lease put on the landlord the obligation of proving a reasonable ground of dissatisfaction, and this they maintained on the legal effect and construction of the condition. Secondly, they maintained in point of fact, on the proof, that there was no reasonable ground for his dissatisfaction; and, lastly, they maintained that the landlord's dissatisfaction was feigned, and not genuine, and this ground they supported, partly as a necessary consequence or corollary from the absence of reasonable ground of dissatisfaction, and partly on the fact that a similar notice had been served on them some months before, at a time when no dissatisfaction had been expressed, and when, as appeared afterwards, it was at least doubtful whether any was entertained by the landlord.

We repelled these pleas after argument, and for reasons expressed in a very anxious advising, in which we all delivered full opinions. I was of opinion, on the first ground, that the landlord was not bound to allege or prove any reason for his dissatisfaction, although the precise scope and construction of the condition was far from being free of difficulty. On the second, I thought the landlord had good reason to be dissatisfied; and on the third, that the landlord had entirely vindicated his good faith in the transaction. But in common with the Lord Ordinary, and, as I understood, the rest of your Lordships, I thought, and still think, that the case deserved and required the full consideration it received. The Lord Ordinary expressed the difficulty he had experienced. One of your Lordships in speaking of the condition of the lease, said, in emphatic terms, that the clause was very peculiar, and that it was not easy to understand exactly what the parties intended; and another of my brethren stated that he

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arrived at his conclusion latterly without any doubt. In short, it never occurred to me to regard the litigation otherwise than as raising questions of moment, which the parties were well entitled to try.

The Lord Ordinary has given the defence of *bona fide* possession the most restricted effect of which it is capable, in limiting it to the period prior to the judgment of the Lord Ordinary in January 1875. It can be of no moment, as regards this period, that there were no conflicting decisions subsequently. These, had they occurred, might have extended the period to which the plea applied, but they could have no other effect. In the well-known case of the Durris leases, as in many others, the losing party never had a judgment in his favour; nevertheless, he was only found bound to account from the date of the decree of the Court setting aside his lease.

I am therefore of opinion that in so far as this is an action for violent profits the defence of *bona fide* possession is sufficient to protect the tenants until their title was the subject of decision. But I had an impression throughout the argument, and am now quite satisfied, that the true claim of the landlord here is not one for violent profits in any sense; that it is not necessary for him to assail the tenant as mere intruders, but that his demand truly rests on a breach of a mercantile contract, of which the defenders have been guilty, and to the consequences of which *bona fides* never can be a defence. The pursuer's claim, therefore, arises on his second plea in law, and is limited to the actual loss which he can shew that he has sustained by the defenders' failure to remove in terms of their contract. To such a claim for reparation it is irrelevant to allege that the defenders read the contract otherwise. It is enough that their reading of it was wrong, and that they acted on their error to the injury of the other party to the contract. I forbear to inquire, for it is not necessary to do so, how far the analogy of a proper agricultural lease will extend in all its effects to a lease of a subject which yields no periodical produce, which has no reproductive power, and under which the tenant appropriates not the increment or fruits of the property, but the property itself. Questions of difficulty under this head may arise, and I reserve my opinion on them. But here the true interest which alone the landlord has any just claim to assert is so obvious that it requires no subtle distinction or analogies to establish it. He was deprived of the advantage of being able to let the mineral field on a new lease, which, indeed, seems to have been provisionally concluded, and the intended tenant is a consenter to the action. For the amount of any increased lordship or rent which he might thereby have obtained I think his claim is unanswerable, and that, in truth, is the measure of any legitimate interest he has in the action. I propose, therefore, that we should recall the Lord Ordinary's interlocutor, and find that the pursuer is entitled to recover from the defenders damages for such injury as he may have sustained through the wrongful retention of possession by the defenders, and before further answer allow a proof to both parties in regard to the amount of such damage.

Lord Ormidale.—The present action is a sequel to the judgment pronounced by this Court in May last (4th series, Court of Session Cases, vol. ii. p. 683), in a former suit between the same parties, in which it was found that the present pursuer, Mr Houldsworth, was entitled to terminate the mineral lease in question by his intimating to the tenants his dissatisfaction with the working thereof; and it is not disputed that such intimation was given on 3d February

1874. It was accordingly held by the Lord Ordinary in the former action, by interlocutor dated 15th January 1875, affirmed by the Inner-House on 18th May thereafter, that the lease had come to an end, and that the defenders were bound to cede possession to the pursuer, and also to make over to him the whole plant of the colliery as soon as the value thereof could be ascertained.

In the present action the pursuer, Mr Houldsworth, founding upon the judgment in the former suit, concludes against the defenders for £10,000, which, as he explains in article 15 of his condescendence, is the amount of violent profits or loss and damage to which he is entitled in respect of the defenders' retention of the colliery subsequent to the intimation given to them on 3d February 1874. The defenders resist this conclusion, and maintain that they are not, in the circumstances, liable in violent profits or damages for the time they retained possession, or, at any rate, not prior to the judgment by the Inner-House of date 18th May 1875, when, at the soonest, according to their view, it can be held that their *bona fides* in retaining possession ceased.

The Lord Ordinary by his interlocutor now under review has found that the defenders have wrongfully retained possession of the pursuer's colliery since 15th January 1875, the date of the Lord Ordinary's judgment against them in the former suit, and has found them liable in violent profits accordingly. In this interlocutor the defenders have acquiesced, but the pursuer has reclaimed, and contends that he is entitled to violent profits or damages as from the 3d February 1874, when the formal intimation of his dissatisfaction with the working of the colliery and his resolution to resume possession was given.

In determining the question thus raised it is necessary to keep in view the relative positions of the parties, and the nature of their respective rights. The pursuer is landlord and the defenders are his tenants, and they are both parties directly to the agreement or contract of lease under which they stand in that relative position. The dispute has also arisen directly between themselves in reference to their respective rights under their contract, and not in consequence of the emergence of any third party with some other and better right. Neither does the claim of the pursuer relate to the fruits of a subject which has been allowed, without objection by the rightful owner, to be reaped and consumed in good faith on a colourable title by another. The pursuer's claim has reference exclusively to the time subsequent to the termination of the only right the defenders had, a right which the pursuer was entitled to terminate at the time and in the manner he did. It was so determined by the judgment of the Court in the former action, on a consideration of the import and effect, or in other words, the true meaning and construction of the contract or agreement of the parties.

In one, and I think I may say, the ordinary and *prima facie* view, therefore, of the question now to be determined, arising as I have explained, it does not readily occur why, on the one hand, the pursuer should not be entitled to the full benefit of his agreement or contract with the defenders, and why, on the other hand, the defenders should not be subjected in the consequences of their failure to implement that agreement or contract. Such, undoubtedly, is the ordinary law and rule of contracts. At the same time, I am not to dispute that the defenders might possibly have a good defence to the claim, in whole or in part, now made against them by the pursuer. But the only ground on which they maintain they have such a defence is the difficulty which attended the question, whether the pursuer was, or was not, entitled to terminate the lease

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at the time and in the manner he did. It rather appears to me, however, that the difficulty which arose on that point in the former litigation was attributable in some, if not in a great measure, to the defenders themselves. Their contention was maintained on two grounds,—1st, on the ground that the working of the colliery had been conducted by them in a regular and satisfactory manner; and 2dly, and chiefly, on the ground that the pursuer was not in truth dissatisfied, but had stated he was so *in mala fide*, for the purpose of serving a sinister object. The pursuer denied the accuracy of these averments, and the Lord Ordinary and the Court held that they were ill-founded. It is obvious, indeed, from the report of the case, that had it not been for the defenders' allegation of *mala fides* against the pursuer, judgment would have gone against them without any proof, and in a comparatively short time.

Having regard, then, to a defence so put forward, and so disposed of, in the former suit, I cannot help thinking that it was one which, to say the least of it, is not now entitled to be regarded with much favour. The defenders could not fail, I think, to have known the nature of their operations in the management of the colliery, and that they were not of a description to give satisfaction to the pursuer, and as their allegation to the effect that they had "ascertained" that his intimation of the termination of the lease was made in bad faith proved erroneous, they must be held to have made it, if not recklessly and wantonly, without due inquiry and knowledge.

In this state of matters I must own my inability to see how the defence to the present action can be sustained. The Queensberry and Durris lease cases referred to by the Lord Ordinary do not appear to me to be in point, for in these cases the tenants held leases which were not only in themselves *ex facie* regular and unobjectionable, but had been allowed to subsist for a series of years, during which they expended their capital and paid their rents without complaint or notice of objection from any one. Not only so, but in a reduction of the Queensberry leases (2 Sh. App. 43 and 80), on the grounds that they had been granted by heirs of entail in excess of their powers, in respect of their extraordinary duration, grassum, diminution of rental, and other objections, this Court by a large majority sustained the leases, and it was only on appeal to the House of Lords that they were reduced. In these circumstances, which contrast in a remarkable manner with those of the present case, it is not surprising that it should have been held both by this Court and the House of Lords that the tenants were protected by *bona fides* from payment of violent profits prior to the judgment of the House of Lords. I cannot, therefore, hold that the Queensberry case gives the requisite, or, indeed, any support to the defenders' contention in the present case. The Durris case, again (Carnegie v. Scott, 1 Shaw's App. 114, and 6 Sh. Court of Session Reports, 206), involved a question of great difficulty, of such difficulty that it was only ultimately determined against the tenant in the House of Lords, where a previous judgment in his favour by the Court of Session was reversed, and therefore he was subjected in violent profits only from the date of the reversal. And with reference to the case of the Duchess of Roxburghe, 17th February 1817, F. C., it has to be remarked that it was not that of a lease at all, and did not arise betwixt landlord and tenant. It was the case of a widow drawing the rents of certain quarries situated within her locality lands for several years without objection, but who at once ceased to do so on a challenge being intimated. It was therefore held that she was protected against bygones in respect they were *bona fide percepti*

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et consumpti. In the present case, all the pursuer asks is that the defenders should account to him from the date when intimation of the termination of their lease was made to them. There was, besides, another peculiarity in the Roxburghe case, which appears to have made a strong impression on the Court, viz., that the Duchess had drawn the profits of the quarries through the sub-factor on the estate, and was, therefore, in the language of one of the Judges, entrapped into doing so.

I am unable, therefore, to see anything sufficient in the authorities which were chiefly relied on by the defenders to support their defence to the present action, to the extent, at least, to which it has been urged. On the contrary, it appears to me that their defence has no solid foundation to rest upon, either as regards the facts or the law. They have been wrong throughout. They were wrong in the former action in asserting that the working of the colliery was in all respects unobjectionable, and that the pursuer had *in mala fide* stated he was dissatisfied in order to accomplish a sinister purpose. And these grounds of defence having been found to be ill-founded in the former action, a new and different one is, for the first time, brought forward in the defenders' second plea in law in the present action, to the effect that "they retained possession of the subjects let in the *bona fide* belief that the lease could not be terminated without their consent." But this plea the defenders did not even attempt to support at the debate. The result, therefore, is that the defenders must be held to have been unsuccessful in every plea or point put forward or attempted to be made by them throughout the litigation.

In these circumstances, and for the reasons I have now stated, I am of opinion that the defenders ought to be held liable since the date of citation in the former action, which appears, from the messenger's execution of the summons, to have been the 29th of April 1874, when, if not previously, the *conscientia rei alienæ* on their part must, I think, be held to have commenced, and their *bona fides* to have ceased. In this way the defenders are allowed nearly three months after the date of the pursuer's intimation to them that their lease had terminated to make all necessary preparations for ceding possession. In place, however, of the defenders being subjected in violent profits, which in its strict technical sense is, I think, inapplicable to the present case, it would, in my judgment, be more consistent with the true circumstances and justice of the case that they should be found liable merely in damages, leaving, of course, the amount to be afterwards ascertained in the course of the process, or, in other words, that they should be found liable in the loss which the pursuer may be able to instruct has been sustained by him in consequence of his having been kept out of possession of the subjects in question since the above mentioned date of citation.

LORD GIFFORD.—As this case has been presented in argument it involves some questions of nicety and difficulty. In particular, we have had a very elaborate and ingenious argument upon that rule of law which entitles a landlord to exact from his tenant penal damages under the name of violent profits in cases where the tenant has wrongfully refused to remove from the subject let, and where, in the eye of law, he has wrongfully or violently retained possession. There has also been much ingenious discussion upon another rule of law under which, in certain cases, a possessor of a subject to which he has no right is nevertheless allowed to retain as his own the fruits of that subject, upon the ground that,

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although he had no right to the subject, yet he, on reasonable grounds, believed that he had a right, and in that belief received and used as his own the fruits which the subject produced. From considerations of equity, the law holds that, although a *bona fide* possessor must give up the subject possessed when the true proprietor thereof, or where one having a better title than himself comes forward, yet, as to the bygone fruits or profits thereof which the possessor has received and expended while his *bona fides* continued, these the *bona fide* possessor is entitled to retain. Nice questions also arise, and these also, to a considerable extent, have been discussed in the present case, as to the date or period when *bona fide* possession shall be held to cease, and when the full fruits or profits must be paid or restored to the party really entitled thereto.

The argument on these questions was most interesting, and, to some extent, the Lord Ordinary has entered upon and decided the questions argued; but after very full consideration, I have come to be of opinion with your Lordships that none of these questions really arise in the present case, but that the true rights of the parties, pursuer and defenders, in this action are governed and fall to be regulated by rules much simpler and much better defined—that is to say, by the rules which apply to the enforcement and breach of mutual contracts.

The whole questions depend upon the terms and construction of a mineral lease between the late Mr Houldsworth and the defenders' authors, dated in 1867, and relative agreement, and although, to certain effects, a right of tenancy was thereby created, the real transaction, as has often been remarked, was an actual sale of the minerals, with a right to carry them away, and not a mere right to use an heritable subject *salva rei substantia*. At all events, the special stipulations upon which the present questions turn are really stipulations in a commercial or mercantile contract, and do not arise from the ordinary or common law relation of landlord and tenant.

The summons in the present case concludes for a slump amount, which, the pursuer says, the defenders are bound to pay him. The amount claimed is stated on record alternatively to be either the amount of violent profits in which the defenders are liable for having illegally maintained possession of the colliery under the lease after the lease had really come to an end, or otherwise the amount of damages in which the defenders are liable for having, in breach of the contract of lease, refused to cede possession when the landlord, in terms of the contract itself, had brought the lease to an end. Accordingly, the pursuer has two alternative pleas—(1) that he is entitled to the sum claimed as violent profits, or (2) that he is entitled thereto in name of damages for breach of contract.

Now, I am of opinion that the second of these alternative pleas embodies the true ground upon which the pursuer's action must rest. I think the only claim which the pursuer can make in the circumstances stated is substantially a claim of damages for breach of contract. I think that the pursuer has relevantly stated such a claim of damages. I am also of opinion that the pursuer has proved the breach of contract by the judgments which have been already pronounced between the parties, and by the admissions on record,—I mean, of course, the admission that the defenders have continued to possess and work the coal subsequent to the period when, as the Court have now finally found, the lease had been validly and effectually terminated by the landlord; and in this view it appears to me that the only question now remaining for decision is the assessment of the damages, if any, which the pursuer has sustained in consequence

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of the defenders' refusal to give up possession at the date when, in law, the lease came to an end.

By the agreement between the parties, dated 5th October 1869, the landlord, the late Mr Houldsworth, stipulated, and the defenders or their authors assented to the stipulation, that in the event of the death of Robert Brand (the tenant) the landlord should have power to resume possession of the colliery at a valuation of the stock and plant, if he should at any time thereafter (that is, after Mr Brand's death) be dissatisfied with the working thereof by Mr Brand's representatives. Admittedly this was a valid and binding contract between the parties, and there never has been any dispute between the parties, nor could there be, that this stipulation is binding upon both parties according to its true intent and meaning, whatever that may be. The only difference between the parties, which, indeed, has formed the subject of the past litigation, is as to the true meaning of this stipulation, and as to whether the landlord did or did not truly terminate the lease in terms thereof. The first question, the construction of the stipulation, is a question of law—the second question is, whether the landlord was really dissatisfied with the working when he gave notice to terminate the lease, and this is a question of fact.

The landlord, acting under the agreement, gave notice of his dissatisfaction on 3d February 1874, and intimated that he was to resume possession, and he called upon Brand's trustees to concur in having the plant and machinery valued and handed over. Brand's trustees resisted this demand, and after some correspondence the landlord on 25th April 1874 raised an action of declarator and removing to enforce his rights.

A great deal of litigation followed, but ultimately it was held, both by the Lord Ordinary and in this Division, that the landlord had right to terminate the lease as he did in February 1874, that the pleas of the defenders were ill-founded, and that the defenders were bound to have ceded possession of the colliery in February 1874, or as soon thereafter as the necessary valuations could be completed. In point of fact, however, and in consequence of the defenders' resistance and ill-founded pleas, the pursuer did not get possession of the colliery till November 1875, the whole works having been carried on till then by the defenders, and the question now is, on the assumption that the pursuer has suffered loss and damage by being excluded from possession, are the defenders liable in reparation?

I am very clearly of opinion that they are, on the simple ground that they have committed a breach of contract by not ceding possession at the time when they were bound to do so. They have deprived the landlord of his stipulated rights—rights which he specially contracted for—and if this has caused loss the defenders must make it good.

It is quite true that the contract in this case was expressed in somewhat doubtful and ambiguous terms, and I am not surprised at the dispute and difference which arose regarding it. Its legal meaning and effect was only determined after a serious litigation, and after very full discussion, but the meaning of the contract has now been judicially determined. The Court has decided that the landlord was entitled to terminate the lease at any time after Mr Robert Brand's death, if he, the landlord, from whatever cause, or even causelessly, should become dissatisfied with the working of the colliery. We have finally decided that the landlord was not bound to shew that the colliery was being or had been improperly worked, or that the conduct of the lessees was in any

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degree blameable or remiss, or that he, the landlord, had any ground whatever for dissatisfaction. The bare fact that the landlord was dissatisfied was enough, and whenever that dissatisfaction arose he was entitled to terminate the lease. This was the question of law between the parties, and this was finally decided against the mineral tenants.

In like manner, the other question between the parties—the question of fact—was whether the landlord was really dissatisfied or not, or whether he was only pretending or feigning a dissatisfaction which he did not really feel,—whether, in short, for it came to that, the landlord was fraudulently and *in mala fide* alleging that he was dissatisfied, when, in truth, he was nothing of the kind, but was, in fact, perfectly satisfied and perfectly pleased with the whole working of the colliery and with the whole actings of his tenants. This question of fact was keenly contested also; a long proof was led, an extensive recovery of private documents and correspondence obtained, and the point was finally decided, both by the Lord Ordinary and by the Court. It is now fixed, by final judgment of the Court, that the landlord was not merely pretending dissatisfaction, but was actually and really dissatisfied, that he was acting throughout in *optima fide*, and that he was well entitled to terminate the lease in February 1874, and that he validly and effectually did so. Thus both branches of the former litigation terminated in favour of the landlord, and we must now assume that by refusing to cede possession of the colliery in February 1874 the defenders were guilty of breach of contract. This is clear.

Now, it is no defence whatever against an action of damages for breach of contract to say that the contract was a difficult contract to read, or that it reasonably required a litigation to fix its true meaning. Parties have themselves to blame for making contracts of difficult or doubtful interpretation, and the party who is found to be in the wrong must take the consequences. It would never do to allow a party to commit a breach of contract, and then to exempt him from reparation or damages merely because there was a dispute, reasonable or unreasonable, about the contract's meaning. Such a doctrine would lead both to confusion and to injustice, and if we were to sustain the defenders' pleas in the present case it would afford a very good instance of such injustice, for in the present case we are told, and in the present argument we may assume, not only that the landlord, the pursuer, has suffered great loss by being excluded from his colliery for nearly two years, but also that the defenders have made great gain and very large profits by having wrongfully continued to work the colliery during all that period. The landlord may be liable, for aught we know, in serious claims of damage to new tenants, against which he would have no defence. Now, who is to suffer that loss? Surely not the landlord, who has been right throughout in all his contentions, both in law and in fact, but the defenders, who have been wrong in all their contentions—who have relied upon bad law, and upon false, or at least unproved averments in point of fact. It would be giving a premium to litigation, perhaps even to dishonest litigation, to allow the unsuccessful litigant not only to throw the whole loss of a broken contract upon his successful opponent, who from the first was truly reading and rightly observing the contract, but also to pocket the unjust gains which, by means of a groundless litigation, he has succeeded in getting, by defying and breaking his obligations. This would be to reward the man who is wrong at the expense of the man who is right, and to offer a temptation to every

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contractor to get up questions, under cover of which he might, not only without loss, but to his own great gain, repudiate his contract.

I do not think I am trenching in the least upon the doctrine of *bona fide* possession and fruits *in bona fide* received and consumed. I am not aware that that doctrine has ever been applied as between contracting parties, and in cases of mutual, and especially of mercantile contracts, and I shrink from giving the doctrine the extension which is now contended for, an extension of which it would be difficult to define either the limits or the consequences. I think the doctrine is totally inapplicable to the present case.

I really do not think it is necessary or relevant to consider whether the defenders, in resisting the landlord's demand (a demand now found to be just), were acting *in bona fide* or not. Almost all litigants think they are right, and litigants often maintain the most extravagant views *in optima fide*; so far as their own conscience is concerned—they honestly think they are right—but this is nothing to the purpose. If they have bound themselves to do something and fail to do it they will be liable in damages, however honestly or innocently they have been mistaken or misadvised as to what their obligation was. Honest mistake or misapprehension is no defence to an action for breach of contract, and the honesty of a bad defence does not even save the litigant from having to pay the whole expenses of the litigation. *Bona fides*, therefore, seems to me to have really nothing to do with the question. It is now fixed that the defenders were bound, legally bound, to have ceded possession of the colliery in February 1874; they resisted doing so till November 1875. They were wrong, legally wrong; and whatever they thought, they must make good the actual loss and damage which their wrongful act has caused to the pursuer.

At the same time I cannot help adding, that looking to the nature of the pleas upon which the defenders relied in maintaining possession of the colliery, I do not think they are in a very favourable position, to say the least of it, for now alleging *bona fides*. Their main plea was that the landlord was *in mala fide* in resuming the colliery. They said that he was only pretending dissatisfaction with the working, but that he was not really dissatisfied. In short, they maintained that the landlord was making a fraudulent use of the provision which enabled him to resume possession; and this allegation of fraud against the landlord—for it was nothing less—is the allegation by means of which they have succeeded in keeping the landlord out of his rights for nearly two years. It is rather strong in the defenders to say, after entirely failing in this allegation of fraud,—Oh! we made the allegation *in bona fide*, and therefore we shall not only keep the *lucrum* and profits which our false allegation has enabled us to make in the meantime, but we will leave the landlord himself to bear the loss which he has sustained by our wrongful breach of contract.

Suppose the landlord, after giving the notice to the defenders which it has now been held validly terminated the lease, had let the colliery to a new tenant, and undertaken to give possession to the new tenant at the next term: If he failed to do so he would be liable in damages to the new tenant, and it would be no defence that he was prevented from doing so by the *bona fide* resistance of the present defenders. It seems plain, also, that if the present defenders were wrong in maintaining possession, however much they acted in good faith, they must relieve the pursuer of the damages which he would be subjected in to his new tenant, who had been wrongously kept out. In short, I think I may say that, when breach of contract has been committed and damages result, the *bona*

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fides or honest belief of the party who commits the breach can never excuse him from making good the loss.

LORD NEAVES was absent.

THIS interlocutor was pronounced:—"Recall the said interlocutor: Find that the defenders, having wrongfully retained possession of the colliery in question after the period at which they were bound to remove, are liable to the pursuers in reparation for such injury as has been thereby occasioned to him: And before farther answer, allow a proof to both parties in regard to the amount of damages thereby incurred: Find the defenders liable in expenses since the date of the interlocutor reclaimed against, reserving in the meantime all other questions of expenses."

MURRAY, BEITH, & MURRAY, W.S.—ALEXANDER MORISON, S.S.C.—Agents.

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JAMES HENDERSON SENIOR'S TRUSTEES, First Parties.—*M'Laren—Innes.*
MRS MARY WATSON or HENDERSON (James Henderson junior's General Disponee), Second Party.—*M'Laren—Innes.*
MRS AGNES WOOD or HENDERSON and OTHERS (David Henderson senior's Trustees), Third Parties.—*M'Laren—Innes.*
MRS AGNES WOOD OR HENDERSON (John Gray Henderson's Universal Legatee), Fourth Party.—*M'Laren—Innes.*
MRS AGNES WOOD OR HENDERSON AND ANOTHER (David Henderson junior and Janetta Henderson's Tutors), Fifth Parties.—*Lee—Moncreiff.*

Succession—Testament—Vesting.—A testator directed his trustees to pay to his widow out of the free income of his estate an annuity of £150, and to divide the surplus annual income of his whole estate equally among his three sons *nominatim*, the lawful issue of any deceasing being entitled to their parent's share. He further directed his trustees to divide the residue equally among his three sons "or the survivors of them, at such times and in such manner" as his trustees might think proper.

Held that the residue vested in the sons at the testator's death.

Succession—Testament—Implied Direction to Convey.—The testator further directed his trustees on the death of his widow "to hold for and pay over to" his eldest son, whom failing, to his lawful children, equally among them, the free rents of a special heritable subject. After a similar provision for each of his two younger sons the testator directed that in the event of any of his sons dying and leaving issue the trustees should "hold and apply the free annual rents of the property hereby directed to be conveyed to such of my said sons for behoof of such child or children" until the youngest attained the age of twenty-one, when the property should be conveyed to or divided among such children equally.

Held (*diss.* Lord Gifford) that there was an implied direction to convey the three properties to the testator's three sons respectively in fee, and that their right vested at the testator's death.

D DIVISION. R.

JAMES HENDERSON senior died on 28th May 1869, leaving a trust-settlement conveying his whole estate, heritable and moveable, to trustees, for, *inter alia*, the following purposes, viz.,—"In the third place, in the event of my said spouse surviving me, I direct my said trustees to pay to her an annuity of £150 sterling, payable out of the free income of my said estates, heritable and moveable: . . . . In the fourth place, I direct and appoint my said trustees, after fulfilling the provisions contained in the first, second, and third articles hereof, and after making provision for . . . . and all other disbursements during the lifetime of my said spouse, to divide the surplus annual income of all of my said heritable and moveable estates equally among my children aftermentioned, and that at such times and

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in such manner as to them may seem proper, and in the event of the death of any one or more of my said children, leaving lawful issue, such lawful issue shall be entitled to receive the share of said surplus which would have fallen to his or her parent had such parent survived; and upon the death of my said spouse, or, should she predecease me, upon my decease, my said trustees shall hold for and pay over to my said son, James Henderson, whom failing, to his lawful children, equally between or among them, the free rents, after deducting interest on bonds and all other charges of that tenement of land belonging to me, situated in Florence Street, Hutchesontown, Glasgow; and in the said event I also direct and appoint my said trustees"—(then followed similar special provisions in favour of the testator's sons, David Henderson and John Gray Henderson, and their children, with reference respectively to two other separate heritable properties, one in William Street, Anderston, Glasgow, and the other in Albert Drive, Queen's Park, Glasgow):—"Farther, I hereby authorise and empower my said trustees either to collect the rents of said respective properties or to appoint a factor to do so, or to allow each or any of my said sons to collect the rents of and manage the properties in which they are respectively interested, and that so long as my said trustees may think proper.

"In the fifth place, in the event of any of my said sons dying leaving a child or children I hereby direct and appoint my said trustees to hold and apply the free annualrents of the property hereby directed to be conveyed to such of my said sons, for behoof of such child or children, until the youngest of them shall attain the age of twenty-one years complete, when the property shall be conveyed to, or, in the option of my said trustees, sold, and the free proceeds thereof, after deducting expenses, sums secured on bond over said property, and expenses, shall be divided equally amongst them if more than one; declaring, however, that in the event of any of my said beneficiaries predeceasing me without leaving lawful issue, the share and interest in my said estates which would have fallen to such beneficiary is hereby declared to form part of the residue of my said estates, and shall be divided as after-mentioned. In the sixth place, in the event of the said John Gray Henderson surviving me, I direct and appoint my said trustees, at my death, to assign, dispone, convey, and make over to him a bond and disposition in security, granted in my favour by William Weir, builder in Glasgow, for £400. . . . . In the seventh place, I direct and appoint my said trustees to divide the residue of my said heritable and moveable estate equally amongst my said children, or the survivors of them, at such times and in such manner as my said trustees may think proper."

The testator left a widow, Mrs Agnes Wood or Henderson, and three sons, James Henderson junior, David Henderson senior, and John Gray Henderson.

James Henderson senior's estate consisted of the three heritable properties specially disposed of under provisions four and five of his settlement, and of another heritable property acquired after the date of his settlement, together with certain moveable funds.

In consequence of the death of all James Henderson senior's sons before their mother certain questions arose amongst their representatives with regard to their interest in his succession.

The first set of questions turned upon the period of vesting of the residue of the trust estate. The first four parties to this special case, being the trustees of James Henderson senior, and the representatives of his three sons, contended that the residue of James Henderson senior's estate vested *a morte testatoris;* the fifth parties contended that it did not vest

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until the death of the testator's widow. The Court ordered this question to be first argued.[1]

At advising on 11th December 1875,—

LORD JUSTICE-CLERK.—The solution of the questions laid before the Court in this special case depends on the construction of a complicated and imperfect settlement, and one not easy to be interpreted. The first of these questions,—namely, whether the residue of the testator's trust-estate vested at his death, or whether vesting is postponed till the death of his widow,—depends on a general view of the instrument as a whole, and on the conclusions to be drawn therefrom.

Now, the scope of the deed is as follows:—Mr Henderson, the testator, had two purposes in view,—firstly, to provide for his widow, and secondly, to provide for his three sons. That is, shortly, the object of the deed. But the mode in which it is carried out is very complicated. Mr Henderson first provides an annuity of £150, which is largely within the income of the trust-estate, to his widow; and he also makes a special provision for one son, John Gray Henderson. Then, as regards the remainder of the income and of the capital, he directs his trustees to divide the surplus income among his children, and the issue of any deceasing, and that at such times and in such manner as to them may seem proper; and after separately disposing of three special subjects, to divide the residue equally among his children, or the survivors of them, at such times and in such manner as they, the trustees, may think proper.

Now, the question is, did this provision of residue vest at the death of the testator, or does it not vest until the death of the widow?

In the general case it may be said, first, that in *mortis causa* deeds the presumption is for vesting *a morte testatoris*; second, that this presumption is not necessarily overcome by the interposition of a liferent; third, that vesting *a morte testatoris* is more readily presumed where there are no ulterior interests provided for either directly or contingently.

In my opinion in the case of Elliot v. Bowhill (June 21, 1873, 11 Macph. 735, 45 Scot. Jur. 446) I made reference to two judgments of considerable importance, that of Lord Corehouse in the case of Forbes v. Luckie (Jan. 26, 1838, 16 S. 374, 10 Scot. Jur. 227), and that of Lord Moncreiff in the case of Provan (Jan. 14, 1840, 2 D. 298, 12 Scot. Jur. 257). I quote that of Lord Corehouse again, in order to compare it with the most recent exposition of the law in the House of Lords. His Lordship says,—"I do not think that the fee of the residue was prevented from vesting in these children, either by the circumstance that the term of paying to each child its respective share was postponed until after the death of the liferentrix who survived the testator, or by the circumstance that a trust by executors was interposed for carrying into effect

[1] *Authorities referred to.*—Laing v. Barclay, July 20, 1865, 3 Macph. 1143, 38 Scot. Jur. 95; Leighton v. Leighton, March 8, 1867, 5 Macph. 561, 39 Scot. Jur. 283; Graham's Trustees v. Graham, May 26, 1868, 6 Macph. 820, 40 Scot. Jur. 452; Aitken's Trustee v. Wright, Dec. 22, 1871, 10 Macph. 275, 44 Scot. Jur. 164; Jamieson v. Allardice, May 30, 1872, 10 Macph. 755; Allan's Trustees v. Allan, Dec. 12, 1872, 11 Macph. 216, 45 Scot. Jur. 144; Elliot v. Bowhill, June 21, 1873, 11 Macph. 735, 45 Scot. Jur. 446; Young v. Robertson, Feb. 14, 1862, 24 D. (H. of L.) 1, 34 Scot. Jur. 270, 4 Macq. 314.

the intentions of the testator, or finally, by the circumstance that the bequest of the residue was conceived in favour of a class of persons, and not in favour of certain individuals *nominatim*."

Now, the last expression of opinion on the general canons of construction in such cases is to be found in the judgment of the Lord Chancellor in the case of Millar v. Finlay's Trustees (Feb. 25, 1875, *ante*, vol. ii. H. of L. 1). His Lordship says,—"It also accords with that which now has been in this country a cardinal rule of construction, namely, that where you find interests given to a class, but the payment postponed for the purpose of letting in preceding life-interests, the interests so given in remainder are vested immediately, and are not postponed until the time of the payment." Therefore we may take that general rule of construction to have been finally settled.

The opinion of Lord Moncreiff in the case of Provan has also a material bearing on this case with reference to the point of ulterior interest. He says,—"Where there is no such ulterior substitution the principle adopted has been that the right vests though the term of payment is postponed."

I may add that in regard to interposed interests, such as liferents, the question always is, whether there is any person other than the liferenter himself in whose interest vesting is postponed till the death of the liferenter. If there is not, postponement of the vesting is not necessary, and is not to be presumed.

Lastly, where the sole interposed interest is not a liferent so as to exhaust the annual revenue, but only a burden on the annual revenue, the presumption in favour of vesting becomes still stronger. These general principles do not admit of doubt.

In some respects the present is a strong case for their application in favour of vesting. As regards the form which the provisions of the deed take, whatever the object of postponing the term of payment may have been, there were no ulterior objects to be benefited by it. Neither is the question of vesting affected by the provisions, such as they are, in regard to the predecease of the children. In the second place, the widow's annuity fell far short of the annual produce of the estate. And, lastly, the residuary clause is conceived in favour of the children and of no other parties whatsoever.

Had these been the only elements for consideration I should have had no doubt as to the vesting. But there are two other points which raise a certain amount of difficulty. There is, first, the provision in the fourth purpose for the distribution of the accruing income. Now, that income was to be the surplus income of the whole estate, including the special subjects afterwards disposed of after paying the widow's annuity. The terms of the provision are as follows:—(Reads fourth purpose of settlement, quoted *supra*, p. 320). Now, unquestionably, that looks at first sight as if the trustees were to retain the whole *corpus* of the estate during the life of the widow, and merely to divide any surplus revenue. And the provision that in the event of the death of any of the children leaving lawful issue, such issue should be entitled to the share of the surplus income which would have fallen to the deceasing parent, would imply that otherwise a child dying during the period of distribution of the surplus income, that is, during the widow's life, would not transmit his share of income to his issue. This would introduce an element of great difficulty, were it not that throughout the deed where the death or predecease of the children is spoken of it is predecease of the testator that is meant.

But the main difficulty arises from the provision in the residue clause itself,

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—"I direct and appoint my said trustees to divide the residue of my said heritable and moveable estate equally amongst my said children, or the survivors of them, at such times and in such manner as my said trustees may think proper." Now, it is a general principle, acknowledged in England, that where there are words of survivorship adjected to a residue clause they must be held to apply to the time of distribution, unless it is clear that they apply to the death of the testator. Decisions on the point have varied, but it is now fixed by the judgment in Young v. Robertson, Feb. 14, 1862, H. L., 4 Macq., 314—(See Lord Chancellor's judgment). If, then, that rule applies, the words of the residue clause point in favour of postponement of vesting. It was accordingly argued very strongly that the trustees were bound to divide the residue at the widow's death, and that the survivorship clause applied to that period. To that argument I cannot give effect. I think the survivorship clause applies, and can only apply to the death of the testator, because I think it was in the power of the trustees to make a division at any time after the death of the testator that they thought proper. Now, if the trustees had thought proper at the death of the testator to divide the whole moveable estate, leaving the heritable property to answer the widow's annuity, I see nothing in the deed to prevent them. If they could, then there can be no doubt that the moveable estate vested *a morte testatoris*. In this view the terms of the deed are sufficient to take the case out of the general rule of law above stated.

I am therefore for finding that the residue of the trust estate vested *a morte testatoris*.

Lord Ormidale and Lord Gifford also held that the right to residue vested at the testator's death.

Lord Neaves was absent.

Parties were subsequently heard upon the remaining question,—"Did the three subjects specially destined (in the 4th and 5th purposes) vest in the testator's sons respectively *a morte testatoris?*"

At advising on 8th January 1876,—

Lord Justice-Clerk.—In this case we have already decided that the residue of the trust-estate vested *a morte testatoris*, and consequently that the residue is divisible among the representatives of the three sons who have deceased.

The question now remains with regard to the three heritable subjects specially destined, whether they also vested *a morte testatoris*.

Our finding that the residue vested *a morte testatoris* has a considerable bearing on this question, for it is not easy to see what grounds there are for arriving at the conclusion that the testator intended to fix a period of vesting for these special subjects different from that appointed for the residue of his estate.

There are two views which may be taken on this point. The first is that these special subjects vested, like the residue, *a morte testatoris*. The second is that nothing but a liferent was provided to the children of the testator, and that the fee was intended to vest in their children, the testator's grandchildren, and, in the event of any of the testator's children having no issue, then to fall either into residue or intestacy. Neither of these views is free from difficulty and uncertainty. But I have come to the conclusion that the real intention of the

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testator was that those special subjects should vest as at his death, and that all the other provisions were made simply with a view of meeting the contingency of any of his sons predeceasing him.

The provision with regard to the first of these special subjects is as follows :—"Upon the death of my said spouse, or, should she predecease me, upon my decease, my said trustees shall hold for and pay over to my said son James Henderson, whom failing, to his lawful children, equally between or among them, the free rents, after deducting interest on bonds and all other charges, of that tenement of land belonging to me situated in Florence Street, Hutchesontown, Glasgow." Now, I am of opinion that that clause contains the whole provisions with regard to this particular subject, as events have turned out. The question is whether that is a provision of fee to the individual sons, or whether it only gives them a liferent. If it does not give a liferent allenarly it manifestly gives a fee. True, there are no words of direct conveyance of the fee. But this is not material or conclusive. The real intention of the testator, as I gather it from the deed generally, and from the analogy of the clause of distribution of the surplus income, and of the residue clause, was to leave a wide discretion in the hands of the trustees as to the time of payment or conveyance, and that that is the explanation of the absence of any express direction to convey.

The trustees are directed to hold for and pay over the free rents. Under this direction they could convey at any time after the widow's death. Then, there is a conditional institution, "to my said son James Henderson, whom failing, to his lawful children," which appears to me wholly irreconcileable with the idea that the sons are only to have a liferent. In the event of James Henderson failing, that is, predeceasing the testator, the trustees were to hold for his children as conditional institutes.

That is the view which I take of the clause disposing of these special subjects. What follows refers solely to circumstances which have not emerged,—"In the fifth place, in the event of any of my said sons dying leaving a child or children, I hereby direct and appoint my said trustees to hold and apply the free annual rents of the property hereby directed to be conveyed to such of my said sons, for behoof of such child or children, until the youngest of them shall attain the age of twenty-one years complete, when the property shall be conveyed to, or, in the option of my said trustees, sold, and the free proceeds thereof . . . . shall be divided equally amongst them if more than one." Now, has that event happened? I think not. The event in which that direction was to take effect was the death of the son, leaving issue, before the death of the testator. But this is put beyond all doubt by the second limb of the clause,—"Declaring, however, that in the event of any of my said beneficiaries predeceasing me without leaving lawful issue the share and interest in my said estates which would have fallen to such beneficiary is hereby declared to form part of the residue of my said estates, and shall be divided as after-mentioned." Therefore, reading the whole clause together it is, I think, clear that the testator's intention was that if his sons failed, that is, predeceased him, leaving issue, that issue was to step in and the trustees were to hold till the youngest attained twenty-one—that if his sons failed without leaving issue the properties destined to them respectively were to fall into residue—but that if his sons survived him they were to take as from his death, though the conveyance was postponed till the death of his widow.

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The other contention, that the sons were only to enjoy a liferent, involves this absurdity, that the trustees must go on holding even though there may be no fiar—and this though the general provision of residue is to vest *a morte testatoris*. The testator, I think, contemplated nothing of the kind, and, accordingly, although without disguising the difficulty I have experienced in coming to a conclusion, I am of opinion that these special subjects vested the same as the residue, *a morte testatoris*.

LORD ORMIDALE.—It having been already held by the Court, in answer to the first query, that the residue of Mr Henderson senior's estate vested at his death, the second, third, and fourth queries are thereby superseded.

In regard to the fifth question, I am of opinion that the subjects to which it refers as specially destined vested in the testator's sons respectively *a morte testatoris*. I am unable to see how any other conclusion can be come to consistently with the fact that all of the testator's sons survived him, and with the declaration in the fifth purpose of the testator's settlement to the effect that "in the event of any of my said beneficiaries predeceasing me without leaving lawful issue the share and interests in my said estates which would have fallen to such beneficiary is hereby declared to form part of the residue of my said estates, and shall be divided as after-mentioned." According to this declaration it was only in the event of his sons, or any of them, predeceasing the testator that the subjects in question were intended by the testator to fall into and be divided as residue; but as no such event happened, that is to say, as none of his sons predeceased the testator, none of the subjects specially destined to them can be held to have fallen into and to be divisible as residue. But then it was objected, as I understood the argument for some of the parties, that there was no express destination at all of the fee of the subjects referred to, and in a literal sense this is true, for undoubtedly the testator's settlement is defective in that respect. Having regard, however, to the whole scope and tenor of the settlement, and particularly its fourth and fifth purposes, I think that on the principle of implied, if not of express destination, it must be held that the three sons had right respectively to the fee or *corpus* of the special subjects in question. This view is supported and illustrated by various cases which are referred to by Mr M'Laren in his work on Wills, p. 327, *et seq.* On any other footing the result would be that the fee of the special subjects in question must be held as undisposed of altogether by the testator, and to constitute intestate succession, a result which is not to be arrived at if it can on any reasonable ground be avoided.

LORD GIFFORD.—At the former advising of this case, on 11th December last, the final judgment of the Court was that the general residue of the trust-estate of James Henderson senior vested *a morte testatoris*,—that is, immediately on the death of the truster one-third of that general residue then vested in each of the three sons who survived the testator, and this must now be taken to be the law of the will in question.

This cardinal point having been fixed, we had an additional argument on the remaining points of the case, especially as these were affected by the decision as to the vesting of the residue, and in the course of the argument both parties found it necessary to remodel the questions put in the special case, so as really to obtain from the Court available and practical rules to regulate the distribu-

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tion of the estate. The amended questions now before the Court have been sustained and substituted for those originally put.

The first four questions, as they now stand, are already answered by the decision formerly pronounced. As the general residue (whatever that general residue may ultimately embrace or consist of) vested *a morte testatoris*, then there was no lapsing of that residue by the sons having predeceased the widow, and the partial distribution already made by the trustees is valid and effectual.

The remaining five questions as put in the amended case relate to difficulties as to what subjects do and what subjects do not fall under the general residue of the testator's estate, and as to the special bequests and special provisions of heritable subjects contained in the trust-deed, as to which, or as to some of which, it is doubtful what is to become of them, or whether they have lapsed into the general residue or not. The chief of these special legacies, or special provisions, are the three separate heritages specially destined in the deed.

Now, in reference to these three special heritable subjects, I am sorry that I have found myself unable to concur in the view taken by your Lordships. I am of opinion that as special bequests, or special provisions, these special heritages did not vest in the three sons of the testator at the testator's death. As I read the deed, the subjects are not given to the testator's sons at all. All that the testator gives to his sons is the rents of these special subjects after his widow's death. The fee of the property is not given to the sons; on the contrary, the trustees are specially directed to hold and to pay the rents even after the death of the respective sons, and to continue to apply the rents, but still only the rents, for behoof of the lawful children of each son, and that until the youngest of such children respectively,—that is, of the three families of grandchildren respectively,—shall attain the age of twenty-one. It is only when this event happens,—the majority of the youngest grandchild,—that the fee of these special subjects is disposed of, for it is only then that the properties are to be conveyed to the respective families of grandchildren, or to be sold and the proceeds divided among them.

Now, I do not think that this bequest or provision gave anything whatever to the immediate sons of the testator, excepting an interim right to rents. I view the fee as provided conditionally to the grandchildren, and to them alone. I think the provisions, so far as concerns the fee of the special heritages, are really conditional bequests to the testator's grandchildren, and to the grandchildren alone,—conditional, that is, if there should be any child of the respective sons alive when the time of payment, or of conveyance, shall arrive, and as there is interposed all the machinery of an effectual subsisting trust I think a bequest or provision of this nature is quite valid.

It is true that a bequest or provision to a father in liferent, and to his unborn children in fee, vests an instant fee in the father, and the children take nothing but a bare *spes successionis*, unless there be some restrictive words, such as "liferent allenarly," which restrict the father's right and exclude him from the fee. But this is a somewhat arbitrary rule, introduced from a supposed necessity that a fee cannot be *in pendente*, but must instantly vest somewhere, and the rule only applies to cases where there is a conveyance or disposition to the father himself in liferent. It has never been applied to cases where there is no conveyance at all to the father, but where a subject is vested in trustees who are directed to hold and keep it, and to pay the rents for a time, or for his lifetime, to a father, and only upon the father's death, or upon some other event men-

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tioned, to convey the fee to his children. A direction like this has always been held equivalent to restrictive words—the arbitrary rule has no place, and the intention of the testator receives effect, which is, that the father shall only receive the rents, and shall have no power to defeat his children's right to the fee.

If, therefore, all Mr Henderson's three sons had survived, and were yet alive, I should say that these three special subjects had vested in none of them, that none of the sons had right to defeat the rights of the grandchildren, and that the fee was vested in the trustees for behoof of the grandchildren if they should survive the appointed time of conveyance.

But all the sons, although they survived the testator, have now deceased, two of them without issue, and the third son leaving two children. I am of opinion that by the death without issue of the two sons who left no issue the special subjects destined to them have lapsed and fallen into residue. The fee of these two special subjects was intended for and given to grandchildren who have never existed, and who now can never exist. The condition, therefore, has failed; the provision is simply a lapsed legacy, and the subject of it falls, not into intestacy—for there is a general and universal settlement—but into residue, just like other lapsed legacies. As to the third subject,—as David, the third son, has left issue, I am of opinion that the trustees must continue to hold for David's children, and in exact terms of the deed. They must convey to these children, or sell for their behoof, when the youngest of them attains majority, and not till then. The result is that, in my opinion, two of the special subjects have fallen into residue, and belong with it, one-third to those in right of each son. The third special subject must be held still for David's children. I regret, therefore, to be obliged to differ from your Lordships.

Lord Neaves was absent.

This interlocutor was pronounced:—"Find, 1st, that under the settlement of James Henderson senior the residue of his estates vested at his death; 2d, that the three subjects specially destined vested in the testator's sons respectively *a morte testatoris*."

M'Ewen & Carment, W.S.—Wilson & Dunlop, W.S.—Agents.

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Gibson and Stewart, Petitioners.—*Asher—Brand.*
Brown and Company, Respondents.—*Balfour—Jameson.*

Contract—Compensation—Damages—Petition for Sale.—A storekeeper received a quantity of corn from a merchant to be stored. There was no written contract. After re-delivering the greater part, the storekeeper retained the remainder, and presented a petition to the Sheriff for warrant to sell it, and apply the proceeds towards payment of warehouse rent and storage charges for the corn, which the merchant refused to pay. The merchant stated as a counter claim damage to a greater amount done to the corn re-delivered, owing to the neglect of the storekeeper. The counter claim for damage having been restricted to the amount of the petitioners' claim, *held* that it might competently be stated as a set off, both claims being rested on stipulations of the same implied contract, and objection that it was an attempt to set off an illiquid against a liquid claim *repelled*.

Question, Whether, if one of the stipulations had been in writing, but not the other, the one could have been set off against the other.

Question, whether a larger counter claim could have been partly set off and partly reserved.

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1ST DIVISION.

Sheriff of Lanarkshire.

M.

Compensation.—Held that the petition for warrant to sell the respondents' goods and to appropriate the proceeds was, as regarded the plea of compensation, in the same position as a petitory action for payment of money.

THIS was a petition to the Sheriff of Lanarkshire by Gibson and Stewart, storekeepers, Glasgow, against Brown and Company, starch manufacturers there. It set forth that in June and July 1872 the petitioners received into their stores 2000 bolls of Indian corn from the respondents, of which 1792 bolls had been re-delivered; that the respondents were owing storage charges to the petitioners for receiving, hoisting, turning and weighing the corn, amounting in all to £111, which they refused to pay; and the petition prayed for warrant to sell the remainder of the corn, and to apply the proceeds *pro tanto* in liquidation of the charges.

The respondents did not deny that the charges were reasonable, but stated that the corn which had been re-delivered was damaged to the extent of £125 by the petitioners' failure duly to turn it, and otherwise take sufficient care in storing it.

They pleaded;—(2) The said corn having, through the fault of the petitioners, been damaged to the extent of at least £125, they are liable therefor; and the respondents are entitled to deduct the same from the rent and charges due to them.

The petitioners pleaded;—(1) The petitioners have a right of lien or retention over the goods in question in their possession for the rent and charges applicable to the whole parcel stored. (2) The claim of damage stated in the defences is illiquid, and cannot be set off against the petitioners' claim for rent and charges.

The corn was sold of consent, reserving the rights of parties.

The Sheriff-substitute allowed a proof, and found that the respondents had failed to prove their counter claim of damages.

On appeal, the Sheriff pronounced this interlocutor:—"Recalls the interlocutor appealed against: Finds that the grain in question was stored in the pursuers' stores for the time specified in the petition, and that their proper charges therefor are £111, 4s. 10d.: Finds that it was the pursuers' duty to have said grain properly stored and turned while in their hands, but that they failed in that duty, in consequence of which the grain deteriorated in quality and value, and the defenders suffered loss to an extent equal to, if not greater, than the pursuers' said claim: Therefore sustains the defences to that extent and effect: Finds that the pursuers were not justified in refusing to deliver the portion of the said grain which they retained under their lien for store charges, and that the price thereof falls to be paid to the defenders: Accordingly appoints the clerk of the Court to pay to them the sum consigned: Finds the pursuers liable in expenses," &c.

The petitioners appealed to the Court of Session.

Argued for the petitioners;—It was incompetent to set off an illiquid against a liquid claim.[1]

Argued for the respondents;—This was a case of failure to fulfil one of the stipulations of a mutual and entire contract, and damages arising from that failure might be pleaded as a counter claim to the petitioners' claim founded on other stipulations of the same contract.[2] The cases

[1] Scottish North-Eastern Railway Coy. v. Napier, March 10, 1859, 21 D. 700, 31 Scot. Jur. 350; Mackie v. Riddell, Nov. 20, 1874, *ante*, vol. ii. 115.

[2] Taylor v. Forbes, Dec. 2, 1830, 9 S. 113, 3 Scot. Jur. 67; Stewart v. Campbell, Nov. 12, 1834, 13 S. 7, 7 Scot. Jur. 30; Johnston v. Robertson, March 1, 1861, 23 D. 646, 33 Scot. Jur. 335; Macbride v. Hamilton and Son, June 11, 1875, *ante*, vol. ii. 775.

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quoted on the other side were cases of two separate contracts. The prayer of the petition was more comprehensive than the conclusions of a petitory action, but it contained all the elements of a petitory action.

The respondents by minute restricted their counter claim for damages to £111, 4s. 10d., the amount of the petitioners' claim.

At advising,—

LORD PRESIDENT.—There is no real difficulty in this case when it is thoroughly examined, but it belongs to a class of cases which raise points of some delicacy, and therefore we found it necessary to have a full argument.

The petitioners are storekeepers, and the respondents are merchants who import grain. In June and July 1872 the respondents delivered at the storekeepers' premises two thousand bolls of Indian corn for the purpose of being stored. There was no written contract, and no express verbal contract, but the act of delivery created an implied contract, for the terms of which we must resort to the usage of trade and the ordinary rate of charges.

Accordingly, we find it is not disputed on the one hand that the storekeepers were entitled to charge for receiving the corn at the rate of 5s. per hundred bolls, for hoisting 3s., 1s. 6d. for turning the grain every time it was turned, also to make certain charges for weighing the grain when it was delivered out, and for warehouse rent.

On the other hand, the petitioners were bound to take due care for the safe custody and proper treatment of the grain, and under the head of proper treatment is included turning it, in order to prevent its heating or becoming injured. Thus the contract has its terms settled by usage merely. Therefore a claim on the one side or the other founded on breach of the contract depends on proof of usage, and could not be otherwise established unless admitted, and if the storekeeper brings an action it is open to the merchant to dispute his charges.

If this were an action for payment, the pursuer would be put to prove his case, and, in the same way, if the merchant were to allege in such an action as he does here that the storekeeper has not done his part, but ill-treated the grain by omitting to turn it, and in other respects, that claim of damages arising out of the same mutual contract would constitute a good counter claim which could be pleaded by the defender.

The peculiarity of this case is that it is a petition to enforce a lien or right of retention. The petitioners have retained a portion of the corn, and they ask that it should be sold, and the proceeds applied in extinction *pro tanto* of their claim.

At first sight this does create considerable embarrassment, and the embarrassment which is caused by the form of procedure is aggravated by the circumstance that the claim of damages exceeds the claim of the petitioners.

The Sheriff appears to have thought that the one claim might be set against the other without ascertaining the amount of the counter claim, beyond the fact that it was at least equal to the petitioners' demand.

But this difficulty has been removed to some extent now that the respondents have restricted their claim of damages to the amount of the petitioners' demand, discharging all farther claim.

That being so, and looking to the fact that the prayer of the petition, though it takes the form of asking for a warrant to sell, would operate, if granted, payment in money of their claim, I do not see sufficient ground for making a

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distinction between the question as it arises here, and in a proper petitory action. If I am right in that, and if it is clear that the two claims arise out of stipulations in the same mutual contract, the only question remaining in point of law is, whether the law applicable to cases of express contract is equally applicable where all the terms of the contract are ascertained by usage merely.

On full consideration, I do not find any sufficient reason for drawing a distinction. If, on the one side, the stipulations were express, while on the other they arose only by implication, the matter would have been much more doubtful, but here both the claims stand in the same position in that respect.

Then, if the claim be competent, I do not think there can be much difficulty on the merits. The grain has been injured, and I am of opinion that the respondents have proved that the damage was caused by the failure of the petitioners to perform the duty which lay upon them under the contract. I am therefore for adhering to the judgment of the Sheriff.

LORD DEAS.—No doubt there is here a little embarrassment at first sight in consequence of the peculiar form of the procedure. But it is more apparent than real. The application to the Sheriff set forth that certain charges were due to the petitioners in connection with the corn which had been stored with them, and that they had a lien for these charges over the portion of the corn which still remained with them, and what was craved was warrant to sell the corn and to apply the proceeds towards liquidation of the charges. In that way it was just equivalent to a petitory action for payment of the money. And this is made still more clear when we see that on 21st May 1873 the plea that the application was incompetent was repelled as not being insisted in, and on 30th June same year warrant to sell the grain was granted of consent, so that nothing remained but the question whether the petitioners were entitled to uplift and apply the price in payment of their charges. Then there comes the question whether the fact that the whole contract arises on implication makes any difference in the applicability of the rule, that before a party can insist on implement of a mutual contract he must fulfil his own part of it. I think there is no such difference. It is true that the respondents admit some of the charges, and that comes near to making them liquid, while the claim for damages is illiquid. But although they admit the charges for receiving, hoisting, and weighing, they do not admit the charges for turning and storage, which form the main portions of the dispute.

As to the fact that the claim for damage is in excess of the petitioners' claim, I do not wish it to be understood that I think any difficulty would arise from that circumstance. However, the respondents have restricted their counter claim, so it is unnecessary to go into that point.

On the merits of the claim of damages I agree with your Lordship.

LORD ARDMILLAN.—On the merits, apart from the legal plea, I have nothing to add to what has been already stated. As to the question whether the respondents' plea of compensation can be competently stated, I think that if the claim of the petitioners (whose position is equivalent to that of pursuers) had rested on a written contract which liquidated their claim, then the respondents could not have pleaded compensation against the claim so liquidated, unless the written contract contained elements which brought out the grounds of the compensatory plea. But the petitioners have no ground of action resting on writing.

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They have to prove the terms of the contract, which was not a written one, and in that state of matters the other party, who says it was part of the same contract (and that is not denied), that the storekeeper should keep the grain with such care that it should not be injured, must be entitled to prove it and to plead it. The respondents allege that the grain has not been carefully kept in store, and has been damaged in consequence.

I cannot doubt that they are entitled to state a plea to that effect in defence. Whether the respondents could have pleaded their claim of damages as a defence to the extent of the petitioners' claim, and have reserved it to the extent that it exceeded that claim, is a question which it is not necessary here to decide. I understand that the respondents do not press their claim beyond the demand by the petitioners.

LORD MURE.—This is a case of mutual contract, and the only difference between it and the cases which have been referred to in support of the competency of here pleading compensation is that these were cases of express written contract, which the present is not. But I agree with your Lordship that that does not make any difference in the application of the rule, which is equally applicable to verbal contracts when they are distinctly set forth and proved.

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This case appears to me to be in substance identical with that of Taylor v. Forbes, and must, I think, be ruled by that decision. For the pursuers, as storekeepers, are in no different position from the owner of a ship who stores corn in his ship. Now, it was there laid down that the plea of set off in respect of damage done to a cargo by defective stowage was competent against a liquid claim for freight, and in that respect the present respondents are in a more favourable position than the defenders were in the case of Taylor, because the rent and charges here claimed were not liquid at the time of closing the record. I see, moreover, that the amount of damages in the case of Taylor was greater than the claim for freight, so that, in this respect also, the case is an authority in favour of what the Sheriff has done.

On the merits, I have no difficulty in concurring.

THIS interlocutor was pronounced:—"Find that the grain in question was stored in the petitioners' (appellants') stores for the period specified in the petition, and that their proper charges therefor are £111, 4s. 10d.: Find that it was the duty of the petitioners to have said grain properly stored and turned while in their hands, but that they failed in that duty, in consequence of which the grain deteriorated in quality and value: Find that the respondents suffered loss thereby, which they are entitled to set off as a counter claim in compensation of the petitioners' said claim: Find that the respondents by the said minute, No. 31 of process, have restricted their counter claim for said loss to the sum of £111, 4s. 10d., which is held to be the full amount thereof, and, being of the same amount as the petitioners' said claim, there remains no balance due to or by either party in connection with said storage: Find, in these circumstances, that the petitioners were not justified in refusing to deliver the portion of the said grain which they retained under their lien for store charges: Therefore refuse the appeal, and decern: Find the appellants liable in expenses," &c.

DUNCAN & BLACK, W.S.—J. & R. D. ROSS, W.S.—Agents.

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THE SCOTTISH HERITABLE SECURITY COMPANY (LIMITED), Pursuers.—*D.-F. Watson—Keir.*

ALLAN, CAMPBELL, AND COMPANY, Defenders.—*Kinnear—H. Johnston.*

Poinding the Ground—Right in Security—Ex facie absolute Disposition.—*Held* that a creditor holding a recorded *ex facie* absolute disposition to lands belonging to his debtor was not entitled to use the diligence of poinding of the ground although he had granted a back-letter declaring that he held the lands merely in security for his debt, his relation to the lands being that of a feudal proprietor and not of a creditor, and there being no *debitum fundi*.

Observed, that the recording of the back-letter in the Register of Sasines would not have altered the creditor's position as feudal proprietor of the lands.

1ST DIVISION. Ld. Craighill. M.

THE SCOTTISH HERITABLE SECURITY COMPANY (LIMITED) advanced to Messrs Allan, Campbell, and Company, manufacturers, Newburgh, Fife, the sum of £1500, to be repaid by instalments. A personal bond dated 13th April 1874 was granted by the borrowers as a firm and as individuals.*

* The personal bond bore that Allan, Campbell, and Company, and the individual partners of that firm, as trustees for their copartnership, in consideration that the Scottish Heritable Security Company "have agreed to lend us the sum of £1500 sterling, on condition of our granting these presents in manner underwritten, and of our, the said John Carmichael Allan and Douglas Campbell junior, conveying to the said company for their further security certain subjects and others belonging to us as trustees foresaid, situated near the west shore of Newburgh, and lying within the parish of Newburgh and county of Fife, by absolute disposition to be held by the said Scottish Heritable Security Company (Limited), under obligation to re-dispone the same to us, and the survivor of us, and the heir of the survivor, as trustees and trustee for our said firm, or our assignees or successors, on payment of the whole sums due, or that may become due, under these presents." The bond then acknowledged receiving the £1500; and proceeded,—"Therefore we, the said Allan, Campbell, and Company, and we, the said John Carmichael Allan and Douglas Campbell junior, as partners of our said firm, and as individuals, hereby bind and oblige ourselves, and our respective heirs, executors, and representatives whomsoever, and the whole property, stock, and effects of our said firm, all jointly and severally, without the necessity of discussing them in their order, to pay to the said Scottish Heritable Security Company (Limited)" interest at the rate of 6 per cent from the date of the deed to the term of Whitsunday, and the sum of £103, 10s. half-yearly thereafter until the term of Whitsunday 1884, after which the payments were to terminate. They also bound themselves to pay interest at the rate of 15 per cent on all arrears of these half-yearly payments; and added,—"And farther declaring that nothing herein contained shall be held to affect the right and power of the said Scottish Heritable Security Company (Limited), in the event of any payment of interest or half-yearly instalment remaining at any time unpaid, to take all proceedings against us or our foresaids, by diligence or otherwise, for enforcing payment of whatever sum may be then due." They also bound themselves to relieve the security company of all feu-duties, public and parochial burdens, repairs, and premiums of insurance. The bond then continued,—"And it is hereby specially provided and declared that the said Scottish Heritable Security Company (Limited) shall have all the rights and powers of absolute proprietors in and over the said subjects and others conveyed by the said disposition so long as any part of the loan remains unpaid, and shall have full power at any time during the continuance of the said loan, or any part thereof, and without any other or further authority than is herein contained, to enter into possession of the said subjects and others, to draw the rents thereof, to output and input tenants, to grant tacks or leases of the said subjects, or any part thereof, at such rents and for such periods of endurance as they may think proper, to appoint factors, and generally to exer-

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Of the same date the borrowers granted an absolute disposition of certain heritable subjects in Newburgh. The disposition bore to be for onerous causes, and was unqualified.

This disposition was duly recorded on 16th April 1874, and on the same day Mr Moffat, the manager of the Heritable Security Company, executed a back-letter addressed to Allan, Campbell, and Company, in which, after referring to the above absolute disposition of 13th April 1874, he stated that although that disposition was *ex facie* absolute, it was truly granted in security of £1500 and other sums contained in the bond, upon repayment of which the company would reconvey the subjects to them. This letter was duly forwarded to Allan, Campbell, and Company, and received by them.

Allan, Campbell, and Company remained in possession of the subjects referred to in the disposition, and paid the interest at the rate of 6 per cent due between 13th April and Whitsunday 1874, but they did not pay the instalment of £103, 10s. due at Martinmas 1874, nor did they make any other payments. Notice that the company intended to enter into possession of the subjects in fourteen days in terms of the personal bond was accordingly given, but nothing followed thereon.

The manager of the Heritable Security Company on 1st February 1875 executed a duplicate of the back-letter above mentioned, and recorded it in the Register of Sasines on 2d February.

Of the same date a summons of poinding the ground was raised at the instance of the security company against Allan, Campbell, and Company.

The pursuers pleaded;—The pursuers being, in virtue of the documents set forth, creditors in a debt which is *debitum fundi* are entitled to decree of poinding the ground as concluded for, with expenses.

Allan, Campbell, and Company lodged defences, and pleaded;—(1) The action is incompetent, in respect the pursuers are barred by the nature of

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cise the whole powers of absolute proprietors in and over the said subjects and others," and in the event of their so doing, to be only liable in omissions and not in exact diligence; "provided always, that before entering into possession of the said subjects and others as aforesaid the said company shall be bound, through their manager, to give us and our foresaids fourteen days' previous intimation of their intention to do so; and it is further hereby specially provided and declared that in the event of us or our foresaids failing to make due and punctual payment of the interest of the said sum of £1500, and of the said half-yearly payments of £103, 10s., or increase thereof, as the same falls due, or to implement any of the other obligations hereby undertaken by us, the said Scottish Heritable Security Company (Limited) shall be entitled forthwith to take all proceedings against us or our foresaids competent by the law of Scotland, by diligence or otherwise, for recovery of whatever sums, principal, interest, expenses, and other payments or disbursements may then be due by us or our foresaids; and in the event of us or our foresaids allowing one full half year's payment of £103, 10s., or any part thereof, or the interest of the said sum of £1500, or any part thereof, to remain unpaid for two months after the date when the same shall fall due and be payable, then and in that event it shall be lawful to and in the power of the said Scottish Heritable Security Company (Limited) or their foresaids, upon giving us or our foresaids one month's intimation in writing, under the hand of their manager, without any further intimation or process of law whatever, to sell the said subjects, and that either by public roup or private bargain," and to grant dispositions, which, with all other deeds granted by the company, were to be good and valid without the consent or concurrence of Allan, Campbell, and Company; "and on receiving payment of the sums that may be due and arranged as aforesaid, the said company shall be bound, at our expense, to reconvey and dispone the said subjects to us and to our foresaids as we may require."

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their titles from having recourse to poinding the ground. (2) The debt due by the defenders, Allan, Campbell, and Company and John Carmichael Allan, to the pursuers, not being *debitum fundi*, an action of poinding the ground is incompetent. (3) The recording by the pursuers at their own hands, on 2d February 1875, of a duplicate of the back-letter granted by them on 16th April 1874, without the consent of the defenders, Allan, Campbell, and Company, and John Carmichael Allan, was illegal, and did not create the debt due by the said defenders to the pursuers a *debitum fundi*, and an action of poinding the ground is therefore incompetent thereon. (4) Under the whole deeds constituting their security the pursuers had, at the date of raising the action, all the rights and powers of absolute proprietors in and over the subjects embraced in the conclusions, and the action is therefore incompetent. (5) Having, in virtue of the powers conferred on them by the personal bond, given fourteen days' notice to the defenders that they were to enter into possession, and the fourteen days having expired before the summons was raised, the pursuers were barred from raising the present action.

The Lord Ordinary, on 2d July 1875, pronounced this interlocutor:—"Finds (1) that the sum for which the pursuers conclude that warrant for poinding the ground should be granted is not *debitum fundi;* and *separatim* (2) that the title of the pursuers to the ground, the moveables on which are the subjects to be attached by the proposed diligence, being a disposition *ex facie* absolute, is that not of creditors but of proprietors, and consequently is not a foundation for the diligence of poinding the ground: Therefore sustains the second plea in law, and also the first plea in law for the defenders, dismisses the action, and decerns: Finds the defenders entitled to expenses, of which allows an account to be given in, and remits," &c.*

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* "NOTE.—The pursuers are creditors under a personal bond for £1500, and they are infeft in the heritable subjects described in the summons on an *ex facie* absolute disposition. The reality of the situation, however, is that they are not out-and-out proprietors, but must reconvey the property on receiving payment of their debt. A back-letter establishing this obligation was granted immediately after infeftment was taken, but this document never was recorded. A duplicate, however, written out and signed by the manager of the pursuers' company was recorded by the pursuers the day before the present action was instituted. No authority for this proceeding was given by the defenders, who consequently contend that the pleas of parties relative to the competency of poinding the ground must be disposed of as they would have been if the back-letter had not been recorded. The Lord Ordinary thinks that the solution of this question is not necessary for the decision of the cause.

"1. There is no doubt that a debt for which the ground can be poinded must be *debitum fundi*, and hence the first question here is, whether that due to the pursuers is a debt of this description. The bond for £1500 is only a personal bond, and the disposition is not the constitution of any debt whatever. Nor would the recording of the back-letter accomplish that which the disposition leaves unperformed, all which would thence ensue being merely the limitation of the sum for which the property conveyed could be retained to the debt as it stood when the back-letter was recorded. The amount of that debt behoved to be otherwise established. Quite true, through the instrumentality of the disposition security is in effect afforded. But how? Not by the imposition of the debt as a burden upon subjects belonging to the debtors, but by the right to withhold these subjects from the debtors till the debt is paid or otherwise extinguished. They can demand retrocession only after this condition has been fulfilled, but till payment and retrocession the subjects are not theirs but their creditors'. This, as the Lord Ordinary thinks, involves the conclusion that the debt is in legal acceptance not *debitum fundi*, because the opposite view would

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The Heritable Security Company reclaimed, and argued;—There were three classes of persons holding heritable rights who stood in different relations to poinding of the ground—(1) those who were proprietors holding the radical right; (2) those who held a title inferior but assimilated to a property title; (3) those who held mere incumbrances. Admitting that poinding of the ground was competent only to the last class, the present case came under that category. The Court were bound to look at the substance of the transaction, and the substance of this transaction was a mere incumbrance.[1] This was necessarily known to the defenders, who were the debtors, no third parties being involved. But even if third parties were involved, the real nature of the transaction was made apparent on the records by the registration of the back-bond. The defenders could not plead that that was their deed, which they alone had right to record. The pursuers, as creditors, were entitled at any moment to disclose to the public the real nature of their title, and the true account of the transaction between them and their debtors.

The law relied on by the defenders was founded entirely on the case of Garthland.[2] In that case the poinding creditor was a wadsetter, and had entered into actual possession of the lands so far as to grant a tack of them to the reverser. The legal effect of this was just the same as setting a tack of them to any third party. Actual possession was held by the creditor through his tenant. But that case did not support the

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make the debt a burden or charge upon the property, not of the debtors, but of the creditors.

"2. Proprietors cannot poind their own ground, and if the pursuers are proprietors in the sense of this rule, they as such are excluded from recourse to that diligence. In a matter of this kind, the actual title, the Lord Ordinary thinks, is all that can be regarded. In heritable securities, properly so called, the debtor is proprietor and the creditor only incumbrancer. But where an *ex facie* absolute disposition has been granted the property no longer remains with the debtor. He has been feudally divested, his creditor has been invested, and there must be a formal reconveyance before the estate can be restored. The ground, according to the title, is the ground of the disponee, the tenants are his tenants, and if he refrains from doing all that an owner might, in the levying of rents and in the management of the property, all that can be said is that he refrains from doing things which are within his competency. His infeftment gave him real, actual, and corporal possession, and there is no other sasine of the property. This is the view of the law which received the sanction of the Court in the well known case of Garthland v. Lord Jedburgh, 2d March 1632, Mor. 10,545-6. That decision is the foundation of all the *dicta* to be found in the books on this subject, and the Lord Ordinary is of opinion that the doctrine for which it is the authority is well explained in Ross' Lectures, vol. ii. p. 431, where it is laid down 'that no title upon which a man may enter into the natural possession of land can be a foundation for the diligence of poinding the ground, and hence the holders of adjudications, liferent rights, wadsetters, and others of that class, cannot demand the ground to be poinded. They must enter like other landlords, and if the tenants will not pay them, the possessory action of mails and duties is the proper step to be taken.' Analogous passages are to be found in other books of authority, as, for example, in Erskine, b. 4, t. 1, s. 11. What is thus presented is, as the Lord Ordinary conceives, the law by which, in so far at least as the first of the defenders' pleas is concerned, the present action must be determined.

"The reasons which have now been explained are those by which the Lord Ordinary has been led to pronounce the prefixed interlocutor."

[1] Gardyne v. Royal Bank, March 8, 1851, 13 D. 912, 23 Scot. Jur. 410, H. of L. May 13, 1853, 15 D., H. of L. 45, 25 Scot. Jur. 399, 1 Macq. 358.

[2] Garthland v. Lord Jedburgh, 1632, M. 10,545-6.

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extension of the doctrine attempted here, where the substance of the transaction was admittedly an incumbrance merely, and where there had been no possession either actual or even fictitious given, or alleged to be given, to the creditor.[1] This case, therefore, wanted what was essentially necessary to bring it under the rule of Garthland, and of the doctrine of law founded on that case, namely, actual possession on a title to possess.

Argued for the respondents;—1. The pursuers' title was absolute. The back-letter had never been recorded. The pursuers had no right to record it. It was not their deed, but the defenders'; in the defenders' possession, and under the defenders' control. It was not necessary to complete the pursuers' title or strengthen their security. What the pursuers had put on record was another deed altogether, which had never been delivered. Even supposing the back-letter had been recorded, it would not have limited the pursuers' absolute title. It would only have feudalised in the defenders a right of reversion which had previously been personal.

2. Poinding of the ground was a diligence or distress originally available only to the superior against his vassal. Instead of taking the extreme course of resuming the land, the superior could seize and retain moveables to distress the vassal into fulfilment of his obligation. But the diligence did not transfer anything. It only effected a compulsory *nexus* for the purpose of coercing the distressed person into performance. The right to avail himself of it was in course of time extended to the heritable creditor. In both cases, poinding supplied the place of possession.[2]

3. Poinding of the ground was only competent to a heritable creditor who held a *debitum fundi*.[3] Where a debt was *debitum fundi*, the land personified was considered the debtor. The land was bound and continued bound, though the personal obligation of the owner might cease.[4] The ground being the debtor, poinding of the ground was just an attachment of the moveable effects found on the ground, and so, *fictione juris*, assumed to belong to it.

4. The creation of a separate feudal estate, made real by infeftment (the property remaining feudally vested as before), was an essential element in all the different classes of debt which were *debita fundi*.[5] But the pursuers' security in the present case wanted all the characteristics of a *debitum fundi*. Their title was absolute. They had not an estate which was feudally made a burden on another estate. The disposition constituted no debt against the land; neither did the back-letter, whether recorded or not. It only gave a right of reversion. So absolute was the pursuers' title, that if the defenders were to take benefit by the back-letter a re-conveyance was necessary. The debt due by the defenders to the pursuers was constituted by the personal bond, and not by any security affecting the lands by infeftment, so as to make the land the debtor, and lay the foundation for a poinding of the ground.

5. The object of the pursuers in taking their security in the form of an *ex facie* absolute disposition was to make their position different from that of a mere incumbrancer, to give them rights and powers which an ordinary heritable creditor had not. Having contracted for extraordinary

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[1] Henderson v. Wallace, Jan. 7, 1875, *ante*, vol. ii. 272.

[2] Ross' Lect. ii. 392, *et seq.*

[3] Ersk. iii. 6, 20, and iv. 1, 11; Ross' Lect. ii. 401.

[4] Peddie v. Scot's Trustees, Feb. 27, 1846, 8 D. 560, 18 Scot. Jur. 578; Small v. Millar, Feb. 3, 1849, 11 D. 495, 21 Scot. Jur. 143; Gardyne v. Royal Bank, *supra*, p. 336, note 1.

[5] Bank. ii. 5, 18; Stair, iv. 23, 5, and 35, 24; Menzies (1856), 794, *et seq.*

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rights and powers, they could not avail themselves also of the remedies peculiar to ordinary heritable creditors. In all questions as to the validity of diligence the debtor was entitled to the benefit *strictissimi juris*. The creditor must be held to have relinquished legal diligence otherwise competent to him, but inconsistent with the form of his security.[1]

6. Ross' statement that "no title upon which a man may enter into the natural possession of the land can be a foundation for the diligence of poinding the ground,"[2] contained the true statement of the law on the subject. Erskine's doctrine,[3] though apparently requiring actual, not merely potential possession, was really the same, as might be seen from the following analogies—(1) Poinding of the ground, which was competent to a superior for his retour duties before citation, was incompetent after citation, whether the superior had entered into possession or not, because he might enter into possession.[4] (2) Poinding of the ground was incompetent to an adjudger, even though he held his decree for the sake of preference merely, and never entered into possession. (3) Poinding of the ground was incompetent to a wadsetter, though he did not enter into possession himself, but allowed the reverser to remain in possession under a back-tack. The case of Garthland[5] was, *mutatis mutandis*, the same as the present. The *ex facie* absolute disposition could not be distinguished from the wadset, nor the back-letter from the back-tack.

But, 7, the pursuers' security covered not only the money debt contained in the personal bond, but also several prestations connected with the property, till all which were fulfilled they were under no obligation to reconvey. And not only that, but their security also covered all future debts incurred by the defenders to them, on bond, bill, open account, or in any manner of way, prior to the recording of the back-letter.[6] If they could poind the ground for the money debt, they could equally do so for any of these prestations, or for any subsequent debt incurred, of which there could be no trace in their title or in the original document of debt. There could be no saying in that case where the right to poind the ground was to stop.

On these grounds, the respondents contended that poinding of the ground was incompetent in the present case.

At advising,—

LORD PRESIDENT.—This is an action of poinding the ground which the Lord Ordinary has dismissed upon two grounds. In the first place, that the sum for which the pursuers conclude that warrant for poinding should be granted is not *debitum fundi;* and secondly, that the title of the pursuers to the ground, the moveables on which are to be attached, being a disposition *ex facie* absolute, is that not of creditors but of proprietors, and consequently is not a foundation for the diligence of poinding the ground. I agree with his Lordship in both grounds of judgment.

The writings which constitute the relation between the two parties and which

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[1] Wylie v. Scottish Heritable Securities Investment Company, Dec. 22, 1871, 10 Macph. 253, 44 Scot. Jur. 150.

[2] Ross' Lect. ii. 431.

[3] Ersk. iv. 1, 11.

[4] Stair, ii. 4, 22; Ersk. ii. 5, 42.

[5] *Supra*, p. 336, note 2.

[6] Ross' Leading Cases, Land Rights, vol. 2, p 721, *et seq.*

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define their rights and liabilities are three in number. The first is a personal bond by the defenders in favour of the Scottish Heritable Security Company acknowledging receipt of a loan of £1500, and binding themselves to repay that loan. That bond contains no disposition of heritable subjects, and nothing in the shape of a heritable security at all. Therefore, in so far as the bond itself is concerned, it is nothing but a personal bond. No doubt it contains certain statements and declarations about an absolute disposition which is at the same time granted by the defenders in favour of the pursuer, but that does not in the least degree affect the character of the obligation itself, which is contained in the bond for repayment of the money, which, being clothed with no heritable security of any kind, remains, as I have already said, a purely personal obligation. Now, that of itself furnishes sufficient ground for the judgment of the Lord Ordinary under the first head of his interlocutor. This is not *debitum fundi*, and therefore it cannot be the foundation of a process of poinding the ground.

But it is quite right that we should proceed, as his Lordship has done, to consider what is the title of the pursuers to the heritable subject, whether that title is not the title of absolute proprietors and so is not a title which can afford them the remedy that they here seek to use. I have already said that the personal bond contains reference to the disposition in favour of the pursuers, and it provides a number of things which are exceedingly unnecessary, because they would have been all implied or effected by means of the absolute disposition which was granted in favour of the pursuers, without being expressed, as they are on the face of this personal bond. For example, it is specially provided and declared that the Scottish Heritable Security Company shall have "all the rights and powers of absolute proprietors in and over the said subjects and others conveyed by the said disposition so long as any part of the loan remains unpaid, and shall have full power at any time during the continuance of the said loan or any part thereof, and without any other or future authority than is herein contained, to enter into possession of the said subjects and others, to draw the rents thereof, to output and input tenants, to grant tacks or leases of the said subjects or any part thereof at such rents and for such periods of endurance as they may think proper, to appoint factors, and generally to exercise the whole powers of absolute proprietors in and over the said subjects and others." Then it is further provided that in the event of the borrowers running into arrear of the annual payments of interest, it shall be in the power of the pursuers to sell the subjects; and there are some other clauses of a similar tendency and effect. Now, it seems to me that these were very unnecessary clauses to introduce into this personal bond, because the whole of the powers thereby expressly given to the pursuers were given them by the disposition of the subjects *ex facie* absolute which was at the same time executed. When infeftment was taken upon that disposition, or when the equivalent proceeding of recording the conveyance in the Register of Sasines had been completed, the pursuers became avowedly the proprietors of these subjects, and entitled to use all the powers of proprietors. They could do anything with the subjects they pleased. They had an absolute right of ownership of the subjects. Nor was this in the slightest degree affected in so far as powers were concerned by the back-bond which was granted by the pursuers in favour of the defenders, and which declared that the subjects, although conveyed by a disposition *ex facie* absolute, were in truth conveyed as in security only of the advance of £1500 made by the company—*i.e.*, by the

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pursuers to the defenders, and for the due fulfilment of the whole obligations contained in the bond granted to the company. And by that same back-letter the pursuers undertake that upon the advances and all sums that may become due under the said bond being repaid, and the whole claims of the company under the same being fully satisfied, the company shall re-dispone the said subjects and others to the defenders. It is said that this back-bond was recorded, and that the recording of the back-bond so qualified the infeftment upon the absolute disposition that the pursuers were no longer upon the face of the records absolute proprietors of the subjects, but only heritable creditors. Now, that I consider to be quite unsound in law, on the assumption that the back-bond was recorded. But I take leave to doubt whether this back-bond was recorded at all. The back-bond remained naturally, and as it was intended to do, in the hands of the defenders, in whose favour it was granted, and to whom it was delivered, and that back-bond so delivered to them was never recorded. But it seems that the manager of the company executed a duplicate of it, and sent that to the record. Now, that was not the back-bond which had been granted and delivered to the defenders, and which is the only proper back-bond in this transaction. And therefore I am humbly of opinion that the back-bond was not recorded. But, for the reason I have already given, I do not think it of any consequence whether it was recorded or not. The back-bond did nothing more than this—it shewed that under certain conditions the present proprietors of the subjects,—the Heritable Security Company,—were bound to convey the subjects to somebody else; but it did not make them one bit the less for the time absolute proprietors of the subjects. They were no doubt under an obligation to reconvey them to the party from whom they had acquired, but the mode of their acquisition remained the same; it was by disposition absolute. It is not an incumbrance upon lands that is created by such a disposition, because an incumbrance can be discharged, but this infeftment of the pursuers cannot be discharged. It can only be extinguished by a conveyance, and if by a conveyance to the original owner to whom the money has been advanced, it is a re-conveyance no doubt, and it is a re-conveyance in terms of an obligation contained in the back-bond. But that does not in the slightest decree affect the position of the pursuers as proprietors of the subjects. By means of their infeftment they are put in possession of the subject, because infeftment is the solemn and legal mode of taking civil possession of heritage, and if they refrained from drawing the rents, that was of their own accord, for they were just as much entitled to draw the rents payable by tenants as any other absolute proprietor was. They were entitled, without any of the provisions of that personal bond, to let leases of the subjects, and to deal with the estate in every respect as their own. They required no process of law to enable them to enter into possession as it is called, and if they had proposed an action of maills and duties, for example, for the purpose of enabling them to uplift the rents, it would have been an idle formality, and indeed incompetent, because it is only an incumbrancer that requires to use a process of maills and duties in order to give him a title in a question with the tenant to uplift the rents. But these absolute owners were just as much entitled to uplift the rents of these subjects as any singular successor deriving his right from the former owner. Now, that being the nature of their title, the question comes to be, whether a party so situated can poind the ground; and I am humbly of opinion with the Lord Ordinary that he cannot. The authorities upon that subject are perfectly clear and distinct. Poinding the ground is not

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a diligence proper to an owner at all. He cannot poind his own ground, as it is expressed, and therefore upon that second reason assigned by the Lord Ordinary for his judgment I am entirely in accordance with him also. I am for adhering to the interlocutor.

LORD DEAS.—The nature of the transaction out of which this question arises seems to be this:—The Heritable Security Company, in April 1874, agreed to give a loan of £1500 to the defenders,—the lending of money at a pretty high rate of interest being, as I understand, an important part of the business of the company. It is stipulated in the bond that the £1500 should be repaid by half-yearly instalments of £103, 10s. each, the first payment to be made at Martinmas 1874. The money had been advanced so recently as April of that year, and the effect of that system of lending is to enable the company to lend upon what ordinary lenders would consider inadequate security, because the company no sooner lend the money with one hand than they begin to gather it in with the other. The interest payable is to be five per cent, or a higher rate when the current rate of interest is higher; but if there be any delay in repaying the half-yearly instalments of the capital then the interest payable is to be fifteen per cent. In accounting for the rents the lenders are neither to be liable for omissions nor bound to do strict diligence, and, as regards repayment of the debt, principal, interest, disbursements, and expenses, it is stipulated that the amount shall be sufficiently ascertained by a certificate under the hands of the manager of the company for the time being, "and the amount stated in such certificate shall, without any other voucher or instruction thereof, constitute a charge" against the debtors, "and no suspension shall pass upon a charge for payment thereof, or upon any other threatened proceeding at the instance of the said company, except on consignation of the amount in said certificate only." These stringent conditions are analogous to those which were brought under our notice in the case of Wylie v. The Heritable Securities Investment Association, 22d December 1871, 10 Macph. 253. And when we find that they are here attempted to be carried out by a sort of mongrel combination of, I may say, all the different kinds of voluntary securities which have been hitherto known in our practice in a separate form, but in a separate form only, it is the duty of the Court to make sure that the bondholders are within the law before sanctioning such a combination, by which debtors may be subjected to unusual hardship, and other creditors who have trusted to heritable securities conceived in the terms hitherto alone regarded as legitimate may be placed at a disadvantage.

Now, laying aside judicial securities, which are not here in question, we all know that voluntary securities are divided into two great classes—the one in which the deed (which may be in various forms) avows itself on the face of it to be a security merely, the other an *ex facie* absolute disposition, which is usually accompanied by a back-letter or back-obligation declaring it to be a security merely. This last is in many respects more favourable for the creditor and less favourable for the debtor than any of those forms in which it appears *ex facie* of the deed that it is a security merely. The holder of the *ex facie* absolute disposition, when followed by infeftment, or, what is now the same thing, when the deed is recorded in the Register of Sasines, appears before the world as absolute proprietor. Even if the back-letter or back-obligation be also recorded in that register, heritable creditors whose rights bear *ex facie* to be securities merely cannot interfere until not only the particular debt specified in

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the back-letter or back-obligation is fully satisfied, but until all other debts, of whatever amount, contracted either before or after that debt, and whether immediately connected with it or not, are fully paid and satisfied. A debtor is not generally willing to grant such a deed, which *ex facie* divests him absolutely of his estate, and has effects like these, as well as others which I need not enumerate. His necessities may, however, lead him to do it. But I take it that while the law concedes all that I have said to the holder of such a deed, he can only have the advantages which have been immemorially recognised by our law and practice as attending that form of security. The law does not allow the creditor to create a form of deed never known in practice before, by which he shall have at one and the same time all the advantages of an heritable creditor under a bond and disposition in security, and all the advantages of an heritable creditor who holds under an absolute disposition and back-bond. That would be carrying his powers over the debtor, and his preference over all other creditors holding heritable securities, voluntary or judicial, to an extent which in our law and practice has never yet been recognised, and which has not even expediency to recommend it. But that is what is proposed to be done here, and I agree with your Lordship that we cannot possibly sanction it.

The only argument we have heard in support of it is, that although the deed contains a conveyance *ex facie* absolute, the company are, after all, mere security holders, and therefore are entitled to all the benefits and remedies of security holders, such being the real nature of the transaction. A conclusive answer to that is, that it has been settled for centuries that the thing cannot be done. It is undoubted law that a proprietor cannot poind his own ground, and it was decided more than two hundred years ago that this law is applicable to one who, although in reality an heritable creditor, holds his security in the form of an absolute conveyance. It is not necessary to go for this doctrine beyond the case of Garthland, decided in March 1632, Mor. 10,545. Spottiswoode's report of that case is this:—"The Lord Jedburgh having wadset to the Laird of Garthland some land received a back-tack for payment of 1200 merks yearly. Garthland raised a summons against him for payment of the back tack-duty, wherein he concluded likewise to have the ground poinded for it for all years to come. Which conclusion the Lords would not sustain, for the pursuer, being infeft in the property, could not seek his own ground to be poinded for anything due to him out of the said lands." There is a much longer and fuller report on the next page by Durie, in which, among other explanations, it is mentioned,—"This cause being called *in præsentia dominorum* the decision here noted was renewed, and it was found that the heritor could not desire the goods of his tacksman, nor of his sub-tenant, to be poinded by this pursuit for the tack-duty, but that he might and ought to pursue personally therefor." The whole practice and the whole authorities for the past centuries since that time have been conform to what is there laid down, and whatever, therefore, might be said about this being a mere form of title, it is settled that, in this very matter of poinding of the ground, the heritable creditor is exactly in the same position as if he were the undoubted and out and out proprietor, and there had been no loan transaction at all. If he could poind the ground he would be in a position to exclude all other heritable creditors as well as personal creditors, so long as he thought proper to exercise that right; because, as was decided in several of the cases, and laid down by Lord Stair, the poinding of the ground gives a man a paramount and enduring right. It is not only good against all prior debts and prior

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parties but it is good against singular successors, and does not require even to be transferred against heirs. It is a constant continuing right that sets all the world at defiance in favour of that particular creditor. I am clearly of opinion with your Lordship that it is beyond all doubt that those parties who choose to take their title in the form now in question, while they are entitled to all the rights and diligences belonging to that form of title, are not entitled to the inconsistent position of having also all the rights and remedies of an *ex facie* heritable creditor. The Lord Ordinary puts this as the second question, but I think it is truly the first question, because it goes to this, that this debt is not a *debitum fundi*. In order to a debt being *debitum fundi* it must be a debt upon the face of the feudal title. It would be so if this were an ordinary heritable security, but it is just because this is not an ordinary heritable security,—because the title of the party is not the title of an ordinary heritable creditor, but the title of a proprietor,—that it becomes perfectly clear that this is not a *debitum fundi*. It is laid down by Lord Stair, and all the authorities, that a *debitum fundi*,—that is to say, a debt made real upon the property,—is necessary to found the diligence of poinding the ground. But to say that a man, whose title in its form is that of a proprietor, has a right to poind the ground, is just to say that he is at one and the same time proprietor and not proprietor. I think what are called two grounds of judgment resolve truly into one and the same ground, but whichever way you take it the result is equally conclusive.

LORD ARDMILLAN.—I feel rather reluctant also to separate the two grounds. I do not by any means venture to differ from your Lordship's view that this is not a *debitum fundi*, but I rather think that the grounds for holding that it is not a *debitum fundi* very much depend upon the other question, which is one of much interest. I am unable to see anything to distinguish the principle of this case from the principle laid down in the case of Garthland, so long ago as 1632. If there had been no recorded back-bond, this was an absolute disposition of the premises by the borrower of the money to the lender of the money.

The mode by which the borrower who has given an absolute bond protects himself is by recording the back-letter, which qualifies and makes the apparent proprietor in the position truly of an heritable creditor. In this case the proceeding in regard to the matter is a very singular one. I impute not the slightest blame to this company. They are doing a business which is in itself perfectly fair and honourable, and which they are quite entitled to conduct, and they are quite entitled to make their securities as perfect as they can make them, but when they had got the heritable disposition, and granted a back-bond, which they did on 16th April 1874, they gave one back-letter only to the borrowers of the money. The borrowers did not record that back-bond, and what did the lenders do? On the 1st of February they signed another letter, and that other letter, which they called a duplicate, they recorded on the 2d February. Now, I do not blame them for the motive, which is very obvious. If they had not signed that back-letter and recorded it they would have held an absolute disposition to this property, and they could not have poinded the ground upon that. They do not themselves profess that they could have done so; and so they first grant and then record a new back-letter, which they call a duplicate; and this they did in order to give them the rights of a creditor in addition to the rights of a proprietor, which they previously had, for as the proprietors they could not have used the diligence of poinding the

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ground. Therefore this granting and recording the back-letter by them was simply done to combine in their persons the inconsistent rights of a proprietor and of a creditor. Now, that I do not think they can do according to law. The case of Garthland was very well considered very long ago, and all our recent authorities, Mr Ross, Mr Bell, and Mr Duff, allude to the case as a standard authority, which I never in the least doubted. As Mr Ross says in his Lectures, —"No title upon which a man may enter into the natural possession of land can be a foundation for the diligence of poinding the ground," or, as it is put in the judgment itself, the owner of the ground cannot poind his own ground. Now, these parties were truly the owners of the ground, unless the borrower of the money held the back-letter and recorded the back-letter to qualify the right. The recording of their own back-letter was an attempt, which I think the law cannot sanction, to clothe themselves with the two inconsistent rights. That view, I think, really disposes of both points, because clearly there could be no *debitum fundi* when the party who calls himself the creditor held the rights to the subjects himself. There was no burden upon the property of another. The lender of the money and the holder of the bond was also the proprietor, and there could be no *debitum fundi*. Therefore I think that truly the two questions turn on the one point, and taking it in that composite view, I am very clearly of the same opinion as your Lordship.

Lord Mure.—In the discussion of this case it was not disputed by either party, and it may be assumed as settled law—(1) That an heritable creditor, as holder of a *debitum fundi* burdening the land of his debtor, is entitled to have recourse to poinding of the ground in order to operate payment of his debt; and (2) that this remedy is not open to a proprietor, because it is held to be incompetent for a party to poind ground belonging to himself. The law is so laid down by Mr Erskine in the passage which has been referred to by the Lord Ordinary in his note; and there are other authorities to the same effect.

In the present case the pursuers' title is not that of heritable creditors by bond and disposition in security in the ordinary form, but is *ex facie* that of absolute proprietors, with a separate back-bond or letter of reversion. The parties do not seem to be at one as to the date when the back-letter was granted, or as to whether it has been duly recorded. But it was not disputed by the defenders that such a letter had been granted; and it seems to be admitted that the transaction was substantially that of a security for debt, and intended to be so. Such being the nature and character of the transaction, it has been strongly contended on the part of the pursuers that they were entitled to the same remedies for the recovery of their debt as other heritable creditors, including that of an action for poinding the ground.

The question thus raised is, in a general point of view, one of very considerable importance, and is, I think, attended with nicety; and if the matter were still open I should have had some difficulty in coming to the conclusion that the substance of this transaction was to be disregarded, and that because the title of the creditor was *ex facie* that of a proprietor he was not in a position to sue a poinding of the ground. But the question is, in my opinion, no longer an open one. For it seems to have for long been held that parties whose titles are *ex facie* absolute, although they may not be out-and-out proprietors, such as life-renters and wadsetters, are not entitled to have recourse to a poinding of the ground, but must operate payment of their debts in some other way. That was

decided as regards a wadsetter in 1632, in the case of Garthland, referred to by the Lord Ordinary. Now, a wadset is defined to be "a conveyance of land in pledge for or in satisfaction of a debt or obligation, with a reserved power to the debtor to recover the lands on payment or performance;" and that I apprehend is substantially the position of the pursuers in this case. Upon the authority of the case of Garthland, therefore, I have come to the conclusion that the interlocutor of the Lord Ordinary ought to be adhered to.

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THE COURT adhered.

STUART & CHEYNE, W.S.—LEBURN, HENDERSON, & WILSON, W.S.—Agents.

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VISCOUNT FINCASTLE, Pursuer.—*D.-F. Watson—Keir.*
THE EARL OF DUNMORE, Defender.—*Fraser—Kinnear.*
CATHERINE COUNTESS DOWAGER OF DUNMORE AND ANOTHER (Earl of Dunmore's Trustees), Defenders.—*Crichton.*
JAMES CAMPBELL TAIT AND OTHERS, Defenders.—*MacLean.*

Entail—Disentail—Reduction of Disentail—Entail Acts 11 *and* 12 *Vict. c.* 36, *sec.* 1, *and* 16 *and* 17 *Vict. c.* 94, *sec.* 24.—An heir of entail in possession of lands held by trustees under an entail dated after 1st August 1848, and born before the date of the tailzie, presented a petition for authority to acquire in fee-simple the entailed lands, and, with the consent of his uncle and two cousins as the three next heirs, obtained from the Lord Ordinary a decree authorising the petitioner to acquire the lands in fee-simple, and ordaining the trustees to convey them to him in fee-simple. After completing his title to the lands in fee-simple the proprietor borrowed money over the estate, and granted a bond and disposition in security to a creditor.

In an action of reduction brought by his son, born after these proceedings, *held* (1) that the petition to acquire in fee-simple was presented without the consents required by law, in respect that the proprietor being heir under a new entail, and born before the date of the entail, could only disentail with consent of an heir-apparent who had attained the age of twenty-five, and therefore that the decree granting warrant to acquire in fee-simple, and the conveyance of the trustees following thereon, fell to be reduced; but (2) (*diss.* Lord President) that the bond and disposition in security was protected by 16 and 17 Vict. c. 94, sec. 24, which enacts, that after the time allowed for appeal to the House of Lords has elapsed judgments of disentail "shall, as regards third parties acting *bona fide* on the faith thereof, be no longer reducible on any ground of irregularity, or non-compliance with the provisions of the said recited Act or of this Act, but, in respect of any such ground of challenge, be final and conclusive."

1ST DIVISION. Lord Young. B.

THE Earl of Dunmore was heir of entail in possession of the estate of South Harris under an entail on heirs-male dated in 1841. In 1864, after the necessary procedure under the Entail Acts, and with consent of his uncle and cousins, the three next heirs, he executed an instrument of disentail. The consents were given without pecuniary consideration, on the footing that the estate should be sold and other lands purchased and entailed on the same series of heirs as before. Accordingly, in the same year, Lord Dunmore executed a trust-disposition of the estate to the Countess Dowager of Dunmore and Mr John Tait for the above purpose, upon which they were infeft.

In 1869, however, Lord Dunmore presented a petition to the Court for authority to acquire the estate in fee-simple, under the Acts 11 and 12 Vict. c. 36, 16 and 17 Vict. c. 94, and 31 and 32 Vict. c. 84, calling as respondents his uncle, Sir C. Murray, and two of his sons, being the three next heirs, and the trustees under the trust-disposition of 1864. Deeds

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of consent were lodged by the three next heirs, and after the usual procedure, and a remit to a man of business to inquire into the facts, the Lord Ordinary, by decree dated 5th February 1870, after narrating that the petitioner had disentailed the estate in 1864, and thereafter conveyed it to trustees, who were still infeft, for certain purposes, granted warrant to Lord Dunmore to acquire the estate in fee-simple, and ordained the trustees to execute a conveyance in his favour.* They did so by deed dated 29th March 1870.

In April 1870 Lord Dunmore borrowed £35,000 from Mr J. C. Tait, W.S., for which he granted a bond and disposition in security over the estate.

During these proceedings Lord Dunmore had no heir-apparent. His eldest son, Viscount Fincastle, was born in 1871.

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* The extract decree, *inter alia*, narrated "that the petitioner was the before designed Right Honourable Charles Adolphus Earl of Dunmore, who was called as institute under the foresaid destination contained in the trust-deed, and was the party who, if the said southern portion of Harris, still remaining unsold, and held by the said trustees for the purposes specified in the said trust-deed, or any part thereof, had been sold, and the proceeds thereof invested in the purchase of lands, and entailed in terms of the said trust-deed, would have been for the time institute or heir of entail in possession of the same: That the heirs of entail, whose consents, if the said lands held in trust as aforesaid had been sold, and the proceeds thereof invested in lands which had been entailed, would have been required to a disentail thereof, and whose consents were required to the application, were (first), the Honourable Sir Charles Augustus Murray, Knight Commander of the Bath, the uncle of the petitioner, and brother-german of the said deceased Alexander Edward Earl of Dunmore, Her Britannic Majesty's Envoy Extraordinary and Minister Plenipotentiary at the Court of Lisbon, and presently resident in or near Lisbon, or elsewhere furth of Scotland; (second), Charles James Murray, the eldest son of the said Honourable Sir Charles Augustus Murray, presently residing at Barton Vicarage, Bury St Edmunds, Suffolk, or elsewhere furth of Scotland; and (third), Cecil Henry Alexander Murray, second son of the said Honourable Sir Charles Augustus Murray, presently residing with his said father in or near Lisbon, or elsewhere furth of Scotland, they being the three nearest heirs who for the time would be entitled as aforesaid to succeed in their order successively immediately after the petitioner: That the petitioner was desirous to acquire in fee-simple the foresaid lands and estate held by the said trustees under and by virtue of the said trust-deed, and made the application to their Lordships for authority to acquire in fee-simple the said lands and estates: And which petition prays their Lordships to interpone authority to the proposed transaction, and grant warrant to and authorise the petitioner to acquire in fee-simple the foresaid lands and estate, held in trust as aforesaid, and for that purpose to grant warrant to and ordain the said trustees to make and execute a valid conveyance to the petitioner in fee-simple of the foresaid lands and estate. After sundry procedure, in the course of which" a remit was made to a writer to the signet "to inquire into the facts and circumstances set forth in the petition, and whether the provisions of the Acts of Parliament and Sederunt have been complied with, and to report." . . . . "Sitting in judgment the said Lords, of the date hereof, having considered the report, the petition, and whole proceedings, interponed and hereby interpone authority to the proposed transaction; granted warrant to and authorised, and hereby grant warrant to and authorise the petitioner to acquire in fee-simple the southern half or portion of the lands and estate of Harris, held in trust, as mentioned in the petition; granted warrant to and ordained, and hereby grant warrant to and ordain the Right Honourable Catherine Countess Dowager of Dunmore, and John Tait, the trustees mentioned in the petition, to make and execute a valid conveyance to the petitioner in fee-simple of the foresaid lands and estate, and decerned and hereby decern," &c.

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This was an action by Lord Fincastle, with consent of his father as his administrator, concluding for reduction of (1) the interlocutor of 5th February 1870; (2) the conveyance by the trustees of 29th March 1870; and (3) the bond and disposition in security in favour of Mr J. C. Tait, and assignations thereof, and for declarator that the trust-disposition was still subsisting. Lord Dunmore, the trustees, Sir C. Murray and his two sons, and the creditors under the bond, were called as defenders, and appearance was made for Lord Dunmore, the trustees, and the creditors.

The pursuer pleaded;—(1) The prayer of the said petition to acquire in fee-simple having been granted without the requisite consents, the interlocutor or decree, dated 5th February 1870, was and is unwarranted, incompetent, and inept, and ought to be reduced as concluded for. (2) The defenders, the Countess Dowager of Dunmore and John Tait, trustees foresaid, not having been *in titulo* to grant the disposition and conveyance, nor the defender, the Earl of Dunmore, to grant the ratification and discharge contained in the deed dated 29th March 1870, the same are inoperative, and null and void, and as such should be reduced and set aside. (3) The trust-deed dated 21st June 1864 being still in force, and the said defenders, the trustees foresaid, being still bound to execute the trust purposes therein contained, so far as not yet implemented, the pursuer should have decree of declarator and implement as concluded for. (4) As the defender, the Earl of Dunmore, is not and was not at the date of the bond and disposition in security, 12th April 1870, fee-simple proprietor of the lands and others therein mentioned, he was not *in titulo* to grant the disposition thereof to the defender, James Campbell Tait, contained in that deed, and the same, and the various assignations thereof, should be reduced as and to the extent concluded for.

The defender, Lord Dunmore, pleaded, *inter alia*;—(2) The disentail effected in 1864 being for the purpose of selling the lands of South Harris with a view to the purchase of other lands to be entailed on the same series of heirs, and the trust-deed having been granted solely with the view of carrying this purpose more completely into effect, the consent necessary to the disentail of the trust property was merely such consent as was requisite to the disentail of the lands in 1864. (3) The defender did not, under the decree dated 9th June 1864, and instrument of disentail thereafter recorded, acquire the lands and estate of South Harris in fee-simple within the meaning of the Act 11 and 12 Vict. cap. 36.

The trustees pleaded;—(1) The disposition and conveyance executed by the defenders in favour of the Earl of Dunmore having been granted under authority of the decree of the Court, the trust in favour of the defenders was extinguished. (2) The trust having been validly put an end to, the defenders are not bound again to take it up, and to execute the unfulfilled purposes thereof.

The creditors pleaded;—The bond and disposition in security and assignations thereof having been made and taken *bona fide* on the faith of the decree of disentail, and the said decree not having been appealed from or brought under reduction within the time appointed by law, the said bond and disposition in security, and assignations thereof, are unchallengeable, and ought not to be reduced.

The Lord Ordinary pronounced this interlocutor:—"Finds that the prayer of the petition for authority to disentail, in which the interlocutor of 5th February 1870, in the first place mentioned in the conclusions of the summons, was pronounced, was granted without the consent required by law, and that the said interlocutor, and the deed or writing dated 25th, 26th, and 29th March, and recorded in the Register of Sasines 1st April 1870, in the second place mentioned in the conclusions of the summons,

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are in consequence invalid; but finds, nevertheless, that the bond and disposition in security for the sum of £35,000, with interest and penalties corresponding thereto, and containing in security of said sum, interest, and penalties, a conveyance of the lands and estate of South Harris, described in the conclusions of the summons, granted by the defender, the Earl of Dunmore, in favour of James Campbell Tait, W.S., dated the 12th, and recorded in the division of the General Register of Sasines applicable to the county of Inverness the 26th days of April 1870, and the several assignations thereof in the 4th, 5th, 6th, 7th, 8th, 9th, 10th, and 11th places mentioned in the conclusions of the summons, are, by virtue of the 24th section of the Act 16 and 17 Victoria, cap. 94,* valid and effectual securities, and that the several sums of money contained in the said bond and disposition in security, and assignations thereof, form valid and effectual charges on the said lands of South Harris and others: Therefore reduces the said interlocutor and deed or writing, and decerns and declares, as regards said writs, in terms of the reductive conclusions of the summons, but always under the declaration that this decree of reduction shall not prejudice or affect the said bond and disposition in security, and the several assignations thereof, and that the dispositions therein contained shall be held to subsist, in so far as necessary to protect the said bond and disposition in security, and the assignations thereof, and the rights of the creditors therein: Further, assoilzies the said James Campbell Tait," &c., " from the whole conclusions of the summons: Grants warrant to the keeper of the Register of Sasines to mark upon the said register that decree of reduction has been pronounced of the said deed or writing, subject to the exception above mentioned: Finds and declares, but without prejudice to the validity of the said bond and disposition in security, and assignations thereof, that the conveyance made, and the trust constituted by the defender, the Earl of Dunmore, under his trust-disposition, dated 21st June 1864, in favour of the defenders, Catherine Dowager Countess of Dunmore, and John Tait, as his trustees, is operative and subsisting, and decerns and ordains the said two last mentioned defenders to give effect to and forthwith to execute the purposes contained in the said trust-disposition, in so far as the same have not been already implemented by them, subject always to the effect of the said bond and disposition in security and assignations thereof as valid securities on the said estate of South Harris and others: Finds no expenses due, and decerns."

Lord Dunmore reclaimed, and argued;—The consents obtained to the petition to acquire in fee-simple were sufficient. Lord Dunmore was not heir under a new entail made after 1848, but was still under the old entail of 1841. The fetters were not new. They were the old fetters relaxed for a special purpose. Even if it were held that, after the disentail of

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* Sec. 24. " Every judgment and decree pronounced and that shall be pronounced upon any application under the said recited Act or under this Act, where such judgment or decree has not been or shall not be brought under review of the House of Lords by appeal, or brought under reduction upon any relevant ground during the period within which such judgment or decree might have been appealed from, shall, as regards third parties acting *bona fide* on the faith thereof, be no longer reducible on any ground of irregularity or non-compliance with the provisions of the said recited Act or of this Act, but in respect of any such ground of challenge, be final and conclusive; and the period during which challenge or appeal is competent under the said recited Act or under this Act, of any such judgment or decree, or of any instrument of disentail or other deed executed in virtue of such judgment or decree, shall not be extended in respect of the minority or want of capacity to act of any person or persons whatever."

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1864, he was proprietor in fee-simple, he was entitled to revoke his conveyance to the trustees,[1] and he did so by the proceedings in the petition to acquire in fee-simple.

The pursuer argued;—When Lord Dunmore disentailed the estate in 1864 he became fee-simple proprietor. The lands could then have been attached by his creditors. The old entail was at an end, and its fetters were inoperative. By his trust-deed of 1864 he created a new entail. He was then heir of entail in possession under an entail made after 1848, born before the date of the tailzie, and he could not disentail without the consent of an heir-apparent who had attained the age of twenty-five.[2] But the Lord Ordinary's interlocutor was wrong in so far as regarded the bond to Mr Tait. The 24th section of 16 and 17 Vict. c. 94, did not apply to cases of this kind. This was not a case of "irregularity or non-compliance with the Act." The petitioner was not within the Act at all, and it appeared *ex facie* of the decree in the petition that that was so.

The creditors argued;—They had acted *in bona fide*, and were entitled to rely on the decree of the Court, and were fully protected by the 24th section of 16 and 17 Vict. c. 94.

At advising,—

LORD DEAS.—There are two questions here,—in the first place, whether the deed now sought to be reduced is a valid disentail, and, in the second place, whether, if it be not so, the heritable securities nevertheless remain good to the creditors. The Lord Ordinary has found in favour of the pursuers of the reduction on the first of these questions, and in favour of the heritable creditors upon the second.

It appears that there was an entail of the estate executed by the father of the present Earl in 1841, and there seems to be no question raised as to the validity of that entail. But it seems equally clear that that entail was done away with by a valid deed of disentail, followed by a trust-disposition, under which the proceedings now challenged took place. I cannot say that I think it admits of any doubt that the entail of 1841 was effectually done away with and extinguished. If so, the consequence was that the trustees of the Earl were acting entirely upon the trust-disposition which he had executed, and this, I think, placed him in the position of not being entitled, under the clauses of the statute quoted in the record, to execute the deed which he did execute without the consent of his heir-apparent for the time being. It is true he had at the time no heir-apparent, but the consequence of that I take to be that he was not in the position in which alone the clauses of the statute quoted entitle an heir of entail to execute such a deed. I need not go into any detail of the enactments. I think it only necessary to say that on that part of the case I entirely agree with the Lord Ordinary.

The difficult and delicate question is the second question, whether, notwithstanding that what was thus done was unauthorised by the statute, and consequently reducible, those heritable securities which were granted upon the faith that the proceedings were not reducible are nevertheless to take effect? The Lord Ordinary has found that they are; and the soundness of that judgment depends entirely upon the construction to be put upon section 24 of the statute 16 and 17 Vict. c. 94. That section bears that "every judgment and

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[1] Lindores v. Stewart, 1714, M. 7735; Scott v. Scott, 1713, M. 15,569.
[2] 11 and 12 Vict. c. 36, sec. 1.

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decree pronounced and which shall be pronounced upon any application under the said recited Act or under this Act, where such judgment or decree has not been, or shall not be brought under review of the House of Lords by appeal, or brought under reduction upon any relevant ground during the period within which such judgment or decree might have been appealed from, shall, as regards third parties acting *bona fide* on the faith thereof, be no longer reducible on any ground of irregularity or non-compliance with the provisions of the said recited Act or of this Act, but in respect of any such ground of challenge be final and conclusive; and the period during which challenge or appeal is competent under the said recited Act or under this Act of any such judgment or decree, or of any instrument of disentail or other deed executed in virtue of such judgment or decree, shall not be extended in respect of the minority or want of capacity to act of any person or persons whatever."

Now, it cannot be disputed that no appeal or reduction of the judgment or decree now complained of was instituted within the time mentioned in the enactment which I have just read,—that is to say, within the time during which it was competent to have appealed to the House of Lords against that judgment or decree, and that being so, the question is, whether the heritable creditors are not entitled to say that they are in the position of third parties who acted *bona fide* upon the faith of that judgment or decree, and so are entitled to the protection given by the statute.

There can be no doubt, I presume, that if third parties choose to take heritable securities within the time allowed for appealing against the judgment or decree they take the risk of that judgment or decree being altered upon appeal, and it may very plausibly be said that that goes a considerable way to shew that the heritable creditors in this case must be held to have taken that risk. But although that may be so, still, if the time for appealing is allowed to lapse without either reduction or appeal being instituted, it does not follow—whatever risk they may have been taking in the interval—that these creditors are not then entitled to the protection given by the statute. I think it would be very difficult to say that creditors who had accepted securities within that time, but with reference to whom no appeal or reduction had been instituted till after the time had expired, were in any worse position than creditors who had taken their securities after the time had expired. Those of the defenders, at all events, who became onerous assignees after the time for appealing had expired, but before the reduction had been instituted, would surely be in the ordinary position of *bona fide* singular successors, in what, although relating to securities merely, is really a question of heritable rights. The more general question, however, comprehends the original creditors as well as assignees, and just comes to be, what did the Legislature mean by this protecting clause? what was the *bona fides* with which the Legislature was here dealing? It appears to me that the words "third parties, acting *bona fide* on the faith thereof," mean third parties acting *bona fide* upon the faith of the judgment or decree. The word "thereof" plainly refers back to the words "judgment or decree," and this reference is, I think, carried throughout the rest of the sentence. Well, then, what is *bona fides* in a judgment or decree? The thing required is not *bona fides* in the proceedings which preceded the judgment or decree, but *bona fides* in the judgment or decree itself. It appears to me that if the parties *bona fide* believed the judgment or decree to be a good judgment or decree, that was the kind of *bona fides* which the statute required. It must

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be kept in mind that such a judgment or decree is never pronounced without careful investigation and consideration. It is not pronounced lightly, far less as a matter of course, but *causa cognita*, after the mind of the Court has been applied to the whole matter, including the question whether the applicant is or is not in the position required by the statutes to entitle him so to apply. No one can dispute that in this case the Lord Ordinary applied his mind to this question. It was his undoubted duty to do so. There is no more anxious duty, according to my experience as a Lord Ordinary, which a Judge has to perform, than to deal with petitions under this class of statutes, to see that they are all right and regular, that they come within the terms of the statutes, and that the thing which is proposed to be done is a thing which the law allows to be done. Most unquestionably, therefore, we are to hold that the Lord Ordinary took all these things into consideration, that he made a remit for inquiry in the usual way, and that he had the facts as well as the statutes before him, and if a mistake was made it was a mistake of the Judge, who thought he was pronouncing a sound judgment.

The question then comes to be, was it necessary, to entitle a creditor to plead the statutory *bona fides*, that he should himself, by his own counsel and agents, make all the investigation and solve all the legal questions which the statutes have committed to the Lord Ordinary, and through him, if he sees difficulty in the case, to the Court. I cannot think that is the meaning of the clause. The matter was committed to a competent Judge, who, it is to be presumed, knew his duty, and performed his duty. There was nothing upon the surface to create suspicion of error or mistake, and this being so, I think it would be an unreasonable construction of the enactment to hold that the creditor was bound to perform over again all that the Judge had already performed, with the chance of arriving at a different conclusion from that at which the Judge had arrived, before being entitled to the benefit of the protecting clause in the statute.

It may appear a little startling at first sight to say that a creditor lending upon heritable security was not bound to look farther, but we must recollect that these statutes as to the law of entail have interfered to an extraordinary extent, and by very complicated enactments, with what had always previously been considered the rights of property; and it is not, to my mind, at all wonderful that, in making these changes, the Legislature should have extended to creditors lending their money on the faith of all being right the privilege and protection of *bona fides*, in the sense in which I am disposed to construe these words in the enactment. Be this as it may, however, I think such is the fair and sound construction of the clause in dispute; and, although the point is undoubtedly a nice and delicate as well as a novel one, I am on the whole inclined to agree, on that point also, with the judgment of the Lord Ordinary.

LORD ARDMILLAN.—I concur in the decision of the Lord Ordinary. I concur also in the opinion now expressed by Lord Deas.

There can be no doubt that the petition for disentail presented in August 1869 was supported by deeds of consent which were not sufficient in law, as the petitioner had no heir-apparent, and therefore could not have the consent of an heir-apparent. The only consent was not according to the provisions of the statute, and accordingly the interlocutor or decree of the Court was invalid.

It has been so declared, and rightly so, by the Lord Ordinary.

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But a more difficult question arises in regard to the validity of the bond for £35,000, granted by Lord Dunmore to creditors on the faith of the decree, and accepted *in bona fide* by the creditors.

I think these bonds were granted and were accepted *in bona fide*, on the faith of the judgment of the Court. I think that, being held by *bona fide* third parties, they are within the protection of the statute 16 and 17 Vict. c. 94, sec. 24, and that the Lord Ordinary has rightly found the bond and assignations to be valid and effectual securities.

After the explanations given by Lord Deas I have really little to add.

The petitioner for disentail was the Earl of Dunmore, the heir in possession. The obtaining the proper consents was necessary to the success of the petition; and these consents, believed to be appropriate and sufficient, were obtained after the petition had been presented. These consents are not conditions of the petition, but muniments of the right to demand decree in terms of the prayer. They were required by the Act. The obtaining and producing the consents after the petition was presented, and in course of the procedure, was compliance with the provisions of the Act. The production of insufficient consent was just failure to produce sufficient consent, and was non-compliance with the provisions of the Act, leaving the petition unsupported by the consents which the statute required, and decree on the petition was therefore reducible—reducible within a certain time to all effects, but after a certain time the rights of third parties acting *in bona fide* are protected. Now, on this petition, regularly presented but insufficiently supported by consents, there was judicial procedure, and a regular decree of Court was pronounced, authorising the acquisition of the estate in fee-simple. On the faith of this decree the bond was executed and accepted, and the assignations granted. All this was done in good faith, in the natural and honest belief that the decree of Court was conclusive.

Now, observe the provisions of the 24th section of the 16th and 17th Vict. c. 94—[reads]. The non-compliance is something different from mere irregularity.

It is also very important to observe what it is that is protected. It is not the procedure, or any step of a party in the procedure. It is the "judgment and decree." Around the judicial deliverance of the Court this protection against reduction is thrown by the statute in every case where third parties have acted *in bona fide* on the faith of the judgment. It seems to me natural, equitable, and becoming, that a party acting on the faith of a judgment of Court, obtained by an heir of entail in possession, and presented to him as a valid judgment, shall be protected.

The judgment stands till reduced, and this statute of 16 and 17 Vict. declares that, when acted on by third parties, relying on the faith of it *in bona fide*, it shall not be reducible on any ground of irregularity or non-compliance with the provisions of the Act.

During the debate I asked Lord Dunmore's counsel—"Why did you get consents?" The answer, and the right answer, was, "Because it is so provided by the statute." Then the failure to obtain the proper consents is "non-compliance with the provisions of the Act;" and on the ground of such non-compliance the judgment is assailed. Having been accepted and acted on by third parties in good faith I think that, to their prejudice, it cannot be reduced.

I am at present assuming the good faith of these third parties, and, if so, I am humbly of opinion that the bond and assignations cannot be reduced on the grounds here alleged.

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But it is said or suggested that these creditors were not *in bona fide*, because they might have discovered, and ought to have discovered, the defective character of the consents, and could have done so by careful and skilful perusal of the judgment and the titles.

I shall only say that, while admitting this question to be attended with some difficulty, I cannot arrive at that conclusion. There are preliminary examinations and reports on these petitions. There was in this case such examination and report before judgment, and the judgment is given, not hastily or without inquiry, but *causa cognita* on consideration of "the report, petition, and whole proceedings." There is every presumption in favour of a judgment thus pronounced. There is everything to give and to sustain confidence, and nothing to excite suspicion. Nothing has been proved or alleged to throw the least doubt on the good faith of these creditors; and I cannot hold that want of *bona fides* is to be presumed or lightly implied against creditors accepting a bond granted under such judicial authority, and as the result of such a judgment.

There was no appeal from the decree of disentail, and no reduction instituted within the period allowed by law. It was acted on as valid, was unchallenged, and uncomplained of, and, on the faith of it, *in bona fide*, money was lent, and this bond accepted. The reduction of the bond, the refusal to *bona fide* creditors of the protection of the Act of 16 and 17 Victoria, notwithstanding that these creditors acted on the faith of a decree of the Court, would, in my view, be most inequitable; and to let in the principles of equity on the laws of entail is, I think, one of the leading purposes of all recent legislation on the subject.

I am of opinion that the Lord Ordinary is right.

LORD MURE.—I have arrived at the same conclusion, and I have not had any difficulty upon the first point, viz., the reduction of the interlocutor of the 5th of February 1870, by which the property in question was authorised to be acquired in fee-simple.

The facts under which this question is raised are few and simple. The original entail under which the estates were held was dated in 1841. There was then a disentail in 1864 at the instance of the present Earl of Dunmore; and that disentail, having been regularly carried through with the requisite consents, the estate was held in fee-simple. In the same year, and as the condition apparently of the consent being given to the disentail, there was a trust-deed executed in favour of certain of the disentailer's relations, by which the estate so disentailed was appointed to be held in trust, with a view to sell portions of it and acquire other lands, and with directions to re-entail the estates.

In 1869 Lord Dunmore, who was born before 1848, presented another application to the Court in order to obtain leave to hold the estates so placed under trust in fee-simple. That was done by him, as the heir of entail in possession of the estate at the time. In the course of the application he obtained the consent of the three nearest heirs, under certain clauses of the statutes authorising disentails, and after due inquiry the interlocutor or judgment now in question was pronounced, authorising him to acquire the lands in fee-simple.

That judgment was pronounced after the procedure which is usually taken in such cases, and after a man of business had been appointed by the Court to inquire into the whole proceedings, and to report whether they were in com-

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pliance with the statutes. It further appears, from the appendix which has been laid before us, that, as two of the heirs who were called as respondents in the petition were minors, men of business of experience were appointed to act as their curators, and attend to their interests in the matter. And it also appears that, after due inquiry, a report was made to the Lord Ordinary in the usual way, and that, upon this report, judgment was pronounced, giving right to Lord Dunmore to acquire the lands in fee-simple.

This proceeding is now challenged, upon the ground that the requisite consent was not obtained, inasmuch as Lord Dunmore was in the position of a party holding under an entail dated subsequent to 1848, and it was necessary that he should have the consent of an heir-apparent of twenty-five years of age, without which it was incompetent for him to acquire the property in fee-simple. This objection to the procedure, and to the conveyance of the estate in fee-simple following upon the disentail, is, in my opinion, well founded; and I concur with your Lordships in thinking that the pursuer is, to that extent, entitled to reduction.

But a more difficult question is raised under this action relative to the position of the creditors who have advanced money on the estate upon the supposition that it was held in fee-simple; because, if the estate was not disentailed, and there was no right given to Lord Dunmore to acquire it in fee-simple, then unquestionably the security of the creditors is imperilled, unless they can find protection within the provisions of the statutes. The defence of the creditors is rested on the 24th section of the 16th and 17th Vict. c. 94, which provides that "every judgment or decree pronounced" under such an application which is not taken to appeal or brought under reduction within a certain time "shall, as regards third parties acting *bona fide* on the faith thereof, be no longer reducible on any ground of irregularity, or non-compliance with the provisions of the recited Act or of this Act."

The question, therefore, comes to be, whether, seeing that the proceedings relative to the acquisition of the estates in fee-simple in 1870 have been irregular, and not in compliance with the provisions of the statute as regards the matter of consent, and were therefore invalid, these creditors are entitled to the protection conferred by the statute upon parties acting *bona fide* on the faith of a judgment so pronounced? I have come to the conclusion that the creditors in the present case are entitled to that protection.

Upon the fact of *bona fides* I have no doubt whatever. There is no allegation that the creditors were not *in bona fide*, or that they were not in the firm belief that they were advancing money on a fee-simple estate. In that view the question is reduced to this,—must they be held to have been *in mala fide* because the irregularity was of a nature which might have been discovered upon looking into the proceedings with a view to the advance of money? Now, if it is to be held as a sufficient reason for creditors not being *in bona fide* that they could have found out upon examination, and by the advice of skilled lawyers, that the proceedings were irregular, and not in compliance with the requirements of the statute, I do not very well see how there could be *bona fides* under the statute, in almost any case of this description, where on erroneous judgment has been pronounced, because the examination of legal experts will, in all probability, in most cases detect any mistakes a Court may have made in granting the decree. But I do not think that under this provision of the statute it could have been intended that if the judgment itself bore, as here, to be a judgment of the

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Supreme Court—of the tribuual authorised by statute to deal with these matters —and to be a judgment pronounced after due inquiry, it was still to be the duty of creditors before they advanced money upon the estates to set on foot an examination into the details of the proceedings which led to the judgment, and into the grounds of the judgment, in order to see whether the Court had not gone wrong in granting leave to disentail. I do not think the Legislature ever intended that, or that the words of the statute force one to adopt that construction. It, on the contrary, humbly appears to me that a creditor is entitled to act, and to rely upon a judgment of the Court pronounced on an application bearing to have been presented and carried through under the statute, although it may turn out that the application was defective in respect of non-compliance with the provisions of the statute relative to consents, and I think that this is a matter as to which creditors are entitled to the protection afforded by the 24th section.

It was strongly contended on the part of the pursuer that the whole proceeding was *funditus* and *ex facie* null and void and beyond the jurisdiction of the Court to deal with at all, because Lord Dunmore had then no son, and there could not therefore be an heir-apparent of twenty-five years of age. But this is a difficulty which does not appear to have occurred to the Court when the judgment was pronounced, after due inquiry, as the decree itself bears; and the statute says that every judgment or decree so pronounced and not taken to appeal "shall, as regards third parties acting *bona fide* on the faith thereof," &c., "be final and conclusive."

We have the judgment in this case (partially quoted, p. 346), which, after setting forth that curators had been appointed to the minor children, and a remit made to a man of business to report, bears that "the Lords having considered the report, the petition, and whole proceedings," interponed their authority thereto. Now, I think that creditors, when advancing money, were entitled to believe this to be a sound judgment, and to make advances on the faith of it, and cannot be held to have been *in mala fide* because they did not enter into an examination of the proceedings in order to see whether the Court were right or wrong in the judgment they pronounced. The argument which was pressed upon this point appeared to me to come to this, that because, *ex facie* of the proceedings, there was not any consent of an heir-apparent, the Court had no jurisdiction to deal with the matter; that this was not therefore a mere irregularity or non-compliance" with the statute in the sense of sec. 24, but that, in this view, there was truly no judgment which should have been plain to any man of business advancing money. But this, as I apprehend, does not solve the difficulty. Because, in every case where a Court is exercising a purely statutory jurisdiction, and where there have been irregularities and non-compliance with statutory requisites, the ground upon which such proceedings are generally challenged and set aside is, that the Court had not jurisdiction to act except in the way the statute authorised. To hold, therefore, that the protection given to *bona fide* creditors by the 24th section of this Act cannot be extended to this case because the objection strikes at the jurisdiction of the Court which pronounced the decree would, in the view I take of it, be in effect to hold that there cannot be any case to which the provisions of the statute relative to the protection of creditors can be applied; and this is, in my opinion, a sufficient answer to the objection, in so far as it is rested on alleged want of jurisdiction in the Court to deal with the matter.

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I agree therefore with Lord Deas and Lord Ardmillan in holding that the objection taken to the securities granted to the creditors is not well founded, and that the interlocutor of the Lord Ordinary should be adhered to.

LORD PRESIDENT.—The Lord Ordinary has found that the interlocutor of 5th February 1870, and the conveyance by the trustees to Lord Dunmore by disposition dated 25th and other days of March 1870, are invalid; and there I agree with his Lordship and with all the Court. But the Lord Ordinary further finds, "nevertheless, that the bond and disposition in security for £35,000, and the various assignations thereof, are, by virtue of the 24th section of the 17th and 18th Vict. cap. 94, valid and effectual securities, and that the several sums of money contained in the said bond and disposition in security and assignations thereof form valid and effectual charges on the said lands of South Harris and others." In regard to this second finding I have the misfortune to differ from all your Lordships and from the Lord Ordinary; and as the question appears to me to be one of great and general importance I must take leave to state the grounds of my opinion somewhat in detail. In the first place, we must ascertain what was the position of the Earl of Dunmore when he proceeded to make the disentail in 1864. He had succeeded as heir of entail and provision to his father under a deed of entail which was executed and recorded in the year 1841, and he was infeft as heir of tailzie and provision under that deed. He was thus in the position of being heir of entail in possession of the estate of South Harris and others under an entail dated prior to the 1st of August 1848, and he was entitled to disentail that estate if he could obtain the requisite consent, under section 2d or section 3d of the Entail Amendment Act. He did obtain the requisite consents, and the category under which he brought himself, among the various categories contained in these two sections, was that of an heir of entail in possession, with the consent of the three nearest heirs. That disentail was regularly and properly carried through; but, although he thereby became fee-simple proprietor for the time, he had carried through this disentail under an arrangement with the three next heirs not to pay them any pecuniary consideration for their consents, but under an obligation undertaken by him that he would re-entail the lands, or rather that he would apply the lands in such a way, by selling them and employing the price in the purchase of new lands, as to secure these new lands under a deed of entail to the same destination of heirs as was contained in the entail of 1841. In implement of this obligation he conveyed the lands of South Harris, which he had disentailed in the manner explained, to two trustees, his mother, the Countess Dowager of Dunmore, and Mr John Tait, and the purposes of that trust are very clearly explained in the 5th and 6th heads of the deed. After providing for some preliminary purposes it provides, —"In the fifth place, I hereby authorise, empower, and direct the said trustees, as soon as it is by them deemed advisable and advantageous, to bring to sale the whole lands and estate and other heritages hereby disponed, and after advertisement of sale thereof in such way and to such extent, having regard to the advertisements already made and being made, the trustees may deem best calculated to effect an advantageous sale or sales (of which they shall be the sole judges), to sell and dispose of the said lands and estate and other heritages hereby disponed, in whole or in part, by public roup or by private bargain." Then the sixth purpose is,—"I hereby authorise and empower, appoint and direct, the said trustees, as opportunities may offer, after the sale or sales of the said lands

and estate, and other heritages hereby disponed, of applying the free residue of the said price or prices in the purchase of other lands and heritages in Scotland, to apply the said free residue of the said price or prices in the purchase of such other lands and heritages in Scotland as may be approved of by me, or, failing me, by the said Honourable Charles Augustus Murray; and, failing him, by the said Honourable Henry Anthony Murray; and upon such lands and heritages being so purchased and acquired, and the title of the said trustees thereto being duly made up, I direct and appoint the said trustees forthwith to execute an irrevocable and valid and sufficient disposition and deed of strict entail, one or more, of the said lands and heritages so purchased and acquired, to and in favour of myself, the said Charles Adolphus Earl of Dunmore, and the heirs-male of my body; whom failing, of the said Honourable Charles Augustus Murray," and so forth, repeating the destination in the original entail of 1841.

Now, it was contended in argument that, as this disposition was granted in implement of an arrangement and agreement between Lord Dunmore, on the one part, and the three next heirs of entail upon the other, it was in the power of these parties to put an end to the agreement, and also to discharge this conveyance, or to require the trustees to reconvey, although they were infeft upon this disposition. I do not think any of your Lordships have given the slightest countenance to that contention, and I am not surprised at that, because nothing can be clearer than that the heirs of entail in the destination of the original deed of 1841 acquired a *jus quæsitum* under the trust-conveyance, and that no parties, not the whole parties to the agreement in implement of which this was granted, could have put an end to this trust. What, then, was the position of Lord Dunmore under this trust-deed? He was no longer fee-simple proprietor. He had divested himself of that character, and he was beneficiary under this trust, and institute in the deed of entail to be executed by the trustees when they had sold South Harris and acquired other lands. He was in the position contemplated by the 27th section of the Entail Amendment Act; and it is very necessary to attend to the precise words of that statute. It provides that, "where any money or other property, real or personal, has been or shall be invested in trust for the purpose of purchasing land to be entailed, or where any land is or shall be directed to be entailed, but the direction has not been carried into effect, it shall be lawful for the party who, if the land had been entailed in terms of the trust, would be the heir in possession of the entailed land, and who in that case might, by virtue of this Act, have acquired to himself such land so purchased, by executing and recording an instrument of disentail as aforesaid, to make summary application to the Court, as hereinafter provided, for warrant and authority for the payment to him of such money or the conveyance to him of such land in fee-simple, and the Court shall, upon such application and with such consents, if any, as would have been required to the acquisition of such land in fee-simple, have power to grant such warrant and authority." In connection with that must be taken the 28th section, which provides that, "for the purposes of this Act, the date at which the deed or writing placing such money or other property under trust or directing land to be entailed first came into operation shall be held to be the date at which the land should have been entailed in terms of the trust, and shall also be held to be the date of any entail to be made hereafter in execution of the trust, whatever be the actual date of such entail."

Now, the date of this deed of trust was 1864, and it came into immediate operation. About that, I suppose, there can be no doubt; but at all events it

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is very clear that the date of this deed of trust cannot be earlier than the year 1864, and therefore the date of the entail for the purposes of this Act, from the fetters of which Lord Dunmore proceeded to attempt to relieve himself, is not earlier than the year 1864. From that it follows very clearly that Lord Dunmore was then in the position of an heir of entail in possession by the operation of the 27th section of the statute, under a deed of entail made after the 1st of August 1848. I presume so far that cannot be disputed. Now, can an heir of entail, possessing under a deed made after the 1st of August 1848 disentail an estate, and in what circumstances is it possible? That is the inquiry which must always be made in a question of this kind, and the answer to it is to be found in the 1st section of the statute, and, let me add, nowhere else, because the other two sections, the 2d and 3d, which refer to disentailing, are concerned entirely with entails made before the 1st of August 1848. Therefore the simple key to Lord Dunmore's position as he stood after the execution of that trust of 1864 was this, that he could not disentail at all unless he was in the position contemplated by the 1st section of the statute. Now, what does the 1st section of the statute say? It provides that in two cases such a disentail may be made, but in two cases only. In the first place, if the heir was born after the date of the tailzie, and is of full age, and in possession of the entailed estate by virtue of the tailzie, he may disentail without any consents at all; and, in the second place, if he was born before the date of the tailzie, and is of lawful age, and in possession of the estate by virtue of the tailzie, he may disentail. And now I give the very words of the statute:—"With the consent, and not otherwise, of the heir next in succession, being heir-apparent under the entail of the heir in possession, and provided that such consent and such instrument of disentail shall not be valid and effectual unless granted by a person of the age of twenty-five years complete, not subject to any legal incapacity and born after the date of the tailzie to which such instrument applies." Now, Lord Dunmore was not born after the date of the tailzie, and therefore he could not fall within the first part of this section. He was born before and not subsequent to the date of the tailzie, and therefore he is not entitled to disentail—I do not say without the consent of an heir-apparent, but he is not entitled to disentail unless there exists an heir-apparent of the full age of twenty-five years complete, born after the date of the tailzie. It is the existence of such a person in this world that gives the sole title to Lord Dunmore to disentail that estate; and, without the existence of such a person, there can be no title in him to disentail the estate. It is not merely that a consent is required. Now, the condition of Lord Dunmore at this time was that he had no son and no heir-apparent; and what was the necessary legal consequence of that under this statute? that, until he begot a son, and bred him up to the age of twenty-five years complete, he could not disentail that estate. That was his position in 1864. Therefore, it appears to me that Lord Dunmore had no more title to disentail the trust lands held by these trustees than if he had not been in the position of heir in possession. The one is not a bit more a condition of the right to disentail than the other. It is required that he shall be the heir in possession, but it is also required that he shall have an heir-apparent of the full age of twenty-five. The one is just as essential as the other. It seems to me there is here, not a failure to comply with any of the provisions of the statute, but the simple fact that Lord Dunmore is not within the statute at all. He is not contemplated by the statute, and he has no rights under the statute. And thus the objection to his proceeding in the

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year 1870 is not that what was done in Court was wrong, but that antecedently, and before he presented his petition at all, he had no title to do it. There is, in short, a radical defect of title. Now, what is done? He presents an application to disentail this estate as if the entail was dated prior to the 1st of August 1848, and gets the consent of the three next heirs, none of them being heir-apparent, and he carries through the proceeding upon that footing, and as if it were a case under the 3d section of the statute; and it is said that that is to be valid and effectual, so far at least as to set up all the bonds that have been granted by Lord Dunmore in the character of fee-simple proprietor acting on the faith of that warrant of disentail. I cannot agree with your Lordships in thinking that this is a case within the 24th section of the statute 16 and 17 Vict., and I think it would be very much to be deplored if that were the meaning of the 24th section of that statute, for I think it would lead to great practical injustice and great practical inconvenience. Just let us consider for a moment, before adverting to the language of that clause, what was the position of the party lending his money here. He lends the money upon an heritable security after employing a conveyancer to examine the titles, and the duty of that conveyancer is to examine the titles for forty years prior to the date at which the loan is proposed to be contracted. Now, what would the conveyancer employed by the borrower here find in that progress of titles? He would find that Lord Dunmore had been an heir of entail under an old entail executed in 1841, and that he had validly and effectually got rid of that entail, and become fee-simple proprietor. He would then find that, in fulfilment of an agreement with the next heirs of entail, he had conveyed the estate in trust to be re-entailed, or rather to be converted into other lands, and these other lands re-entailed on the same series of heirs; and he would see that then, and from that date, Lord Dunmore was no longer an heir of entail in possession under the deed of 1841, but was an heir of entail in possession under a deed with the statutory date of 1864. Having arrived at these facts, which are patent on the face of the title, was it not the duty of the conveyancer next to inquire, could Lord Dunmore get rid of that entail which was to be made by the trustees? And if he had looked at the state of the titles a little further he would have seen, not only that he could not possibly do that under the statute, but that he had attempted to do it in a way that was altogether out of the statute. He must have seen that an heir possessing under a deed dated in 1864 could not disentail under the 3d section of the Entail Amendment Act, but could only disentail under the 1st section of the Entail Amendment Act, because the 1st section of the Entail Amendment Act is the only one that is concerned with entails made after the 1st of August 1848. Now, that seems to me to be a radical defect in the progress of titles which any conveyancer ought to have detected, and which, if he did not detect, he must meet the consequences. But it is said he and his client proceeded *in bona fide*. I confess I really do not understand what is meant by *bona fides* in a case of this kind. There must be a failure to look at the progress of titles, or an incapacity to understand them when you do look at them. But it is said he *bona fide* trusted to the decree of Court, and the decree of Court, it is said, bears such an authority upon the face of it, that everybody is entitled to rely that it is a good decree. But the decree is truly a decree in absence, so far as the interests of heirs *nascituri* are concerned. At all events, the conveyancer was surely at least bound to examine the decree to see if it was what it professed to be. And what did

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the decree bear? Why, the decree of Court,—that is to say, the extract decree which formed one of the steps of the progress of titles,—disclosed upon the very face of it the illegality that had been committed. It shewed that this was an entail dated subsequent to the 1st of August 1848; it shewed that Lord Dunmore had not and could not have the consent of an heir-apparent, and that he was born prior to the date of the entail, and therefore it shewed incontestably that he could not by any means whatever obtain a disentail of this estate. The extract decree, upon the face of it, condemned itself, not for want of consent—it is a mere mistake to talk about it as a case of want of consent—it disclosed upon its face that Lord Dunmore having no son, having no apparent heir of the age of twenty-five, could not by possibility disentail this estate. But let us look at the 24th section of the 16th and 17th Vict., and see if this is really a case within the meaning of that section. "Every judgment and decree pronounced after the time for reduction or appeal has gone by shall, as regards third parties acting *bona fide* on the faith thereof, be no longer reducible on any ground of irregularity or non-compliance with the provisions of the said recited Act or this Act, but in respect of any such ground of challenge be final and conclusive." Now, pray, observe it is not sufficient to bring the case within the protection of this statute that the party lending his money or buying the estate shall have acted *bona fide* on the faith of the judgment or decree, because it protects him only against certain grounds of challenge, —not against all grounds of challenge. And, therefore, the inquiry must always be whether the ground of challenge in this case is within the specification of the grounds of challenge in this 24th section. Now, what are the grounds of challenge against which the party is to be protected? "On the ground of irregularity or non-compliance with the provisions of the said recited Act or this Act." I do not think it was contended, and I do not think your Lordships have expressed an opinion that the ground of challenge here is an irregularity. It is certainly something more than that, and therefore unless it can be brought within the category of non-compliance with the provisions of the recited Act or this Act it is not within the clause. Non-compliance with the provisions of an Act of Parliament—what does that mean? It means a failure to comply, but there cannot be a failure to comply when a person cannot by possibility comply. That surely cannot be said; an heir of entail, who is not in possession of the entailed estate, fails to comply with the provisions of this statute in one sense of the word, for he is not the person whom the statute contemplated. But just in like manner, an heir of entail in possession of an estate under an entail dated after the 1st of August 1848, being himself born before that date, fails to comply with the provisions of this statute unless he has an heir-apparent of the full age of twenty-five years. But the one is a non-compliance just in the same sense as the other. It is not that he has omitted to do something which the statute requires. It is that he is not in a position to do it,—that he cannot bring himself within the statute at all by any means. And that is exactly the position of the case here. It is not a non-compliance with the provisions of the statute in carrying through the proceedings of disentail; but it is that he comes into Court without any right whatever to have a disentail. The statute has given him no such right. It has given him no such right upon any conditions that it is possible for him to fulfil. And therefore I say this is not within the category of non-compliance with the provisions of the statute. I think it is not in the least difficult to see what it was that *bona fide* third parties were to be

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protected against by means of this 24th section. It was against irregularities in carrying through the proceedings of disentail, and a most proper protection that was, because it must be observed that under the Entail Amendment Act there are a great many very stringent provisions about the way in which the thing is to be done. Under the 33d, 34th, 35th, and 36th sections of the Entail Amendment Act your Lordships will find a great many things that must be done, and to fail to do which would be a most serious non-compliance with the provisions of the statute; and that is the class of objections plainly which is intended to be covered by this 24th section of the more recent statute. I think to extend it any further would be not only against the plain sense and meaning of the words used, but would be inconsistent with the construction of statutes of this kind altogether. I confess I never heard of such words as these, "irregularity or non-compliance with the provisions of the statute," being held to cover a case where a party was not within the statute at all,—had no title or *locus standi* under the statute; and yet that is the condition of the judgment, in my humble opinion, which your Lordships are now affirming.

THE COURT adhered.

DUNDAS & WILSON, C.S.—TAIT & CRICHTON, W.S.—Agents.

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Jan. 17, 1876.
Minister of Borthwick v. Dundas.

REV. WALTER WADDELL, Minister of Borthwick, Pursuer.—*Asher.*
ROBERT DUNDAS AND OTHERS, Defenders.—*Lee—Dundas.*

Teinds—Augmentation—Decimæ inclusæ.—In an augmentation the minister condescended upon free teind arising from several different parcels of lands. Only one of the heritors objected to the condescendence, and on the ground that he held his lands under a title *cum decimis inclusis*, and craved that the process should be sisted that the minister might bring a declarator to try the validity of the objector's *decimæ inclusæ* right. *Held* that as there was free teind apart from that of the objecting heritor the minister was entitled to an augmentation, and that the objection of the individual heritor would fall to be disposed of in the locality.

TEIND COURT.
Teind Clerk.

THIS was an action of augmentation, modification, and locality at the instance of the Rev. Walter Waddell, minister of the parish of Borthwick, against the heritors.

After hearing counsel, the Court appointed the minister to "condescend upon the free teind which he alleges to exist in the parish."

The minister accordingly put in a condescendence in which he averred that the free teind in the parish was £107, 17s. $8\frac{4}{12}$d., arising from eleven different parcels of lands, and, *inter alia*, from 81 acres of the lands of Shank belonging to Robert Dundas of Arniston, which, he averred, were unvalued and paid no stipend.

Mr Dundas objected that the lands referred to were really part of the Mains of Arniston, and were held by him under a title *cum decimis inclusis et numquam antea separatis*, and was consequently not liable to be localled on for teind.

When the augmentation was called for debate, it was contended for Mr Dundas, on the authority of the Minister of Glenluce v. The Earl of Stair,[1] that the process should be sisted in order that the minister might bring a declarator to try the validity of the *decimæ inclusæ* right founded on.

[1] Nov. 9, 1874, *ante*, vol. ii., 76.

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LORD PRESIDENT.—This is a special case in its circumstances, and not governed by the rule followed in that of the Minister of Glenluce v. Lord Stair, 9th Nov. 1874, *ante*, ii., 76. In that case the only hope of the minister was to establish that the particular heritor was possessed of free teind which could be localled upon, and was not proprietor under a title *cum decimis inclusis*. That being a matter of doubt the minister was put to bring a declarator before an augmentation could be granted. But we cannot refuse the minister here an augmentation, because independently of the teinds, about which there is this disputed question, he has shewn that there is free teind to a material extent. In any view of the case therefore we must give an augmentation. If Mr Dundas is found in the locality not to hold these lands *cum decimis inclusis*, there will be all the more free teind out of which the minister can draw his augmentation. If, on the other hand, Mr Dundas' title to these lands, *cum decimis inclusis*, is as clear as he asserts, the first step in the locality will be to hold Mr Dundas free from any additional stipend, but that will not free the other heritors from liability to augmentation.

I think, therefore, that we ought to grant an augmentation on the footing of there being the amount of free teind alleged by the minister. If it turns out that there is not, as has been the case in many instances, then he will simply be unable to draw the full amount of augmented stipend.

LORD ORMIDALE, LORD MURE, LORD GIFFORD, and LORD CURRIEHILL concurred.

THE COURT granted an augmentation of six chalders.

ADAMSON & GULLAND, W.S.—J. & F. ANDERSON, W.S.—Agents.

No. 62.

Jan. 18, 1876. Blair's Executors, &c. v. Taylor, &c.

MRS BLAIR'S EXECUTORS AND OTHERS, First Parties.—*M'Laren.* MRS JANET CUNNINGHAM OR TAYLOR AND OTHERS, Second Parties.—*Horn—Mellis.*

Succession—Testament—Conditio si sine liberis decesserit.—A testator bequeathed his whole estate to his father (who predeceased him), whom failing, to the testator's whole brothers and sisters *nominatim*. *Held* (1) (*diss.* Lord Gifford) that the *conditio si sine liberis* did not apply in favour of the issue of a brother who predeceased the testator; (2) that there was no partial intestacy, and that the surviving brothers and sisters were entitled to the whole fund.

2D DIVISION. R.

THE late Charles Cunningham, sometime merchant in Smyrna, afterwards H. M. Consul at Galatz, and who died at Galatz on 26th November 1860, left a will in the following terms:—"I, Charles Cunningham, son of James Cunningham, of Bonnington Mills, in the county of Edinburgh, in North Britain, now about to settle as a merchant at Smyrna, in the Turkish dominions, do hereby, in the event of my death, give and bequeath all my estate and effects, of every description, and wherever situated, which shall belong to me, or to which I shall be entitled at the time of my death, unto the said James Cunningham, my father, and failing him by death before me, unto Archibald Cunningham, John Cunningham, George Cunningham, Margaret Cunningham, Janet Cunningham, Andrew Cunningham, and Mary Cunningham, my brothers and sisters, equally among them, share and share alike. And I hereby name and appoint the said James Cunningham, whom failing, my said brothers and sisters before named, to be my executors.—In witness whereof I write and sign this, my testament, at Bonnington Mills, the 17th day of January 1825. CHARLES CUNNINGHAM."

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The parties named as beneficiaries, failing the testator's father, were the whole brothers and sisters of the deceased. The testator's father died in 1833. The testator's brothers, Archibald and John, also predeceased him. John died, leaving issue, in 1838. Archibald died, without issue, in 1853. The other brothers and sisters survived the testator.

This special case was presented by (1) the brothers and sisters of Charles Cunningham, the testator, who were alive at the time of his death, and their representatives; (2) the children of John Cunningham.

The parties of the second part maintained that they were entitled to take their father's share under the *conditio si sine liberis*, and to share with the parties of the first part the proportion of the estate which would have fallen to Archibald if he had survived the testator.

The parties of the first part maintained the negative on both these points.

The questions of law submitted for the opinion and judgment of the Court were:—"1. Whether the shares of the estate of the late Charles Cunningham, provided by him to his brothers, Archibald and John, who predeceased him, or either of these shares, have lapsed into intestacy? 2. Whether the brothers and sisters of Charles Cunningham who survived him have right to these shares to the exclusion of the children of the said deceased John Cunningham? Or, 3. Whether the children of John Cunningham have right to the share of the testator's estate provided to their father? And, 4. Whether they have right to a proportional part of the share provided to their deceased uncle, Archibald Cunningham?"

Argued for the children of John Cunningham;—The *conditio si sine liberis decesserit* had received a much wider application in the law of Scotland than in the civil law. It had been extended to all cases where, as here, the testator was making a provision for his nearest relatives as a class, whether he stood to them *in loco parentis* or not. If the element of the *pietas paterna* was necessary, it was sufficient that the testator assumed the position and duties of a parent. The *conditio* had been applied in a great variety of cases, not only to bequests to children, but to bequests to nephews and nieces,[1] to a bequest by a person to the children of his brothers uterine,[2] and even to a bequest to cousins.[3] It would be anomalous if it were held not to be applicable to the present case, where the testator stood in a much nearer relationship to the beneficiaries. There was no *delectus personæ*, the persons named in the will being the testator's whole brothers and sisters, a class of which there could be no more, since their mother was dead at the date of the will.[4] John's children were entitled to a proportional part of the share provided to their deceased uncle Archibald, as well as to the share provided to their father. Their names must in effect be read into the will in place of their father's.[5] Alternatively, if it were held that the beneficiaries were called *nominatim*, and the *conditio si sine liberis* to be inapplicable, the shares provided to John and Archibald, who predeceased the testator,

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[1] Wallace v. Wallace, Jan. 28, 1807, M. "Clause," App. No. 6; Thomson v. Robb, July 10, 1851, 13 D. 1326, 23 Scot. Jur. 619; MacGown's Trustees v. Robertson, Dec. 17, 1869, 8 Macph. 356, 42 Scot. Jur. 161.

[2] Nicol v. Nicol's Executors, July 13, 1875, reported *infra*, p. 374.

[3] Christie v. Patersons, July 5, 1822, F. C. and 1 S. (n. ed.) 498.

[4] This was stated at the bar, and assumed to be the fact in the opinions of the Judges.

[5] Rattray v. Blair, Dec. 8, 1790, Hume, 526; Thomson v. Scougalls, H. L., Aug. 31, 1835, 2 S. and M'L., 305.

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must be held to have fallen into intestacy. The doctrine of accretion did not apply to a bequest in shares.[1]

Argued for the surviving brothers and sisters of the testator;—The application of the *conditio si sine liberis* to the present case was not warranted by the authorities. It was essential that the testator should be *in loco parentis* to the institutes.[2] The *conditio* had never been applied to collaterals except in the case of Christie v. Patersons, which could not be considered an authority.[3] The intention of the testator was that his surviving brothers and sisters should receive the whole fund.

At advising,—

LORD JUSTICE-CLERK.—The main question which we have to decide arises out of a settlement executed by Mr Charles Cunningham on 7th January 1825. Mr Cunningham died on 26th November 1860, thirty-five years after the settlement was executed. He appears to have been a young man at that time, about to leave the country and settle as a merchant at Smyrna. Before leaving, he executed the deed before us.

Two of his brothers predeceased Charles Cunningham, one left issue and the other did not. The question before us is whether the issue of the deceased brother are entitled to share in the bequest. We are told that the brothers and sisters named in the will were the whole brothers and sisters of the testator. This raises the question whether the *conditio si sine liberis* applies when the beneficiary is a collateral relative, neither a descendant in fact nor one to whom the testator stood *in loco parentis*. The application of the *conditio si sine liberis* has been made the subject of decision under a great variety of circumstances. The *conditio* has been held to apply where the settlement is universal, where the beneficiaries are a class, and the provision is of the nature of a family settlement, and where the testator, if not a parent, is at all events *in loco parentis* to the beneficiaries. Where all these elements concur, the *conditio* will be applied. The effect given to these elements depends on two principles, first, that the *delectus personæ* implied in a *nominatim* bequest is excluded when the provision is to a class; and secondly, that when the provision is of the nature of a family provision, and where the granter is *in loco parentis* to the beneficiaries, there is a presumption that the granter prefers the issue of a predeceasing beneficiary to any substitute named in the deed.

On the other hand, it has been held that where the subject is a special legacy, where the legatees are called *nominatim* and not as a class, and where the testator is not *in loco parentis*, neither a parent literally, nor in the position of a parent, the *conditio* will not apply, upon this manifest principle, that a bequest to A, whom failing, to B, without mention of A's heirs, is presumed, *ex figura verborum*, to go to B in the event of A's death before the testator.

In the present case there are three elements unfavourable to the application of the *conditio*.

1. The brothers and sisters are themselves mentioned as conditional institutes. The testator's father is instituted in the first place, and failing him, the testator's

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[1] Voet, ad Pand., xxx. 1, 59; Stair, iii. 8, 27; Bell's Prin. sec. 1882; and cases cited in M'Laren on Wills and Succession, vol. i. p. 678 (sec. 1303).

[2] Dig. xxxv. 1, 102; Fleming v. Martin, June 6, 1798, M. 8,111; Hamilton v. Hamilton, Feb. 8, 1838, 16 S. 478, 10 Scot. Jur. 263; Rhind's Trustees v. Leith, Dec. 5, 1866, 5 Macph. 104, 39 Scot. Jur. 120.

[3] Rhind's Trustees v. Leith, *supra*.

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brothers and sisters. It is not likely that when one conditional institution is expressed, another should be implied.

2. The legatees are called *nominatim*. In one sense they may be said to constitute a class, for they were the whole brothers and sisters of the testator, and the mother being dead, there could be no more of the class. Still the form of the bequest is to the beneficiaries *nominatim*, an element which, in the case of Hamilton v. Hamilton,[1] the Court considered sufficient to render the *conditio* inapplicable. Lord Glenlee has some important observations in that case.

3. This is not a provision to children in any sense. It is a will made by a young man, going out to seek his fortune, and leaving this deed as a testimony of his good will to those he left behind. It is a will made by a man who had probably at the time nothing to leave, and made the will to affect any property which he might afterwards acquire. This is a less favourable case for the application of the presumption even than a provision to a family of strangers.

The question, then, is, whether the testator could be said to stand *in loco parentis* to the beneficiaries, and if not, whether the *conditio* applies to collateral relatives, and if so, whether it is of universal application. That last is a proposition which I cannot sustain. It may be that we do not strictly follow the civil law upon this point. If we did, the question is clearly resolved by the civil law and the commentators upon it. I may refer to Voet, book 36, tit. 1, secs. 15-19, where all the learning that is to be had on this branch of the law will be found. In the 19th section he states the very proposition with which we are now dealing, viz., that the *conditio* is not applicable to a bequest by a brother to a brother, and he refers to an opinion of Scævola upon a case where a man left a bequest to his brother, and, if the brother should have no issue, to a stranger, in which case he praises the testator's foresight for having expressed what the law would not have implied. I am not aware of any system of law in which the *conditio* would be held applicable to a bequest by a brother to a brother.

There could not be a stronger illustration than the present of how remote the case of a brother is from that *conjectura pietatis*, on which the *conditio* is based. It is plain that the testator had a great affection for his brothers and sisters. Is it to be assumed that his affection for them was less than his affection for their possible issue, whom he might never see? The probable inference is, that he intended his surviving brothers and sisters to take the bequest.

There is one case so near the present as to be almost decisive of it—Fleming v. Martin[2]—in which a bequest was left by a person to her sister, who was a widow with a large family, and who predeceased the testatrix. The Court refused to give effect to the *conditio* in favour of the children of the predeceasing sister. It is true that it would appear from the note on Lord President Campbell's session papers that the Court dealt with the case as one of a special legacy; but it was not a special legacy, and I take the note to mean that the Court applied the ordinary rule.

It has been held, however, that a bequest to a nephew will imply a bequest to his children, provided the other elements favourable to the application of the *conditio si sine liberis* concur. This was first laid down in the case of Wallace

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[1] Hamilton v. Hamilton, Feb. 8, 1838, 16 S. 478, 10 Scot. Jur. 263.

[2] Fleming v. Martin, June 6, 1798, F. C., and M. 8,111.

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v. Wallace,[1] and we gave effect to it in the recent case of MacGown's Trustees v. Robertson.[2] It must now be held as settled, therefore, that in the case of uncle and nephew the *conditio* will apply where the other elements which I have mentioned are present. Lord Benholme made some observations in the case of MacGown's Trustees in which I concur:—"The inclination of our law is to extend the maxim *si sine liberis*, but the limits within which it is applicable are not very distinctly fixed. In the case of nephews and nieces called collectively it has been held to apply, but it is not so clearly applicable to the case of individuals of a class called *nominatim*. A distinction has been taken between persons chosen out of a class and a whole class called collectively."

On the other hand, there are several cases in which the Court refused to apply the *conditio*. There is the case of Wishart v. Grant,[3] which related to a residuary bequest in favour of the children of the testator's sisters. Then there is the case of Sturrock v. Binny,[4] which really turned on the fact that the mother of the children, who claimed in virtue of the *conditio*, was not alive at the date of the execution of the settlement. The Court held, although Lord Moncreiff differed, that, as it was impossible to hold that the mother, who had predeceased the execution of the settlement, had been instituted, there was no room for conditional institution. Then came the case of Rhind's Trustees v. Leith and Others,[5] which also turned upon the fact that the mother of those who claimed under the *conditio* had never been instituted, she having been dead at the date of the settlement, but in which the present Lord President expressed a doubt whether the *conditio* could be applied to cousins of the testator under any circumstances.

This brings me to the only case which appears to stand in the way of the result I have indicated, viz., that of Christie v. Patersons, July 5, 1822.[6] The decision in that case is the only instance of which I am aware of the *conditio si sine liberis* being implied in a case in which the beneficiary was more remote than a nephew. In that case the bequest was a direction to divide the property among the children of the testator's maternal aunt who should be alive at the time of his death. The beneficiaries were thus the testator's first cousins. The grounds of judgment, as appearing from the report in Shaw's Cases (2d ed.), are very difficult to follow, especially when compared with those in the previous case of Neilson v. Baillie. But if the report in Christie v. Patersons, and that in the case of Neilson v. Baillie (4th June 1822, F. C. 617), as given in the Faculty Collection, be studied, the difficulty of reconciling these authorities in part disappears. In the case of Neilson v. Baillie, which was a case of grandchildren, the Lord President took occasion to say that, although if he had been in Papinian's chair he would have been of a different opinion, he held the point settled. He adds,—"In Cuthbertson v. Thomson, March 1, 1781, the Court considered the application of the maxim to be universal, unless taken off by express words or particular circumstances, and that substitution necessarily implies *si sine liberis*, &c." It thus appears that the Lord President's view was that a substitution, in

[1] Wallace v. Wallace, Jan 28, 1807, M. "Clause," App. No. 6.
[2] MacGown's Trustees v. Robertson, Dec. 17, 1869, 8 Macph. 356, 42 Scot. Jur. 161.
[3] Wishart v. Grant, June 16, 1763, M. 2,310.
[4] Sturrock v. Binny, Nov. 29, 1843, 6 D. 117, 16 Scot. Jur. 100.
[5] Rhind's Trustees v. Leith and Others, Dec. 5, 1866, 5 Macph. 104, 39 Scot. Jur. 120.
[6] F. C. and 1 S. (new ed.) 498.

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the case of a provision to a class, universally implied the *conditio*, &c.; and accordingly that was the principle upon which he and Lord Gillies went in deciding the case of Christie v. Patersons. The case was one of a proper legacy to a class, but the beneficiaries of that class were first cousins of the testator. But it is impossible to sustain that doctrine now, and it has been repeatedly repudiated. It was distinctly negatived in the case of Hamilton, to which I have already referred,[1] where the fact that the beneficiary was called *nominatim* was thought sufficient of itself to exclude the authority of Christie v. Patersons; but Lord Glenlee's opinion, as well as that of Lord Medwyn, goes much farther, and substantially replaces the doctrine generally within the old analogy of the civil law, disclaiming altogether the idea that the *conditio si sine liberis* was universally implied in provisions to a class. That an uncle may be held to be *in loco parentis* to his nephew is fixed; but I consider it essential that the testator shall be *in loco parentis*. After the judgment in the case of Hamilton, and the clear indication of opinion by the Lord President in the case of Rhind's Trustees, the doctrine on which alone the decision in Christie could be supported must be now held not to be law. Lord Balgray and Lord Succoth dissented from the judgment in Christie's case on weighty grounds; and Lord Hermand, although he concurred in it, had expressed an opinion in Neilson v. Baillie, about a month before, that cases relating to collaterals did not apply.

On the whole, then, I conclude that the preponderance of authority is largely in favour of the view that the *conjectura pietatis* on which the civil law doctrine rested still applies, and that the condition will not be inferred merely from the fact that the provision is to a class to which the testator is not *in loco parentis*.

LORD NEAVES.—I have arrived at the same conclusion. The doctrine of the *conditio si sine liberis* is derived from the Roman law, but, at the same time, it is founded on strong equity and natural presumptions. The *conditio* seems to have been first introduced in the case of a settlement upon a son, in which it was declared that the right should cease in the event of the son not attaining a certain age. Papinian laid it down that he would imply from the relationship of the parties that the testator did not mean to carry out the express terms of his testament if the party favoured should leave children. That was founded on the *pietas paterna*, the presumption that he who favoured his son was also inclined to favour his grandson. This result of the *pietas paterna* was necessarily limited to the existence of the relationship of parent and child. The same principle has been recognised in this country and on the Continent. Sande, in his book of Frisian Decisions, after explaining the *conditio si sine liberis*, says,—"Hæc pietatis conjectura, cum cesset in aliis, qui non sunt parentes, idcirco in fidei commisso ab his relicto non subintelligitur hæc conditio, si sine liberis." He goes on to say,—"Licet non desint, qui nihil interesse putant, testator ex ascendentibus sit, an extraneus" (being substantially the opinion which Lord Gillies seems to indicate in Christie v. Patersons); "ac ita *aliquando* sensit Antonius Faber, *quam sententiam retractavit*."[2] So that the only jurist whom Sande mentions as of the opposing opinion came round to the orthodox school.

No doubt the *conditio* has been applied in our law to the case of uncle and nephew, but the relation of uncle and nephew is in many cases almost as close

[1] *Supra*, p. 365.
[2] Sande, Decisiones Frisicæ, lib. iv. tit. vi. def. 6.

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and cogent as that of parent and child. An uncle may often be *in loco parentis* to a nephew or niece. I am of opinion that its operations should not be further extended.

The specialties of this case, if it were necessary to look at them, are adverse to the application of the *conditio*. A man who is going off to Smyrna cannot be said to be *in loco parentis* to his brothers or sisters. Again, the beneficiaries here are enumerated individually, and described *nominatim* and not as a class, which shews that the testator's mind and eye were fixed on these particular persons.

I agree with your Lordship that the decision in Christie v. Patersons cannot be treated as an authority, at least not as an authority in the present case. Neither do I think the case of Wallace applicable. The framework and terms of the settlement there were materially different from what we here find.

LORD ORMIDALE.—The question to be determined in this case arises in peculiar circumstances, and has reference to the construction and effect of the testamentary settlement, not of a father in favour of his children, but of a son in favour of his father, whom failing by death before the testator, in favour of his brothers and sisters, whom he individually calls and names, equally among them, share and share alike.

The father, the institute in this settlement, and also two of the brothers, John and Archibald,—the former leaving issue,—having predeceased the testator, the question which has been submitted to the Court, and very fully and ably debated by the parties, is, whether the share of the testator's estate which would have gone to his brother John, had he survived him, now belongs to the issue of John, in virtue of the implied condition, *si institutus sine liberis decesserit*, or to the surviving brothers and sisters.

In dealing with this question it is necessary to keep in view that the principle which underlies the Roman law maxim referred to, and which has been recognised as of force in our own law, is the implied or presumed will of the testator. But, for obvious reasons, the implied will of a testator ought not to be superinduced upon what he has expressed, except in circumstances making it clear that his true intention is not thereby violated, and a settlement made for him which he would not have made for himself. Accordingly the authorities,—the institutional writers as well as the decisions of the Court,—shew that it is only within certain limits, and subject to certain qualifications, that the will or settlement of a party can be dealt with, except in accordance with its express terms, in order that other terms, not expressed, should be held as implied and given effect to. It must be conceded, however, that it is difficult to say on the authorities what are the limits or qualifications appertaining to this matter, or whether they can with certainty and precision be defined.

It has been stated that the implied condition can only be given effect to in circumstances which denote the *pietas paterna*, as in destinations by a parent to children or descendants in the direct line. But the cases shew that the implied condition has been applied to questions arising between parties standing in other relations, for example, in the collateral degree of relationship of uncles and nephews, where the granter of the deed has been held to stand *in loco parentis* to the beneficiaries; and also in some cases where *conjectura pietatis* has been held to operate, as when the destination is expressly to children as a class, although the granter of the deed is not their father, and cannot

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properly be said to stand to them *in loco parentis*. But, in the present case, it is obvious that *pietas paterna* does not apply, and also that the granter of the deed does not stand *in loco parentis* to the beneficiaries whom he has named and called. And as to the principle of *conjectura pietatis*, I have not been able to discover any instance where it has been held to apply in circumstances similar to those which occur in the present case, where the difficulty arises from the circumstance of the will or testament being not by a father but by a brother, and not in favour of children or descendants, but an ascendant, the testator's father, whom failing by his predeceasing the testator, to his brothers and sisters, who are individually called and named. None of the precedents—and they were very numerous—cited at the debate, were, I think, precisely of this nature. Some of them, however, shew that the principle of implied condition has been given effect to in favour of nephews and nieces of the testator, and that is the position of the claimants in the present case, arising in consequence of their father, as well as the father of the testator, having predeceased him. That the circumstance that the second parties claiming stand in this position, and are not direct descendants of the testator, would not of itself be sufficient to exclude their right in virtue of the implied condition *si sine liberis decesserit*, I consider to be now clear on the authorities, whatever doubt may have been entertained at one time on the subject, even although it may have been, as I think it was, an extension of the doctrine as it was at first understood. But I am not aware, and am unable to hold, that this extension of the doctrine to collaterals is applicable, or can on authority or principle be sustained, under such a destination as that in question,—a destination not to children as a class, or to children at all, or even to nephews or nieces, but to brothers and sisters individually named and called. It was, indeed, conceded in argument that there was no decided case exactly in point, unless it be that of Christie and Others v. Patersons.[1] The circumstances, however, of that case were materially different from those of the present. There the institutes called were the children generally as a class of the brothers and sisters of the testator's mother, there being no *delectus personarum* indicated. And that children may in such and similar destinations be held, according to circumstances, to include grandchildren, is shewn in the cases of Ranken and Others, June 17, 1870 (8 Macph. 878), and of Houston, noticed in footnote to Wemyss v. Gray and Others, Nov. 23, 1810, F. C. But in the present case the *delectus* of the testator is indicated by his having left his estate, not generally to his brothers and sisters as a class, or to the children of his father generally and as a class, but to five brothers and sisters individually called and named by him. It may be true, as was stated in the course of the debate, that the individuals so called and named were all the brothers and sisters of the testator, but the father might, although he had not, have again married and had other children subsequent to the date of the testator's will. I think, therefore, for these reasons, that the case of Christie v. Patersons is distinguishable from the present, and cannot be appealed to as a precedent in point. Besides, even if it had been more directly in point than it is, I doubt whether it is an authority to be safely relied on, for (1) the decision was carried by the narrowest majority, that of one out of the five Judges present; (2) all the majority seemed to think the question fell to be governed by the two previous cases of Mackenzie v. The Legatees of Holt, Feb.

[1] 5th July 1822, 1 Shaw, 543 (n. ed. p. 498), and F. C.

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2, 1781 (Mor. 6602), and Wallace v. Wallace, Jan. 28, 1807, Mor. Appx. *voce* Clause, No. 6, although these cases ought not, I think, to have affected the decision, in respect that in both the testator not only stood, as it were, *in loco parentis* to the beneficiaries, but in both the institutes survived the testator, which was not the case in Christie v. Patersons. Besides, in all these cases, including that of Christie v. Patersons, the destination was in favour of children generally as a class, and not, as in the present case, in favour of particular persons specially called and named. Independently of these considerations, the decision in the case of Christie v. Patersons has been seriously questioned as an authority in any view that can be taken of it. It was so questioned by the Lord Justice-Clerk (Inglis) in Rhind's Trustees v. Leith and Others, Dec. 5, 1866 (5 Macph. 104), who expressly said that he disregarded it as an authority.

For all these reasons, and chiefly for the reason that it makes no mention at all of children, but is simply a destination to the testator's father, whom failing, to his brothers and sisters specially called and named, I am unable to find that the children of the testator's brother John, who predeceased him, are to take the place of their father in the succession which has opened. On the contrary, in my opinion, the share intended for John, had he survived the testator, must, in consequence of his predecease, be held to have lapsed into the general estate, and as such falls to be divided amongst the testator's brothers and sisters who survived him.

There is another ground upon which, in the special circumstances of the present case, I should be disposed to hold that the issue of John Cunningham, who predeceased his brother, the testator, is excluded from the succession. The presumption upon which the implied condition involved in the maxim *si sine liberis decesserit* is raised is not absolute, but may be rebutted by and must yield to other and stronger presumptions. That such is the law is stated by Mr Erskine in his Institutes, book iii. tit. 8, sec. 46, and by Mr Bell in his Principles (sec. 1782), and is illustrated by decided cases. Thus, in Yule v. Yule, Dec. 20, 1758 (Mor. 6400), it was ruled that the condition *si sine liberis* did not take effect where a father, who, while unmarried, and after he had taken certain bonds payable to himself, whom failing, in favour of his brother, married and had children, and yet did not alter the bonds, although he survived their date three years, and the birth of his eldest child two years. It is true that there the bequest was of a special legacy, and not of the *universitas* of the testator's estate, and it is not to be disputed on the authorities that this is an important element militating against the admission of the implied condition. But in the case of Watt v. Jervie, July 30, 1760 (Mor. 6401), which occurred soon after that of Yule, it was held that a settlement by a man of his whole effects on his wife was not voided by the birth of a child five weeks after his death, although the father had disposed of the *universitas* of his estate to the prejudice of his child, for the reason, so far as can be collected from the report, that he must have known of the pregnancy of his wife, and had an opportunity of altering his settlement, but did not do so. Now, the circumstances of the present case are still more favourable for the operation of the same principle of decision. Here the testator's settlement was executed in 1825, and he lived thereafter till November 1860, a period of thirty-five years. John, the testator's brother, died in September 1838, about twenty-two years prior to the death of the testator. But the testator made no alteration on his settlement. In this state of matters the presumption is much stronger than in the cases referred to,

that the testator did not intend that the issue of his brother John should take the place of their father. Indeed, it is more probable that he should prefer the surviving brothers of John, whom he personally knew, and in family with whom he must for some time have lived, to the children of John, to whom he was under no obligation, and, for anything that appears, for whom he could have had no particular regard. I am disposed to hold, therefore, that the presumption involved in the maxim *si sine liberis decesserit* must, even if it had otherwise applied, be held to be overcome and excluded by what I think the stronger presumption afforded by the special circumstances of the case; and I do not see how any other conclusion could be come to consistently with the decisions in the cases of Yule v. Yule and Watt v. Jervie, to which I have referred.

The result is that, in my opinion, the second question in the special case ought to be answered in the affirmative, and this, I think, renders any answer to the other questions unnecessary.

LORD GIFFORD.—The main, and, indeed, the only question raised in this special case is, whether the children of John Cunningham, one of the brothers and residuary legatees of the testator, are entitled, in virtue of the implied condition *si sine liberis*, to the share which their father, the deceased John Cunningham, would have taken had he survived the testator. I do not think the other questions in the case are attended with any difficulty, and on these other questions I concur in the result at which your Lordships have arrived.

On the question of the condition *si sine liberis*, however, I have felt very great difficulty indeed, and, although it is with great hesitation and doubt that I venture to differ from your Lordships, I feel myself unable to concur in laying down the rule or principle which I understand to be indicated in the opinions which have just been expressed, that in general and apart from special circumstances the condition *si sine liberis* will not be held as implied where a testator names his brothers and sisters as his residuary or universal legatees. I hesitate to adopt a rule which, whatever its convenience, I scarcely think warranted either in itself or with reference to the authorities and decisions which have been pronounced. In the present case I incline to think that, looking to the whole circumstances, the terms of the testament in question, the position in which the testator stood, and his relation to the legatees named, the testator must have intended, in the event of any of his brothers and sisters predeceasing him leaving issue, that such issue should take their parents' share. I do not feel compelled, by any of the decisions which have been pronounced, to hold that children are excluded, and I cannot help feeling that it is more in accordance with the probable intentions of the testator to let in the claim of John Cunningham's children than to exclude them altogether.

Two cases seem to be clear upon the authorities. When legacies or shares of residue are bequeathed by a testator to strangers in blood, or even to distant relatives *nominatim*, without any mention of children or issue, such legacies lapse by the legatee predeceasing the testator, and cannot be claimed by the children or heirs of the legatee. The bequest is held to be personal to the legatee himself—to have been given from personal affection or upon personal grounds, and it does not go to the legatee's children when the legatee himself predeceases the testator unless the will expressly so provides. The general rule holds that legacies lapse by the predecease of the legatee.

The other case seems equally clearly fixed by the authorities, that when a

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father makes provisions, whether by way of legacy or by share of residue or otherwise, for his child or children, or for his grandchild or grandchildren, or other descendants, and the children or grandchildren so favoured predecease the testator leaving issue, such issue will take their parent's provision or share unless the testator has expressly excluded them. The *conditio si sine liberis* is always held implied in bequests or provisions to descendants, but not in the case of bequests or provisions to strangers. Of course if there is anything in the deed explaining the testator's intention that must be given effect to. I am only dealing with cases where the deed is silent.

The cases attended with difficulty are those intermediate between the two classes I have just specified,—that is, where the bequest is not to strangers *nominatim*, or to children or descendants, but to collateral relatives either called by name or as a class, and here it is very difficult to lay down a satisfactory principle.

It seems to be fixed that in a bequest to nephews and nieces of the testator, if some of them predecease the testator leaving issue, such issue will in general take their parent's share, and this seems to hold not only where they are called simply as a class, as for example "to all my nephews and nieces," or "to all the children of my brothers," or in some similar way, but also in the case where the nephews and nieces are named, provided that the enumeration embraces the whole nephews and nieces so as not to raise any indication that some are excluded.

The question now raised is whether the same presumption applies to a bequest in favour of the brothers and sisters of the testator. Does a bequest to "brothers and sisters," without anything else being said, imply a provision that if any of the brothers and sisters predecease the testator leaving issue, such issue shall take the share which would have belonged to their parent if he or she had survived the testator? Now, on the whole, and though not without great hesitation (all the greater that I am differing from your Lordships), I incline to hold that it does. I shall come to the specialties of the present case immediately. At present I am taking the case quite generally, as if the residuary or universal bequest had run "to my brothers and sisters equally share and share alike." Such a bequest I think implies that if any of the brothers and sisters predecease their issue shall take their place.

This is undoubtedly the law in regard to bequests to nephews and nieces. Why should the law be different when the bequest is to brothers and sisters? The only reason given, I think the only reason that can be given, is that an uncle is *in loco parentis* to his nephews and nieces, but is not so to his brothers and sisters. This may be true in some cases, or perhaps in many cases, but it is certainly not true in all cases. For example, if a man's own brother is alive and at the head of his family it can hardly be said that he, the uncle, is *in loco parentis* to his brother's children; the *locus* is occupied by the father himself. A man's nephews and nieces, if the children of a much elder brother, may be all older than himself, or in positions which make it unreasonable to say that he is *in loco parentis* to them; and, on the other hand, in the case of an elder brother, he may be so much older than the other children, especially if only consanguinean, as to be far more *in loco parentis* to them than he could ever be to nephews and nieces in other circumstances. It is dangerous to make a legal presumption that one person is *in loco parentis* to another. I rather think that this will always depend upon circumstances apart from the case of direct descendants.

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But, farther, I scarcely think that even when mere relationship may raise a presumption of a testator being *in loco parentis* to beneficiaries that this is the true principle. I rather think the true principle is, does the testator, by the terms of his will, place himself *in loco parentis*, and can it be gathered from the deed that he assumes the duties or the burdens of a parent and is in this sense and by his own act *in loco parentis?* If so and even in the case of strangers in blood there might be the very strongest reasons for implying the condition *si sine liberis*. For example, if a testator should use such language as this: "As my adopted son, whom I intended to make my heir, has unfortunately predeceased me, I leave the residue of my estate to his children equally among them." In such a case as this I should be very much inclined to hold that grandchildren would take if any of the immediate children failed, and this although there was no tie of blood or relationship whatever with the testator. It is true the word children sometimes includes grandchildren or great-grandchildren, but I do not think in the case I have put it would make any or much difference if the testator instead of merely calling the children of his adopted son had named them all and described them as such. But there is express decision that the condition *si sine liberis* applies not only to bequests to nephews and nieces to whom an uncle may very often be said to be *in loco parentis* even when his brother or sister, their parent, is alive, but to the case of a bequest or provision to a testator's cousins. I allude of course to the case of Christie v. Patersons, 1 Shaw 543, new ed. 498; and although I know that this decision has been doubted, yet I think it has never been, either expressly or by implication, reversed or overturned, and I hesitate to do so without calling in the Judges of the other Division. Christie v. Patersons was decided by the First Division, and although there were specialties in it—for example, the cousins were described as "children of the brothers and sisters of my mother who shall be in life at my death,"—still the decision is not put upon specialties, such as the meaning of the word "children," but upon the relationship of the legatees, and the judgment bears to be in respect of the cases Wallace v. Wallace, Mor. Clause, App. 6, and Mackenzie v. Holt, Mor. 6602. Wallace was the case of nephews' children. In Mackenzie v. Holt it was the children of relatives, but the precise degree of relationship does not exactly appear. I cannot, merely on account of the doubts which have been expressed as to Christie v. Patersons, absolutely reverse that decision, as I think we are now asked to do. I do not think the doubts expressed in Rhind's Trustees v. Leith, 5 Macph. 101, warrant us, without calling in our brethren, in introducing another rule, especially as I am by no means satisfied that on general principles the rule should be so narrow as is now proposed.

The specialties in the present case seem to me strongly to favour the claim of John Cunningham's children, though here also I may well hesitate when I find myself in opposition to your Lordships. The testator bequeaths his whole estate first to his father as sole and universal legatory, and it is only in case the father should die before him that he substitutes for his father his whole brothers and sisters. I think this seems to shew that it was because they were all descended from the same father that the brothers and sisters were instituted residuary legatees. It was because they would succeed to the father that the testator made them his own successors, and the same reason, the tie of blood, would apply to brothers' children. They too will take not from personal reasons but because they are the grandchildren of the testator's father. Still farther, there

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is no express institution of survivors. The brothers and sisters alone are named to take equally, and nothing is said of survivors; and although in a conjunct bequest the effect may be the same as if survivors had been called, it is certainly a stronger case for the issue of predeceasers taking their parent's share.

On the whole, putting myself in the testator's place, as I am bound to do by the true canon of construction, and reading the testator's words as nearly as I can in the sense in which he must have used them—and this is the way to gather the intention of the testator—I cannot help thinking that he did not intend to provide that if any of his brothers and sisters predeceased him leaving children such children should be excluded from his succession.

Horn, for the second parties, asked whether the Court intended to decide the first question. He understood the majority of their Lordships to take the view that the bequest was given to the legatees *nominatim* and not as a class. He referred to the alternative argument for the second parties, viz., that the bequest being given in shares, the principle of accretion did not apply, and that the shares of beneficiaries who died before the testator fell into intestacy.

LORD JUSTICE-CLERK.—Assuming that we are right in holding that the condition *si sine liberis* does not apply, it necessarily follows that the intention of the testator was that those of his brothers and sisters whom he named in the deed who might survive him should take the whole of the property he should leave. Such, I am quite clear, was the meaning of the testator, and the true construction of the settlement. Whether the bequests were to be held to be to a class or not, as far as the *conditio si sine liberis* is concerned, does not affect this second question.

THIS interlocutor was pronounced:—"The Lords . . . . are of opinion and find (1) that the two shares of the estate of the late Charles Cunningham provided by him to his brothers Archibald and John, who predeceased him, have not lapsed into intestacy, nor either of them; (2) that the brothers and sisters of Charles Cunningham who survived him have right to these shares to the exclusion of the said deceased John Cunningham; (3) that the children of John Cunningham have no right to the share of the testator's estate provided to their father; and (4) that they have no right to a proportional part of the share provided to their deceased uncle, Archibald Cunningham; and decern."

JOHN M. BELL, W.S.—BRUCE & KERR, W.S.—Agents.

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Nicol v. Nicol's Executor, &c.

THOMAS NICOL AND OTHERS.—*M'Laren.*
JOHN NICOL'S EXECUTORS AND OTHERS.—*Thoms.*
REV. CHARLES FLETCHER AND OTHERS.—*M'Kechnie.*

Succession—Conditio si sine liberis.—Circumstances in which the *conditio si sine liberis* was applied to a bequest by a person to the children of his brothers uterine in respect of the terms of the testament.

2D DIVISION. I.

JOHN NICOL left this holograph will:—"John Nicol, his last will and testament. . . . . Commits . . . . his estate to be disposed of as under,

* Decided July 13, 1875.

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viz.:—To his half-brother, David Fletcher's children, five shares; to his half-brother, James Fletcher's children, seven shares; to his brother, Thomas Nicol, seven shares; the whole to be divided into nineteen equal shares." The testator was unmarried. Thomas Nicol was his only full brother, and David and James Fletcher, who were both dead at the date of the will, were the only children of his mother by a previous marriage.

In a special case presented by the parties interested, it was stated that the number of shares given to each step-brother's family corresponded with the number of children of which each family was composed when all were alive.

The Court, proceeding to some extent upon the implication of the testator's intention to be gathered from this coincidence, held that descendants of those children of David and James Fletcher who predeceased the testator were entitled to the shares of the residue of his estate to which their parents would have been entitled had they survived the testator, John Nicol.

JOHN HENRY, S.S.C.—DRUMMOND & REID, W.S.—WILLIAM BLACK, S.S.C.—Agents.

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Brandt & Co. v. Dickson.

RICHARD BRANDT AND COMPANY, Petitioners.—*D.-F. Watson—H. Johnston.*
JAMES ANDERSON DICKSON (Lumgair's Trustee), Respondent and Appellant.)—*Balfour—Pearson.*

Sale—Suspensive Condition—Delivery—Bankrupt.—The terms of a contract of sale of flax were set forth in the following note by the sellers:—"We confirm the sale made to you of . . . 10 tons . . . flax at £40, 10s. per ton, *ex* warehouse. Draft at 4 months from this date." The goods were forwarded by railway on the evening of Friday, 27th November, and were delivered at the buyer's warehouse next morning, when they were received into stock and partly used by the buyer's manager without his knowledge. On the same day, Saturday, a letter of advice, invoice, and bill, were posted by the sellers, and received by the buyer at his private residence after business hours. The buyer on calling at his works on Monday morning, for the first time learned that the goods had arrived, but before he had given any instructions regarding them he received a letter from his banker restricting his credit to an extent which obliged him to stop payment. The buyer then directed the goods to be put aside, and did not accept the bill.

In a question between the sellers and the trustee for the buyer's creditors, *held* (1) that the acceptance of the bill was a suspensive condition of the sale, and that, until it was implemented, delivery of the goods did not pass the property; (2) That the sellers had not waived their right to insist upon the condition by forwarding the goods before receiving the acceptance; and, therefore, (3) that the sellers were entitled to restitution of the goods.

2D DIVISION. Sheriff of Forfarshire. I.

THIS petition was presented in the Sheriff Court of Forfarshire on 3d December 1874 by Messrs Richard Brandt and Company, merchants, Dundee, against Robert Lumgair, manufacturer, Arbroath, and on his sequestration, on 11th December 1874, was insisted in against James Anderson Dickson, the trustee on his sequestrated estate. The petition was brought to obtain restitution of 10 tons of flax, which had been sent by the petitioners to Mr Lumgair's works in November 1874, in the following circumstances, which were brought out in a proof ordered when the case was brought by appeal before the Court of Session

Brandt and Company, the petitioners, on Tuesday, 24th November 1874, agreed to sell to Mr Lumgair 10 tons of flax, on the terms contained in the following note:—"To Robert Lumgair, Esq., Arbroath.

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Dundee, 24th Nov. 1874.—We confirm the sale made to you to-day, of, *ex* 'Success' in Dundee public warehouses, about 10 tons superior Stararussa 12 hd. flax, at £40, 10s. p. ton, *ex* warehouse. Draft at 4 months from this date, and 1% discount. Should we require the draft payable in London, we shall allow the usual retiring charges of 2s. 6d. %. RICHARD BRANDT & Co."

The flax was weighed at the Dundee public warehouses between the hours of 3 and 5 o'clock P.M. on Friday, 27th November 1874, and was the same day delivered to the Caledonian Railway Company for transmission to Arbroath. The goods were forwarded the same evening, and were delivered at Mr Lumgair's warehouse on Saturday morning. The same day a portion of the flax was heckled by directions of the foreman.

On Saturday Messrs Brandt and Company wrote,—"To Robert Lumgair, Esq., Arbroath. Dundee, 28th November 1874.—Confirming our letter of 24th inst. we herewith beg to advise you having forwarded to your address of the Stararussa, 12 hd. flax, *ex* 'Success,' 182 bobbins and 22 hds. wg. 200 cwt. 2, 24 lbs, which we trust you will receive in good order.

"Enclosed we beg to hand you our invoice, amounting to £401, 17s. 7d., as well as our bill at 4 months, which please accept payable in London, and return to us in due time. RICHD. BRANDT & Co."

Enclosed in this letter was an invoice which had been prepared on the forenoon of the 28th November from the weigh-notes, and a bill for the amount of the invoice price drawn on London at four months from 24th November 1874. The letter was posted at Dundee between 1 and 2 P.M. on the 28th, and on the same day was received by Mr Lumgair after business hours (between 5 and 6 o'clock) at his private residence.

Mr Lumgair became aware of the arrival of the flax on Monday morning when on his way from his house to his office, by seeing it lying in the warehouse, but gave no instructions regarding it. On arriving at his office he had not accepted the bill when he received a letter from the Commercial Bank, with which he dealt, restricting his credit to an extent which made it necessary for him to suspend payment. After having resolved to stop payment Mr Lumgair was occupied for some hours making arrangements for submitting his affairs to a meeting of his creditors; but between three and four o'clock he sent down an order to his heckling foreman not to begin to the flax, and if he had begun to it to stop, and to lay it aside. This was accordingly done, even that portion of it which had been heckled being perfectly separable.

The petitioners pleaded;—The respondent being, and knowing himself to be insolvent at the time of transacting with the petitioners, and not having disclosed to the petitioners the true state of his affairs, the transaction between them and him was and is null and void, and they are entitled to redelivery and restitution of the flax sold as aforesaid. (2) The respondent being and knowing himself to be in insolvent circumstances at the time of receiving the flax, the petitioners are entitled to redelivery and restitution thereof. (6) The respondent never having granted his acceptance as stipulated, the delivery which took place did not pass the property in the flax libelled. (7) At least the respondent, on determining, by reason of his insolvency, not to grant his acceptance as stipulated, was bound to return the flax libelled.

The Sheriff-substitute (Robertson), on 4th March 1875, pronounced this interlocutor:—"Finds in law that a buyer who finds himself to be insolvent and unable to perform his engagement may and ought to reject goods he has purchased when offered for delivery: Finds that if he takes

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delivery under such circumstances a fraud is committed on the seller, of which the buyer's creditors can take no advantage: Finds, in the present case, that, as insolvency was announced almost immediately after the purchase and delivery of the goods, the onus of proving solvency lies on the respondent: Finds that the onus of proving the bankrupt's knowledge of insolvency lies on the petitioners: Allows a proof to both parties accordingly of their respective averments, and to each a conjunct proof."

Both parties appealed to the Sheriff (Maitland Heriot), who, on April 12, 1875, pronounced this interlocutor:—"Recalls the interlocutor appealed: Finds, in fact: . . . . Finds in law that the property of the said flax did not pass to the said Robert Lumgair or to his trustee, and that the petitioners are entitled to redelivery and restitution of the same: Therefore ordains the respondent to deliver the same to the petitioners: . . . . Finds the petitioners entitled to expenses: Allows an account thereof to be given in," &c.*

The respondent (Lumgair's trustee) appealed to the Court of Session.

The Court, when the case came before them on 20th October 1875, were of opinion that they could not satisfactorily dispose of it even on the narrower ground taken by the Sheriff without proof as to the time and manner of the transmission and delivery of the goods, and of the posting and delivery of the invoice and bill, and that as there were other important questions raised, it was expedient that the proof to be allowed should be a general proof. Accordingly they allowed both parties a proof of their respective averments, to be taken before Lord Ormidale.

The facts above narrated were established in the proof.

A considerable portion of the proof was directed to the question raised in the first and second pleas for Messrs Brandt and Company, namely, whether the purchase of the flax in question was not made and delivery taken while Mr Lumgair was, and knew himself to be, in insolvent circumstances.† In the course of the argument the Court intimated an

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* "NOTE.—It was a condition of the sale of this flax that a bill at four months should be granted for the price. That should have been done *simul et semel* as the delivery. Mr Lumgair was not entitled to take delivery of the flax without at the same time granting the bill.

"It may be said, no doubt, that the bill, if granted, would not have been much worth. That may be so, but with such arguments the Sheriff has nothing to do. He has merely to see that the respective parties faithfully observe the conditions of their contract, and it certainly was one of the conditions of this sale that a bill was to be granted for the price, which has never been done.

"Mr Lumgair was probably right, in the peculiar position in which he was placed, to decline the acceptance of the bill sent to him. By doing so he has saved the parties to this case from being under the necessity of investigating the precise position he occupied on the 28th November when he took delivery of the goods. The law on this subject is well stated at p. 259 of Bell's Commentaries, M'Laren's ed. vol. i.,—'If it be stipulated as the condition of a bargain, or if goods be sent accompanied by a draft to be accepted and returned, and the goods are received, but the acceptance is not sent, the property is not passed; the goods are still unsold.' The law as thus stated seems to the Sheriff to be exactly applicable to the facts of this case."

† The following portions of the evidence are specially referred to by Lord Ormidale in his opinion:—Mr Lumgair deponed,—"On 24th November I bought some flax from Richard Brandt and Company through one of their clerks. I made the purchase personally. It was payable by draft at four months from the day of sale, and 1 per cent discount. I first learned on the Monday morning, between nine and ten, that the flax had arrived. I called at

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opinion that Messrs Brandt and Company had failed to make out their case on this point.

Argued for Lumgair's trustee;—1. A suspensive condition in a sale of moveables was not to be presumed. On the face of the contract of sale there was certainly a condition that a bill was to be granted, but it was not expressed that it was to be granted *simul et semel* with the delivery. There was nothing said about acceptance in due course till the letter of 28th November. The obligation of the buyer would have been adequately implemented by accepting a bill after the goods had been delivered to him and had become his property. The facts of the case, therefore, did not come up to those of Brodie v. Tod, and the other cases founded on by the respondents. The terms of the contract were best interpreted by the actings of the sellers. They either considered that there was no suspensive condition in the contract, or they waived the one which there was.

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the shop in passing, and found that it had been delivered. I had received the invoice on the Saturday afternoon, and also a draft for the price. I kept the draft over till the Tuesday. I never transmitted it. I was in the habit of accepting such drafts on the day they arrived, with the exception of some Dundee bills, which I occasionally took with me to the market on Tuesday. It is generally the practice to return these drafts in course of post. This was the first transaction I had had with Brandt and Company. I intended to have transmitted their draft, but my stoppage took place before I had time to do so. So far as I remember, it was between five and six o'clock on the Saturday afternoon when I got the draft. I resolved upon stoppage between eleven and twelve o'clock on Monday forenoon. Between three and four in the afternoon, I sent up word to my heckling foreman, James Fyffe, to lay aside the flax. I was not sure whether the flax was mine or not, and therefore directed it to be laid aside. I got an intimation from the bank that morning a little before eleven o'clock, and made up my mind in about half an hour that I could not go on. My business was going on in the ordinary course,—buying, selling, and doing everything as usual,—until I stopped on the Monday forenoon. I was making additions to my premises down to the time of my stoppage, in the intention and expectation of carrying on. The purchase in question from Brandt and Company was made in the usual course of business, and, until I got the bank's letter, I expected to be able to meet the draft at maturity. My people took in that purchase in the usual course of business, and at once began to heckle it. They were heckling at it on the Saturday and Monday, and continued at it on Tuesday to finish what they had in hand. Before they stopped they had heckled about 20 cwt. of it. I cannot say whether I saw them working at it on the Monday. I saw the flax in the warehouse on the Monday morning. I knew it was Brandt and Company's flax. I gave no orders with respect to it then, or until the afternoon." James Fyffe deponed,—"I was foreman heckler to Mr Lumgair previous to and at the time of his failure. I recollect a parcel of 10 tons of flax from Brandt and Company arriving upon Saturday, 28th November 1874. At that time we were out of that particular description of flax. In spinning flax it is necessary to mix up different sorts of it. The flax in question was quite distinguishable from other flax we had on the premises. On its arrival we commenced to heckle a portion of it, and continued heckling it until Monday the 30th, between three and four o'clock afternoon, when I received a message from Mr Lumgair not to begin to it, and, if I had begun, to stop. About a ton of it had been heckled by that time. That ton had not been in any way mixed with other flax, and I was able to lay it aside perfectly separate. The whole parcel was laid aside by itself, and was thereafter kept entirely separate from any other stuff. Cross-examined.—In beginning to heckle this flax we were just preparing it for being used up in the ordinary course of business. Until I received Mr Lumgair's message on the Monday afternoon we dealt with this flax as just to be used in ordinary course, as Mr Lumgair's other flax was used."

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Had they intended that the acceptance of a bill was to be precedent to the passing of the property they would not have put the goods out of their control without taking steps to have the bill accepted on delivery. Instead of that the goods were delivered when handed to the railway company at Dundee, or, at latest, when received by Lumgair's warehouseman at Arbroath. Stoppage *in transitu* was no longer possible, and the buyer was not put in a position to implement this so-called suspensive condition till after he had had the goods in his possession for a whole day, and till a considerable portion of them had actually been worked up by his people. Under these circumstances it must be held that even if there was a suspensive condition it had been departed from, and that the delivery was unconditional.

2. The delivery being unconditional it was also complete, so that the buyer could not reject. When a merchant or manufacturer is going on with his business as usual, and goods are delivered to his workpeople in the ordinary course of his business, it requires no personal intervention of the employer to make the delivery complete. Delivery is taken as a matter of course by the warehouseman or other servant, who in a large business is employed for that very purpose. It is taken in compliance with the employer's known obligation to take delivery. No large business could be carried on on any other footing. Delivery of goods would be taken day after day in Mr Lumgair's business without his knowledge or intervention, and it could not be held that delivery was suspended in each case till he applied his mind to the matter and approved the acceptance of delivery. It was impossible to doubt, on the evidence in this case, not only that the fact of delivery was complete, but that even if Mr Lumgair's personal intervention was necessary he had accepted the flax with the intention of making it his own property. There was no mental reservation or suspense on the subject when he went to his office on the Monday morning, knowing that the flax was in the hands of his workpeople, and having the invoice and bill in his pocket. The property had passed, and after that it was too late for him to reject, without giving a fraudulent preference to the sellers over his other creditors.

3. But even then he did not reject. He gave no notice to the sellers. He did not accept delivery *custodiæ causa* merely. But foreseeing that there might be questions between the sellers and his general creditors he merely set aside the goods for whom it might concern.[1]

Argued for Messrs Brandt and Company;—1. The contract of sale contained a suspensive condition,—a bill at four months had been stipulated for in exchange for the goods,—a bill had been sent on delivery of the goods, and until that bill was accepted and returned the property in the goods was not passed by mere delivery, the transaction was incomplete. That was the fair reading of the contract as a mercantile document. That it was the understanding of parties was proved conclusively by their respective actings. Brandt and Company at once forwarded the bill and desired it to be returned in due time, which could only mean in course. The bankrupt knew that to complete the transaction and make the goods his he was bound to accept and return the bill in course. He would have done so but for his stoppage. But not having done so he knew that the goods were not his. He acted in the only way in which an honest man could have acted, in holding his hand and not accepting the bill, which would have raised difficult questions between the sellers and his general creditors. Admitting the general rule that "the moment the

[1] Booker v. Milne, Dec. 20, 1870, 9 Macph. 314, 43 Scot. Jur. 141.

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goods are actually in possession of the buyer by the vendor's authority, as sold to him, the transference is complete, and the price becomes matter of personal contract only,"[1] yet there might be conditions which prevented the operation of this general rule. The contract of sale was mutual. The obligations of the parties to pay and deliver were reciprocal. But they might or might not be concurrent. A sale might be for cash before delivery; or for ready money, that is, cash or bill on delivery; or on credit, that is, cash or bill after delivery. In neither of the former cases could the buyer insist for delivery without tendering the price. Where the contract of sale was silent as to the time of payment it was held to be either a ready-money bargain or on the usual trade credit. But if delivery was made the property was passed. The seller had only a personal action for the price. But where the contract was express as to the time of payment the condition as to payment was a condition suspensive—precedent to this effect, that it was suspensive of or precedent to the passing of the property notwithstanding delivery. While the law rejected an implied it admitted an express suspensive condition.[2] Non-performance of a suspensive condition rendered the contract of sale voidable. Transference of the property was suspended till the condition was fulfilled. Consent as well as tradition was necessary to complete the transference; and, until the condition was implemented, there was no consent to transfer. The condition as to payment in this case was an express suspensive condition, and very similar in its terms to conditions sustained as suspensive in decisions both of the Scotch and English Courts.[3]

2. The condition had not been waived by the sellers. So far as practicable in mercantile business they had sent the bill for acceptance *simul et semel* with the goods. The goods were large in bulk, could not be invoiced till weighed on their way to the station, and the bill could not be drawn till the invoice was made out. All this was done without loss of time, and in the ordinary course of business. It was a mere accident that the goods arrived before the bill.

3. Even were there held to be no suspensive condition the bankrupt had timeously rejected the goods. The goods arrived in the warehouse on Saturday morning, and were taken into the warehouse by his servants. But he was personally unaware of the fact. Even when he got the invoice and bill on Saturday night he did not know that the flax had come also. He only learned of its arrival on Monday morning. He then ordered the invoice to be checked, before which was done he naturally would not accept the bill, or take any other step towards accepting delivery. While the invoice was being checked circumstances emerged which obliged him to stop payment, and he then at once decided to reject the goods, delivery of which he had not then conclusively accepted. He personally accepted delivery only *custodiæ causa*.[4] Though the servant's act might bind the master in many cases it could not in such a case as this without special authority, which was not alleged, to the effect of altering the rights of creditors. The employer might have suspended

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[1] Bell's Com., 5th edit., i., 236.

[2] Bell's Com., i., 237-9; Stair, i., 14, 2-5; Ersk., iii., 3, 11.

[3] M'Cartney v. M'Cartney's Creditors, 1799, M. App. *voce* Sale, No. 1; Brodie v. Tod and Co., May 20, 1814, F. C. (see the Session Papers); Hill v. Buchanans, April 11, 1786, 3 Pat. App. 47; Bishop v. Shilleto, 1819, 2 Barn. and Ald. 329, note; Brandt v. Bowlby, 1831, 2 Barn. and Adolph. 932.

[4] Bell's Prin., sec. 1310; Steins v. Hutchison, Nov. 16, 1810, F. C.; Drake v. M'Millan, July 8, 1807, Hume, 691.

payment while absent from home, or there might be circumstances known to the employer which were unknown to his servant, and which rendered it necessary that the goods should be rejected, and the employer could not by his servant's act be prevented rejecting them when he came to the knowledge of their delivery.[1]

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At advising,—

LORD JUSTICE-CLERK.—The pursuer claims the goods in question on two grounds—first, that at the date of the contract the pursuer knew himself to be insolvent; and secondly, that the goods were not finally delivered.

I am of opinion that the first ground of challenge cannot be maintained. The footing on which the bankrupt's trade was conducted was a very slippery one—tiding over a low and falling market by a system of discounts of an irregular and hazardous kind. But I think he had faith in his system, and until he received the bank letter on the morning of the 30th of November he did not contemplate suspending payment. I think there is no ground, therefore, for rescinding the contract.

The second point is one of considerable nicety, and involves some delicate questions. The creditors maintain that the delivery of these goods was complete, and that the bankrupt could not restore them without conferring a fraudulent preference. It is contended, on the other hand, that the delivery was not complete, seeing that something remained to be done by the purchaser before delivery could be taken, and that this was a suspensive condition of the sale.

In all cases arising under bankruptcy regarding undue preferences the element of honest and straightforward dealing is always among the most important. The present is not a favourable case for the creditors. The return of the goods would have made them no worse than they were, and they could have no claim in equity for any part of their value. And, on the other hand, it is not unimportant that the manifest course of honest dealing was to decline to take delivery or grant the bill but at once to return the goods. But, taking the case on the strictest and most technical views of the law of sale and delivery, I have come to be of opinion that the delivery in this case was not complete, and that it was suspended until the stipulated bill was granted, which never was and never could have been done.

1. I think the despatch of the goods by rail, and the sending of the invoice and bill by post, were in law contemporaneous acts. One might arrive before the other, but they were manifestly intended to arrive simultaneously. If the letter had arrived first, the acceptance of the bill would have been postponed until the arrival of the goods, and, in like manner, if the goods had come first, the purchaser could not conclusively take delivery until he had received advice as to the terms on which they had been sent. In the present case the facts exclude the completion of delivery. In point of fact the bankrupt himself had done no act in the direction of accepting delivery. The goods arrived unknown to the bankrupt on the Saturday morning, and were received by the manager at the works, who immediately put part of them in hand. I attach no importance to that fact, and take the case as if the goods had simply been deposited at

[1] Broun v. Watson, Dec. 21, 1816, Hume, 709; Salt v. Field, 5 Term. Rep. 211.

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the warehouse awaiting the principal's orders. There was no power on the part of the manager to forestall any right or obligation which might arise to, or be imposed on, the principal when the invoice should arrive.

2. On the Saturday afternoon, after business hours, the invoice inclosing the bill was delivered at the bankrupt's private residence. If the conclusive delivery was at that time suspended, it continued so until the Monday morning. On the Monday morning the bankrupt looked in at his warehouse on the way to his office, and there he saw the goods, and learned for the first time that they had arrived. He gave no orders on the subject, but went to his office, and there he found a letter from the bank so far restricting the credit he had hitherto enjoyed as to induce him to resolve to stop, and he at once gave directions to set aside this consignment of flax, which has remained entire until now.

I am of opinion, in the first place, that until the letter of advice arrived, and the bankrupt had reasonable opportunity of acting on it, delivery was not complete, and might be honestly and properly refused when the resolution to stop was taken. But looking at the terms of the letter of advice, I am of opinion that the sale was one under the suspensive condition that a bill for the price should be granted on delivery. That bill was not granted, and could not have been given after the resolution to stop had been taken, and therefore the property never passed, and the seller is entitled to redemand his goods. It was pleaded, that even if the condition were precedent, it was waived by the seller, but I can find no ground for so holding.

Lord Neaves.—This is a case of considerable importance in its general bearing on mercantile transactions, as indeed are all mercantile cases which involve questions both of honourable dealing and of strict law. Mr Lumgair, the bankrupt, was engaged in a very extensive business, and his affairs were seriously embarrassed at the time he entered into the contract of sale with the pursuers on 24th November 1874. But I agree with your Lordship that we cannot hold either that he was insolvent, or that, if he was so, he knew himself to be insolvent, in the sense required by the law, to void the contract of sale on the ground of fraud. He had an enormous amount of property lying in foreign markets, and a favourable turn in those markets might have freed him from his difficulties. He evidently did not believe himself to be hopelessly insolvent, and who can put a limit to the sanguine credulity of persons engaged in such speculations as his? He had a cash-credit with the bank, which they had been in the habit of allowing him to overdraw. He had been allowed also to discount bills before acceptance, and he had further been receiving support from friends. I cannot hold that a merchant, in these circumstances, provided he commits no overt fraud, is so incapacitated from transacting that we must cut down any contract he makes on the head of constructive fraud. Accordingly, on the first ground relied on by the pursuers I am prepared to repel their plea.

Laying this point out of view, still the circumstances of Mr Lumgair's business, and his pecuniary position at this time, have a material bearing upon the remaining questions in the case. The history of his business affairs immediately previous to the transaction in question—the difficulties from which he admits he was struggling to extricate himself—followed by his ultimate determination to stop, are important elements in considering the bearing of his conduct on the day of his stoppage.

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On the 24th November Mr Lumgair ordered this flax from the pursuers, and it is clear, from the bargain that it was to be paid for by bill running from the date of the purchase. I am prepared to hold that the granting of the bill was a condition of the purchase,—that an exchange of the bill for the goods was an inherent condition of the transaction entered into by Lumgair and the pursuers. The whole circumstances which occurred from the date of the purchase down to Lumgair's stoppage corroborate that view. The flax was weighed out on Friday afternoon, 27th November, and sent to the Dundee railway station to be forwarded to Arbroath. It arrived there so as to be delivered to Lumgair's people on the morning of Saturday, 28th November. It was not, however, received either by Mr Lumgair himself personally, or by his workpeople, with his knowledge or even with his express authority. It was received by the foreman heckler merely under his general authority to take in goods offered for delivery so as not to leave them in the hands of the railway. Mr Lumgair himself does not appear to have been in the warehouse or heckling-shop at all on Saturday, 28th November. In this state of circumstances, and looking to the terms of the contract, Mr Lumgair's personal intervention was necessary before the delivery said to have taken place was sufficient to pass the property in the goods. But while things were still *in pendente*, and before Mr Lumgair was committed by any personal act—for I cannot hold his passing visit to the heckling-shop on the Monday morning, on his way to his office, to have had any effect—a change of circumstances took place. A letter had been written on Saturday, 28th, by Mr Lumgair's banker in Arbroath, which, for some reason or another, was not delivered to him immediately, but was delivered on Monday, 30th, about eleven o'clock. This letter contained an intimation from the bank which caused Mr Lumgair, after a very few minutes' consideration, to resolve to stop payment.

Now, the invoice of the goods had also been despatched on Saturday, and the sending the invoice was, I consider, an integral part of the sending the goods. It would be most irregular for a merchant to send goods without an invoice stating the quantity and price, and mentioning any conditions as to payment or otherwise, and this more particularly when a bill for the amount was to be exchanged. Accordingly the pursuers having taken no farther interval than the night between Friday 27th and Saturday 28th November—and it must be kept in view that when they delivered the flax to the railway company on Friday between five and six o'clock in the evening they could not with certainty tell when it would be forwarded, or when it would be delivered at Arbroath—posted on Saturday the 28th, about one o'clock, the invoice and a bill for the price, and a letter intimating that they expected the bill to be returned accepted "in due time," which I must take as equivalent to "in course." This letter, with its enclosures, was delivered to Mr Lumgair after business hours on Saturday, the 28th. Now, it has been argued that because the goods had been despatched and arrived before the invoice and bill, therefore there was a waiver on the part of the pursuers of the condition in the contract of sale as to the granting a bill if such truly existed, and that the mere delivery of the goods was enough to pass the property. I think that argument entirely fails. In order to sustain it we should require to construe the duty of the seller in the matter with a strictness totally contrary to practice, and at variance with common sense. In reason and ordinary dealing the invoice, containing all sufficient particulars, and the bill should come *simul et semel* with the goods. It was a

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mere accident here which actually was first delivered. The two things were meant to be simultaneous and *partes ejusdem negotii*, and were so looked upon by Mr Lumgair. At the time the invoice was delivered to him there was lying for him either in the post-office or elsewhere the letter from the bank which I have already mentioned, and which gave the last fatal stab to his commercial credit. He had not seen it before learning at the heckling-shop on the Monday morning that the flax had arrived, but it was ready to be delivered to him when he reached his office. When he read it he saw that it contained two or three matters concerning his mode of carrying on business which at once convinced him that he could not go on any longer, and that he must surrender his affairs to his creditors, and this consequently shewed him that he could not honestly accept the bill which the pursuers had sent with their invoice. The matters contained in the bank's letter involved two changes of practice on the part of the bank, which were of most vital consequence to the bankrupt—first, the restricting him to the authorised amount of his cash-credit, and second, the refusal any longer to discount unaccepted bills. If these resolutions of the bank were enforced, which apparently he had good reason to know they would be, he had no doubt that he must come down.

With this conviction thus brought home to him on the Monday morning, what was it his duty as an honest man to do regarding the pursuers' bill? The question of accepting or rejecting goods when bankruptcy is impending gets into the region of morality as well as of law. Viewing it as a question of morality, could he go on to grant the bill? Certainly not honestly, as he himself knew. And accordingly he did not grant it. The only remaining question is, whether he was entitled in law to hold his hand and to keep the goods when he let the bill lie unaccepted, instead of accepting it, as he says he intended to do, and as was his custom in ordinary cases, and returning it to Dundee by Monday's post,—whether on the Monday morning, when a letter was lying for him which virtually told him that he could no longer honestly grant the bill, no other creditors having in the meanwhile interfered, and there having been no completed personal delivery, he was not entitled to reconsider his position, or whether there was a vested right in his general creditors to insist that he should act as a dishonest man, and accept the bill and keep the goods. That is in reality what the case comes to when plainly put. I have no hesitation in coming to the opinion that he was so entitled to reconsider his position, and to act as he did. He had only delayed accepting the bill from Saturday night to Monday morning, and then almost before he had had time to put pen to paper there came upon him the *bona fide* conviction, upon which he at once acted, that he could no longer accept the bill, and must put aside the goods for behoof of their true owners. In so acting he behaved as a man of honour, doing that which he was morally bound to do, and I have yet to learn that in such a case a man is not entitled in law to do what he is bound to do in morality.

On the whole matter I find nothing in this case to entitle the creditors to lay hands on these goods, and nothing to disqualify the bankrupt from acting as he did. In fact, the property in the goods had never passed from the pursuers to him, and the pursuers must therefore prevail.

Lord Ormidale.—The essential circumstances of this case are to be found in the few following passages of the proof (reads evidence quoted *supra*, pp. 377-8, note).

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From these passages of the proof, as well as from the whole of it taken together, I conclude that Mr Lumgair acted in good faith in entering into the transaction in question. He was carrying on business at a time of great depression in his line of trade. His difficulties were increasing, and he was becoming more deeply involved down to the time of his stoppage. But still he appears, not only from his own testimony, but also from that of others, to have been acting to the last in the *bona fide* expectation of redeeming his fortunes, and retrieving his affairs from the state into which they had fallen. If that be so, it cannot be doubted that he must be held to have acted in good faith in entering into the transaction with Brandt and Company involved in the present case. Mr Bell says in his Commentaries (5th ed. vol. i. p. 244)—"At first, perhaps, it was natural to hold, that if a man was really insolvent, and especially, if from his books it could be made to appear that he was so at the time of entering into the contract, it was his bounden duty to disclose this circumstance, and that concealment of it amounted to fraud in the contract. Such, accordingly, was the opinion entertained by our Judges in the end of the seventeenth century. But this doctrine is inconsistent with an advanced state of commerce. . . . It is now settled, accordingly, that the mere appearance of insolvency from the books is not sufficient to infer fraud in the contract of sale, nor is it enough that a purchaser is struggling even with impending bankruptcy, if there be room for the attempt to retrieve his affairs, and if he be persevering honestly in that attempt." In the present case there was not even an appearance of insolvency on the face of the bankrupt's books. Having regard, then, to the law, as stated by Mr Bell—and its soundness, as so stated, was not impugned—I have no difficulty in holding that the first ground, viz. the fraud of the bankrupt, upon which Brandt and Company endeavoured to maintain their case, has not been sufficiently supported.

The next question in the case is, whether, assuming that there was no fraud in the contract of sale itself, the pursuers, Brandt and Company, who sold the flax in Dundee and forwarded it to Arbroath, where it was received by Lumgair's people on Saturday, 28th November, are entitled to recover it from the trustee for his general creditors. If they are not so entitled, and can only rank for the unpaid price on a sequestrated estate which has not yet paid any dividend, and, as we were informed, is not likely ever to pay except a very small one, the pursuers' case is certainly a hard one. That, however, may not be a legitimate consideration for us, as we must dispose of the case on the strict principles of law applicable to the circumstances.

The real question is, whether the flax in question was so delivered as in law to pass the property to the bankrupt and his general estate. The question is one of considerable delicacy and importance. It does not depend on the principle of stoppage *in transitu*, for the transit was complete. The flax had arrived in Arbroath, and had been delivered by the railway company to Lumgair's people, either at the station or at his warehouse; but then something else required to be done before the property can be held to have passed. The invoice had to be received, and the quality and quantity of the goods, as well as their price, ascertained to be correctly stated. Till the invoice arrived, and till it and the goods were examined, Mr Lumgair could not be expected to accept the draft which was inclosed along with the invoice. And till all this was done, and a reasonable time allowed for it being done, it does not appear to me that it was too late for Mr Lumgair to reject the goods, or to lay them aside for restoration to Brandt and Company. The acceptance of the draft was a suspensive condition

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of the sale, and it never was purified. Neither can I hold that Brandt and Company did anything whatever indicative of their having waived or departed from that condition. In this state of matters, and seeing that in place of accepting Brandt and Company's draft, Mr Lumgair, early on Monday, made up his mind to stop, and surrender everything to his creditors, I think he acted the part of an honest man in causing the flax in question to be laid aside, separated from the rest of his stock, to await any question that might be raised about it. In my opinion, this was done in sufficient time to prevent the property of the goods being held to have passed to his general creditors. The case falls, I think, within the principle stated by Mr Bell (5th ed. vol. i. p. 238), where he says—"So, if it be stipulated as the condition of a bargain, or if goods be sent accompanied by a draft to be accepted and returned, and the goods are received, but the acceptance not sent, the property is not passed—the goods are still unsold." And the case of Brodie v. Tod and Company, May 20, 1814, F. C., on which he founds, appears to me to be in point. If that be so, we must decide for the pursuers, Brandt and Company, on the second ground of action, to the effect that they are entitled to have the flax in question restored to them.

LORD GIFFORD concurred.

THIS interlocutor was pronounced:—"Find that the goods in question were ordered from the respondents (petitioners) by the bankrupt, Robert Lumgair, on 24th November 1874, at the price of £40, 10s. per ton, for which a bill was to be granted as at that date; that the goods were forwarded on the evening of Friday, 27th November, by railway from Dundee, and were delivered at the bankrupt's warehouse on Saturday morning, and were received into stock by his manager, who used a certain portion of the goods, but without the bankrupt's knowledge; that the respondents, on the 28th November, sent by post a letter of advice, invoice, and bill, which were received after business hours by the bankrupt at his private residence: Find that the bankrupt, on calling at his works on Monday, the 30th November, learned for the first time that the goods had arrived; that, without giving any instructions, the bankrupt proceeded to his office, and there found a letter from the bank with which he did business restricting his credit to an extent which obliged him to stop payment: Find that the bankrupt did not accept the bill sent him, and directed the goods to be put aside: Find that in these circumstances the property in these goods never passed to the bankrupt, and that the sellers were entitled to have them back: Therefore dismiss the appeal, and affirm the judgment appealed against, and decern: . . . . Find the respondents entitled to expenses," &c.

WEBSTER & WILL, S.S.C.—LEBURN, HENDERSON, & WILSON, S.S.C.—Agents.

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WILLIAM HARRISON AND HENRY HARRISON, Suspenders.—*Asher—Mackintosh.*
THE ANDERSTON FOUNDRY COMPANY, Respondents.—*D.-F. Watson—Balfour—R. V. Campbell.*

Patent—Process—Jury Trial—Bill of Exceptions—Appeal to the House of Lords.

1ST DIVISION. B.

Vide ante, vol. ii. p. 857.

The Court, in this case, on July 2, 1875, disallowed the bill of exceptions

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for the defenders, at the same time expressing an opinion that the patent was void in law, and on the rule set aside the verdict obtained by the pursuers as contrary to evidence, and granted a new trial. The pursuers, in order that they might take the question of the validity of the patent by appeal to the House of Lords, proceeded to a *pro forma* trial before the Lord President on December 22, 1875, upon the same issues as had been tried in the former trial of the cause. The Judge's notes of evidence in the former trial were accepted as the record of the evidence, and the presiding Judge directed the jury in point of law—"That the letters-patent, dated 29th October 1868, and sealed 19th March 1869, and assigned to the pursuers by assignation dated 30th September 1871, are void in law, and that the jury must therefore return a verdict for the defenders on the pursuers' issue; and farther, that in respect of their verdict for the defenders on the pursuers' issue, it is unnecessary for the jury to return any verdict on the three issues for the defenders, or any of them."

Whereupon counsel for the pursuers excepted to the above direction and ruling.

The jury thereafter found for the defenders on the first issue, and a bill of exceptions was signed.

The bill of exceptions was put to the roll, and counsel intimated that they desired their argument on the former occasion to be held as repeated.

LORD PRESIDENT.—When this case was before us after the first trial on a bill of exceptions and a rule we found that the exceptions taken did not raise the question as to the validity of the patent, but at the same time we were all of opinion that the patent was in law invalid. As we were unable, from the manner in which the case was presented to us, to give effect to that opinion, all we could do was to make the rule absolute for a new trial, holding as we did that the verdict was against evidence. The consequence of that course was that the only remedy of the patentees was to proceed to a new trial. But in the face of the opinions delivered by the Court it was hopeless to go of new into the question of infringement, or to do anything except raise the question of the validity of the patent in such a form as would enable the patentees to take the case by appeal to the House of Lords. Accordingly the new trial which took place was a merely formal proceeding. It was arranged that the Judge's notes of evidence in the first trial should be accepted as the record of the evidence in the new trial. As presiding Judge, I directed the jury in accordance with the views expressed by the Court when granting a new trial. To that direction the counsel for the patentees excepted, and all that we have now to do is, in accordance with our opinions already expressed, to disallow the exception, and thus to enable the patentees to take the case to the House of Lords.

LORD DEAS, LORD ARDMILLAN, and LORD MURE concurred.

THIS interlocutor was pronounced:—"18th January 1876.—The Lords having heard counsel for the parties upon the bill of exceptions for the pursuers, disallow the exceptions, and find the defenders entitled to the expenses incurred in discussing the bill, and remit," &c.

Thereafter the defenders enrolled the case to apply the verdict, but the Court suggested that as the pursuers' appeal required to be lodged within eight days after the commencement of the next session of Parliament,

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and as the House of Lords were bound to dispose of it summarily (55 Geo. III. c. 42, sec. 7), there was nothing to be gained by applying the verdict *hoc statu*, and accordingly

THIS interlocutor was pronounced:—"20th January 1876.—The Lords, in respect of the complainers' intention to appeal against the interlocutor disallowing the exceptions, of consent supersede consideration of the motion set forth in the notice of motion for defenders (respondents), No. 130 of process, to apply the verdict."

HAMILTON, KINNEAR, & BEATSON, W.S.—DAVIDSON & SYME, W.S.—Agents.

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Jan. 21, 1876. Atchison's Trustees v. Atchison.

JOHN MARTIN AND OTHERS (Atchison's Trustees), Pursuers.—*Fraser—J. A. Reid.*

WILLIAM ATCHISON AND ANOTHER, Defenders.—*Morison.*

Execution of Deed—Notary Public—Docquet—Statute—Schedule—Conveyancing and Land Transfer Act (37 *and* 38 *Vict. c.* 94), *sec.* 41.—The 41st section of the Conveyancing and Land Transfer Act enacts that a deed may be subscribed for a party unable to write by one notary before two witnesses, "and the docquet thereto shall set forth that the granter of the deed authorised the execution thereof, and that the same had been read over to him in the presence of the witnesses. Such docquet may be in the form set forth in schedule (I) hereto annexed, or in any words to the like effect." *Held*, that as the statute did not prescribe the use of the form in the schedule, but merely suggested it as a good form, a docquet which was otherwise sufficient was not rendered invalid by its disconformity to the schedule.

1st DIVISION. Lord Young. B.

MRS CHRISTINA ATCHISON died on 17th October 1874. In an action of removing by her testamentary trustees under a settlement dated 19th May 1874, directed against her son William Atchison and his wife, and concluding that they should be ordained to remove from the house of Springbank, Bothwell, occupied by the deceased, the defenders founded on another testamentary deed bearing to be signed for Mrs Atchison by a notary and two witnesses of date 10th October 1874.

The pursuers averred;—(Cond. 19) "With reference to the pretended deed founded on in the statement of facts for the defenders, the pursuers aver that said pretended deed is *ex facie* null and void, in respect that, while bearing to be notarially executed, the name and designation of the notary are not set forth in the docquet."

The pursuers pleaded;—(4) The pretended deed founded on by the defender being *ex facie* null and void, as set forth in article 19, the right of the pursuers is not excluded by said pretended deed, and they are entitled to decree as concluded for.

The deed was produced. The testing clause and notary's docquet were in these terms:—"In witness whereof these presents, including the marginal addition, all written on this page by John Dickson Ferrie, notary public, residing in Portobello, near Edinburgh (five words being deleted before subscription), are subscribed by me at Bothwell, the 10th day of October 1874, before these witnesses, Robert Hedderick Arthur, solicitor Supreme Courts, residing in Edinburgh, and Charles Peattie, gardener, residing in Bothwell." "The foregoing disposition and deed of settlement having been read over and explained by me, the undersigned notary public, to the above designed Christina Smith or Atchison, in presence of the witnesses also above designed, and she having approved thereof in every respect, and stated that she was unable to subscribe the

same from weakness, and having desired me to sign for her, and in token of her request touched my pen, I do hereby subscribe the same for her in presence of the said witnesses. *Per opera.* J. D. FERRIE, notary public. Robert H. Arthur, witness; Charles Peattie, witness."

The Lord Ordinary repelled the pursuers' fourth plea, and afterwards dismissed the action.

The pursuers reclaimed, and argued;—The docquet did not fulfil the requirements of the 41st section of the Conveyancing and Land Transfer Act, 1874,[1] and relative schedule[2] in the following respects:—1. It did not contain the name or designation of the notary; 2. It was not stated that the granter "authorised" the notary to sign; 3. It was not stated that the witnesses subscribed "in testimony of their having heard authority given;" 4. There was no statement that "these presents" (including the docquet) had been read over. The new statute being a relaxation of the law on certain conditions, these must be strictly complied with.[3]

The defenders argued that the docquet contained all that was prescribed by the 41st section, and that it was not necessary to follow the precise words of the schedule.

At advising,—

LORD PRESIDENT.—This is an action of removing at the instance of the trustees of the late Mrs Atchison acting under a trust-deed dated 19th May 1874. It is directed against the son of Mrs Atchison and his wife, who are in occupation of the premises. The defence is rested upon a deed dated subsequently to the trust-deed on 10th October 1874. The pursuers object to this deed as *ex facie* null, because it is not properly subscribed. It is not subscribed by Mrs Atchison but by a notary for her, and the question is, whether the subscription by the notary is well done in terms of the Conveyancing Act of 1874. The question is one of considerable importance in the construction of the Act. The object of the Act was to enable persons who were unable to write to subscribe a deed by one notary in presence of two witnesses, in place of two notaries in presence of four witnesses. It is said that this relaxation of the law is accompanied by certain conditions which have not been fulfilled, and the case turns on a careful consideration of the clause. But before coming to that, it is important to notice the previous state of the law. As we all know, two notaries and four

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[1] 37 and 38 Vict. c. 94, sec. 41. Quoted in the Lord President's opinion, *infra*, p. 391.

[2] Schedule I.—"*Form of Docquet where Granter of Deed cannot write.*

"By authority of the above named and designed A B, who declares that he cannot write on account of sickness and bodily weakness, [*or* never having been taught, *or otherwise as the case may be*], I, *C D* [*design him*], notary public [or Justice of Peace for the county of (*name it*), *or as regards wills or other testamentary writings executed by a parish minister as notary public in his own parish*, minister of the parish of (*name it*)], subscribe these presents for him, he having authorised me for that purpose, and the same having been previously read over to him, all in presence of the witnesses before named and designed, who subscribe this docquet in testimony of their having heard [*or* seen] authority given to me as aforesaid, and heard these presents read over to the said *A B*.

"E F, witness. (Signed) A B, notary public, *or* Justice of
"G H, witness. the Peace, *or* parish minister.

[3] Johnston v. Pettigrew, June 16, 1865, 3 Macph. 954, 37 Scot. Jur. 505; Birrel v. Moffat, 1745, M. 16,846; Henry v. Reid, Feb. 10, 1871, 9 Macph. 503, 43 Scot. Jur. 237.

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witnesses were required, but it is more important, as affecting the present case, to consider what it was necessary that the docquet should bear, because it is alleged that the docquet in this case is imperfect.

Now, the one thing needful was that the fact should be distinctly set forth that the maker of the deed had authorised the notary to sign for him. It is not to be left out of view that the law in regard to this matter was statutory under the Act 1579, c. 80.

All that the statute required was the presence of two witnesses, and that they should be so designed that they could be found. But undoubtedly the common law required further that the docquet should set forth distinctly that the notary had the authority of the maker of the deed to sign for him; and farther, it was matter of consuetudinary law that the granter should touch the pen in token of giving his authority. But I am not aware that it was requisite to set forth any specific fact except the fact of the authority. Erskine states the matter thus in his Institutes, iii. 2, 9,—"The attestation or docquet of the notaries must express the special fact that the granter authorised them to sign, nor can this omission be supplied by mentioning it in the body of the deed." And he refers to the case of Birrel, M. 16,846, which is an important authority. There the objection to the docquet was that it did not bear that the maker had granted his authority. "It was answered—1st, That there was no form required by any statute of a notary's attestation, that when it bore *pro illo subscribo* that was in effect to bear the party's command, since otherwise it could not with truth be said. 2d, That Reid, the first notary, was writer of the deed, which bore in the body of it to be signed by notaries at the granter's command because she could not write, and which was equal to his having said so in the docquet." But these answers were disregarded, and the Court reduced the deed, and Lord Kilkerran makes some important observations. "Witnesses to a deed signed by notaries are not only witnesses to the subscription of the notary but also to the command given him, both which the witnesses attest, and for that very reason it is that four are required; and as witnesses are neither bound nor supposed in any case to know what is contained in the body of the deed, they attest no more than what is in the docquet. The authority also to notaries must be given at the very time of executing the deed, for till then there is *locus pœnitentiæ*, and, for anything that could appear from the face of the deed in question it might have been written many days before signing. The docquet's bearing *pro illo subscribo* was nothing, for though it may be true that the notary could not with truth say so without her authority, yet that was but his assertion, which, whether true or false, is the very question,—as no fact was asserted in evidence of such authority, the truth of which the witnesses were to attest." The answer that the authority was to be found in the deed itself is disposed of thus in an observation from the bench, given by Falconer,—"That in the body of the writ the notary speaks not but the party, and the thing to be attested is that the party has spoke at all."

That case was decided in 1745, and we see from it that the docquet in use was in Latin, and that the one thing required to be set forth specifically was that authority had been given. But it is instructive enough to see that in a work published about this very time (in 1762) on the office of a notary, the Latin form was as follows:—"De speciali mandato dicti A, calamum tangentis, scribereque nescientis ut asseruit, ego B, notarius publicus, pro eo subscribo." Therefore that was the thing necessary to be set forth. In the case of blind persons it was absolutely necessary that the deed should be read over to them in

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presence of the notaries, but it was not required, as matter of solemnity, that that fact should be set out in the docquet. It was so decided in the case of Yorkston, in 1794,[1] which affords an additional indication that nothing more than the authority given in presence of the witnesses was required to be set forth.

Now, that being the state of the old law, let us see the changes which have been introduced by the recent statute. Its main object was to dispense with the necessity of two notaries and four witnesses. The 41st section enacts that "without prejudice to the present law and practice, any deed, instrument, or writing, whether relating to land or not, may, after having been read over to the granter, be validly executed on behalf of such granter, who, from any cause, whether permanent or temporary, is unable to write, by one notary-public or Justice of the Peace subscribing the same for him in his presence and by his authority without the ceremony of touching the pen, all before two witnesses." So far the Act prescribes what is to be done. These are the conditions on which the lieges may avail themselves of this relaxation of the law.

It is further required, by the same section of the Act, that certain things should appear on the face of the docquet. "And the docquet thereto shall set forth that the granter of the deed authorised the execution thereof, and that the same had been read over to him in the presence of the witnesses." Here again there is a change. The docquet must set forth not only the authority, but that the deed was read over to the granter in presence of the witnesses. The question is whether this docquet complies with those requisites, and it appears to me that it does. It is in these terms:—"The foregoing disposition and deed of settlement having been read over and explained by me, the undersigned notary public, to the above designed Christina Smith or Atchison, in presence of the witnesses also above designed, and she having approved thereof in every respect, and stated that she was unable to subscribe the same from weakness, and having desired me to sign for her, and in token of her request touched my pen, I do hereby subscribe the same for her in presence of the said witnesses. *Per opera.* J. D. FERRIE, notary public. Robert H. Arthur, witness; Charles Peattie, witness." Does that not bear that the granter authorised the notary to sign, and that the deed was read over to her? It seems to me that it does. It is contended, no doubt, that the words "authority" or "authorise" are not used, but these words are not necessary *de solennitate*, and the words "approved" and "desired" are quite equivalent. But it is said that the docquet does not expressly bear that the authority was given in the presence of the witnesses, because these words are not repeated in reference to the authority, having been used in the first instance in reference to the reading over. But I think that is far too strict a construction. It seems to me that the touching of the pen in presence of the witnesses, though not now a necessary solemnity is a very clear indication that the whole thing was one continuous act, so that as far as the requirements of section 41 are concerned I hold them to have been fully complied with.

I am very much inclined to maintain strictly the doctrine laid down more than once in this Court, and particularly in the case of Johnston v. Pettigrew, that when a relaxation of the law is introduced on certain conditions, it is indispensable that the party who desires to avail himself of it should comply strictly with those conditions, and if I did not think that that had been done I should not sustain this deed. But we are told that there are other conditions contained

[1] M. 16,856.

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in the schedule which have not been complied with. Now, the authority of a schedule depends entirely on the terms and nature of the reference to the schedule in the enacting clause, which in this case is in these words:—"Such docquet may be in the form set forth in schedule (I) hereto annexed, or in any words to the like effect." It is said that the docquet, a form of which is given in the schedule, requires to set forth four things, 1st, the designation of the notary, 2d, that authority has been given him, 3d, that the deed has been previously read over to the granter, and 4th, that the witnesses subscribe in testimony of their having heard the authority given, and it is said that this docquet is defective in the 1st and 4th points. But in my opinion a party is not bound to absolute and slavish compliance with the words of the schedule if he fulfils the requirements of the 41st section. If it were so, there would not be compliance in this case. But I cannot read the Act in that sense. It does not even direct that the schedule should be followed as nearly as circumstances will permit. The schedule is merely a suggestion of a good practical form, but there is nothing in the Act to make void any form which complies with the provisions of section 41.

Stress was laid on the case of Johnston v. Pettigrew, and it is an important decision upon the construction of the recent Conveyancing Act of 1858, 21 and 22 Victoria, c. 76. The first section dispenses with the necessity of a separate instrument of sasine, and substitutes the registration of the conveyance. The provision is in these terms:—"It shall not be necessary to expede and record an instrument of sasine on any conveyance of lands, but it shall be competent and sufficient for the person or persons in whose favour the conveyance is granted, instead of expeding and recording such instrument of sasine, to record the conveyance itself, in a register of sasines applicable to the lands therein contained, and the conveyance being presented for registration with a warrant of registration thereon, in or as nearly as may be in the form of schedule (A) No. 1, hereto annexed, specifying the person or persons on whose behalf it is so presented, and signed by such person or persons, or his or their agent, and, being so recorded along with such warrant, shall have the same legal force and effect in all respects as if the conveyance so recorded had been followed by an instrument of sasine duly expede and recorded, &c." Now the warrant for registration in that case was in these terms:—"Register in behalf of Matthew Pettigrew; William Maclean, agent." That was on the face of it a most imperfect writing. Matthew Pettigrew might or might not be the disponee. There might be more than one person of the name. William Maclean might be anybody under the sun, and he is not called the agent of Matthew Pettigrew. Now, the schedule of that statute is in these terms:—"Register on behalf of A B (insert designation). Signed A B [or] C. D., W.S., Edinburgh (or as the case may be), agent of the said A B." There there was a failure to comply with the terms of the schedule, and a very serious failure. And this proceeding was to have the effect of completing a feudal title to a landed estate by entering the register of sasines, without any means of determining who the party was who was to be infeft, or who his agent was. And the terms of the enactment stand in very direct contrast to those of the statute with which we are dealing. It is not, as here, that the warrant may be in the form of schedule (A) or words of like force and effect. The warrant is to be in or as nearly as may be in the form of schedule (A). When such language is used, a departure from the form is in ordinary circumstances only permissible when it is made necessary by the cir-

cumstances of the particular case. But when the statute says that a writing may be in the form of a schedule, that means merely that the schedule is suggested as a good form, but it does not superadd anything to the enacting words. It is therein that the great distinction or rather contrast lies between this case and the case of Johnston v. Pettigrew, and others of the same class. For there are other cases in which a schedule has been given effect to and enforced where it has been prescribed as the proper form to be used, and no more latitude has been given than is implied in the words "as nearly as may be."

On these grounds I think we should adhere to the interlocutor of the Lord Ordinary.

LORD DEAS.—Laying aside, in the first instance, the recent statute, the law applicable to the signature by notaries of deeds of importance was regulated by the Act 1579, c. 80, and certain Acts of Sederunt, and by the practice which followed upon these. We are not, however, called on to decide what, apart from the recent statute, was essential to the validity of a notary's docquet, and upon that matter I give no opinion. In the case of Henry v. Reid, the Lord President mentioned some things as essential. He says,—"In the first place, it is indispensable that the granter of the deed should specially authorise the notary to subscribe for him; in the second place, such authority must be intelligently given,—that is to say, the granter must signify that he is aware of what he is doing, and for that purpose should state the fact and specify the cause of his inability to write; and, in the third place, this must be done in the presence and hearing of the witnesses. All these matters ought to be expressly set forth in the docquet." I do not see at present that there is any inaccuracy in that opinion. His Lordship does not say that these exhaust all the things which are essential, but we are not here called upon to decide whether they do or not. But my opinion is, that whatever was necessary before this statute is necessary still, except in so far as it is expressly dispensed with by the statute, and further, that those things which are specified in section 41, in so far as they are additional, must likewise be contained in the docquet. Now, I think it a very nice question whether, in order to take advantage of the relaxation of the law, it was not necessary to have a docquet, either in words or in substance, the same as the schedule. On the whole, however, I am of opinion that if the docquet contains all that was necessary before, and all that section 41 may be held to have added, it will be sufficient, although it does not follow the words of the schedule, and is not even in all respects substantially to the same effect with the schedule. If it were imperative that it should be substantially to the same effect, in all respects, with the schedule, it would be difficult to say that this docquet complies with that requisite. But having regard to the terms of the statute itself I do not think this was intended to be imperative, and consequently I come to the conclusion that the subscription should be held good.

LORD ARDMILLAN.—The only point for consideration at present is, whether the signature of Mrs Atchison, given for her by a notary-public, is valid? Is this docquet probative? And if so, is the deed validly subscribed?

The date of the deed is subsequent to the recent Conveyancing Act (37 and 38 Vict. c 94), and therefore the signature by one notary, and in presence of two attesting witnesses, is sufficient,—as sufficient as two notaries and four witnesses had formerly been. The old law regarding subscription by notaries

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for those unable to write is well known. The statutes 1540, cap. 117, 1579, c. 80, and 1681, c. 5, contain the enactments of the law on the subject down to recent times. But by the Conveyancing Act of 1874 a change was made, and while the old procedure was not abrogated or put an end to, a new and more convenient mode of subscription by notaries was permitted. Now, I fully admit that when a party adopts this newly permitted form of subscription, he must, in exercising the new power, conform himself to its requirements. This is fully and instructively explained by your Lordship from the chair of the Second Division in the case of Johnston v. Pettigrew on 16th June 1865. Some distinction, however, there is between the requirements of the enacting clauses and the inferences from the language of the schedule. There is more precision of authority, more stringency of obligation, in the enactments of the clauses than in the terms of the schedule.

I have carefuly considered the objections taken by the pursuers to this subscription and this docquet in so far as we can now deal with them.

I am satisfied that the docquet—if itself valid—does sufficiently and legally instruct the subscription of the deed by Mrs Atchison. I am also satisfied that in this docquet there is not any violation of the enactments of the statute of 1874. All that the statute requires as necessary to a notarial docquet attesting and instructing subscription by a person who is unable to write is, in my opinion, within this docquet.

In regard to the schedule, the adoption of it is not imperative. It may be adopted. I am of opinion that exact observance of the form of the schedule in minute particulars is not imperative. The statute does not so direct the use, or the mode of the use, of the schedule, as to make every part imperative. The word "may" is not imperative. Not every variance from form is fatal, but only a "material variance."—Nixon v. Nonney, 6 Eng. Jurist, 389. To hold that every trifling deviation from the words of the schedule is fatal to the docquet and to the subscription would be contrary to the spirit of our law, as evinced by all recent legislation and judicial decision on the subject of subscription of deeds.

In the case of Henry v. Reid (10th February 1871) the docquet was not holograph, and this was admitted. If it was necessary that the docquet should be holograph, then there was no doubt that it was void and null, for holograph it was not. That was the only question. No other objection was taken. If the docquet in the case of Henry had been holograph it would have been sustained.

If this case had been under the law previous to the Conveyancing Act of 1874, and if this docquet had been signed by two notaries and four witnesses as then required, and if the docquet had been in the terms of that now before us, I am of opinion that it would have been valid. There is no case of a docquet in such terms as these ever having been set aside on the head of *ex facie* nullity. Lord Kilkerran's remarks, quoted by your Lordship, are, in my view, most important. A witness subscribing as attesting the docquet does attest what is expressed in the docquet, and this, in the case of a blind person, means that the witness attests the authority given to the notary. That which the notary states in the docquet to have been done is by the witnesses attested. In the case of Hardie (6th December 1810, Fac. Coll.) a docquet less correct than the present was sustained; and that case of Hardie was a unanimous judgment in the time of President Blair, and is referred to as an authority by recent jurists.

Now, it was not the purpose of the recent statute to multiply the require-

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ments of formal procedure, or to increase the difficulties of subscription by the blind. On the contrary, to facilitate such subscription was the Legislature's intent.

Accordingly, my opinion is that the Lord Ordinary's judgment is right.

In repelling the fourth plea in law for the pursuers—a plea founded on the alleged express nullity of this deed—I think the Lord Ordinary has pronounced a decision in accordance with legal principle and precedent; and there is no other question before us, for if that fourth plea is repelled the action of removing falls to be dismissed.

LORD MURE.—Had this been a question which fell to be disposed of under the old law, in a case in which only one notary was required, and there were such cases, I should have been of opinion that this was a good docquet, because it bears that the deed was read over to the granter, that authority was given to the notary to sign, and that in token of the authority the granter touched the pen. In addition to the passage in Erskine which has been referred to, to the effect that the docquet must express the special fact that the granter authorised the notary to sign, I find it laid down in Bell's Principles, section 2226, and in Bell's Law Dictionary, *voce* Testing Clause, that the statement that authority to sign has been given is the essential point. This docquet also bears that the deed was read over. It was a question at one time whether it was essential to state this in the docquet, but it was decided in the case of Yorkston, 2d December 1794, D. 16,856, that it was not, and in the case of Hardie, 6th December 1810, a docquet which did not bear that the deed was read over was unanimously sustained. I have no hesitation, therefore, in holding that this would have been a good docquet under the older law.

Now, I do not think that the recent statute has imposed any additional requirements beyond requiring by sec. 41, as an essential, that the docquet should bear that the deed was read over to the party, in the presence of the witnesses. In the docquet here in question this has been complied with, and it also bears that the granter desired the notary to sign for her. And as it contains the substance of all that the form given in the schedule contains, though in somewhat different language, still in "words to the like effect," I am of opinion that it complies with all that the 41st section of the statute enacts, as well as all that the older law required.

LORD PRESIDENT.—I think it right to make an explanation as to the passage from my opinion in the case of Henry v. Reid which Lord Deas has referred to, as it is capable of a construction which was never intended. I do not say that all these matters must, under the old law, be set forth in the docquet, but that they ought to be set forth. They are three in number,—The granter's having given authority; secondly, that the authority should be intelligently given, and for that purpose that the granter should signify that he is aware of what he is doing, and specify the cause of his inability to write; and thirdly, that this should be done in the presence and hearing of the witnesses. As regards the 1st and 3d points, I am of opinion that they must be set forth; as regards the 2d, I cannot affirm that it is necessary that it should be set forth, and therefore, if that should be construed to be implied in my opinion I beg to disclaim it.

THE COURT adhered.

PHILIP, LAING, & MONRO, W.S. R. H. ARTHUR, S.S.C.—Agents.

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GEORGE FERRIER (Leighton's Trustee), First Party.—*Rhind.*
GEORGE FERRIER (Craig's Trustee), Second Party.—*M'Laren—Pearson.*
GEORGE FERRIER AND OTHERS (Craig's Trustees) Third Parties.—*M'Laren—Pearson.*
WILLIAM ANGUS, Fourth Party.—*D.-F. Watson—Hunter.*
ROBERT LEIGHTON AND ANOTHER, Fifth Parties.—*Kinnear.*

Succession—Nearest of Kin.—Two spouses made a mutual disposition of their whole estate by postnuptial contract, directing that the survivor should have the liferent of the whole, and that after his or her death the estate should pass to trustees, who were directed to divide it into two equal portions, and to pay or convey one to any persons to be appointed in writing by the husband, and "failing his executing such, to his nearest in kin equally." The husband predeceased, having made no appointment of legatees. Upon the death of the wife, *held* that the fee of the husband's half of the estate destined to his next of kin was intended to be given to those who should be his next of kin at the date of his death, and that upon his death without having exercised the power of appointment their interest vested.

1ST DIVISION. B.

BY postnuptial contract between John Leighton, merchant in Brechin, and his wife, the spouses mutually disponed to each other their whole estate, and directed, *inter alia*, that the longest liver should, on the death of the other, make up an inventory and valuation of the estate, and deliver a signed duplicate to one of the trustees to be kept "for the use of the nearest in kin or legatees of the first deceaser, and such longest liver shall liferent the whole estate, and shall have the full and entire administration and management thereof during his or her life, with power to sell, use, or dispose thereof for onerous causes, at pleasure," "but shall not have power gratuitously to gift or dispose of the estate to the prejudice of the legatees or nearest in kin of the first deceaser;" and, thirdly, "after the death of the longest liver of the said parties, the said estate and effects shall devolve and belong to George Ferrier," and others, as trustees, "and said trustees shall divide the same into two equal shares after deduction therefrom of the funeral expenses of such longest liver, and of the whole debts and expenses chargeable upon said estate, including the expense of executing the trust hereby created, and one just and equal share thereof shall belong and be paid or conveyed to any person or persons, legatee or legatees, to be named or appointed by or for the purposes to be mentioned in any deed or writing that may be executed by said John Leighton, or failing his executing such, the same shall be paid or conveyed to his nearest in kin, equally, share and share alike, whether they be males or females, or the said property be heritable or moveable, and the other just and equal share thereof shall belong and be paid or conveyed to any person or persons, legatee or legatees, to be named or appointed by or for the purposes to be mentioned in any deed or writing that may be executed by said Elizabeth Leighton, or failing her executing such, the same shall be paid or conveyed to her nearest in kin equally, share and share alike."

John Leighton died in 1841, leaving no testamentary writing other than the postnuptial contract. His widow, who married a Mr Craig, survived him also, and died in 1874. Upon her death various questions arose as to the succession to the half of the estate under Mr and Mrs Leighton's postnuptial contract destined to the legatees or nearest of kin of John Leighton.

A special case was presented by the following parties:—(1) The trustee under Mr and Mrs Leighton's postnuptial contract; (2) the trustee under Mr and Mrs Craig's antenuptial contract; (3) the trustees under a trust-disposition and settlement by Mrs Leighton or Craig and James Craig, the residuary legatee named therein; (4) William Angus, who was in

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right of John Leighton's nearest of kin at his death; and (5) Robert and John Leighton, who were John Leighton's nearest of kin at the date of the death of his surviving spouse. The first question was in substance whether Mrs Leighton, afterwards Craig, effectually conveyed John Leighton's half of the common estate by her antenuptial contract with Craig. The second and third questions were, assuming that the first should be answered in the negative (as it was),—"2. Is the fourth party entitled to the fee of the share falling to the nearest in kin of John Leighton under the said postnuptial contract? Or, 3. Are the fifth parties entitled to the fee of the said share?"

Argued for the fourth party;—The legacies vested *a morte testatoris*. The term "nearest in kin" has an ordinary signification,—those who are entitled to succeed *ab intestato;* and it requires something special in the way of implied intention to displace the natural meaning.

Argued for the fifth party;—The question was entirely one of construction. When a testator used words describing a class the natural period to ascertain who are in that class is when the benefit opens, and that is what the testator must be presumed to have intended.[1]

At advising,—

LORD PRESIDENT.—(After stating his opinion that the first query must be answered in the negative)—The second and third queries may be taken together. They raise the question whether it is the next of kin of the husband as at his own death or at the death of his widow who are to take his share. That depends upon the construction of one particular clause, and though at first sight the point is attended with some little doubt, I think there is no great difficulty in deciding it. The direction to the trustees is to divide the estate into two equal shares, and "one just and equal share thereof shall belong and be paid or conveyed to any person or persons, legatee or legatees, to be named or appointed by or for the purposes to be mentioned in any deed or writing that may be executed by said John Leighton, or failing his executing such, the same shall be paid or conveyed to his nearest in kin, equally, share and share alike."

This is entirely a question of construction, and any reference to the case of Lord v. Colvin, and other cases of the same class, seems to me out of place, as these decisions are only applicable to cases of intestate succession. The question is, What do the parties mean when they say the nearest of kin, failing legatees of each spouse? The ordinary sense of the words would be the heirs *in mobilibus* of the spouses, that is, the next of kin of each at the time of his or her death; and when we come to consider the clause more minutely that ordinary construction is confirmed. The destination is not to the next of kin in the first place, but to legatees to be appointed in any writing by John Leighton, or failing his executing such, to his nearest in kin. Suppose he had died after executing a writing appointing a legatee to take his share, what would the result have been? The right of the surviving spouse being one of liferent merely, the legatee must have taken a vested interest from John Leighton's death. Well, if the next of kin take the right, failing legatees, they are conditional institutes. They cannot be described in any other way. They are certainly not substitutes. But when

[1] The following authorities were quoted:—Lord v. Colvin, July 15, 1865, 3 Macph. 1083, 37 Scot. Jur. 568; Connel v. Grierson, Feb. 14, 1867, 5 Macph. 379, 39 Scot. Jur. 196; Storie's Trustee v. Gray, May 29, 1874, *ante*, vol. i. 953; Pearson v. Corrie, June 28, 1825, 4 S. 120; Scott v. Scott, May 10, 1855, H. L., 2 M'Q. 281.

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a conditional institute takes on the purification of the condition, he takes exactly what would have vested in the party first preferred, if the condition had not been purified. If no legatee is named, the next of kin must take a vested interest in the husband's half at the date of his predecease, and, if so, it is in vain to say that it is not the parties who then stood to the husband in the relation of next of kin who are called.

LORD DEAS.—On 15th August 1833 John Leighton and Elizabeth his wife, both now deceased, executed a postnuptial contract of marriage by which, in the outset, they disponed, in general terms, the means and estate belonging to each of them respectively to each other, but declaring that this conveyance was granted "for the uses and purposes, and with and under the conditions and provisions underwritten." One of these conditions was to the effect that the longest liver should liferent the whole estate, heritable and moveable, and should "have the full and entire administration and management thereof during his or her life, with power to sell, use, and dispose thereof for onerous causes at pleasure," "but such longest liver shall not have power gratuitously to gift or dispose of the said estate to the prejudice of the legatees or nearest of kin of the first deceaser." It was next provided that after the death of the longest liver the estate and effects, after deduction of funeral expenses, and of "the whole debts and expenses chargeable upon said estate," should be divided, by trustees therein named for the purpose, into two equal shares or halves, one of which should be paid or conveyed to whomsoever the husband should have named by any writing under his hand, and failing his executing such, then to his nearest in kin equally, share and share alike, and the other half should be paid or conveyed to any person or persons to be named or appointed in any deed or writing that may be executed by the said Elizabeth Leighton, or failing her executing such, the same shall be paid or conveyed to her nearest in kin equally, share and share alike.

Mr Leighton died in 1841 without issue, and without having executed any deed or testamentary writing subsequent to the said postnuptial contract.

Mrs Leighton survived her husband, and in 1843 entered into a second marriage with David Craig, on which occasion these parties executed an antenuptial contract of marriage which bore to convey their whole means and estate to the survivor, but with and under the conditions and provisions therein underwritten. These conditions and provisions were in similar terms to those contained in Mr and Mrs Leighton's postnuptial contract, including a provision that one-half of the means and estate should go to whomsoever the husband should appoint, and, failing thereof, to his nearest in kin equally, share and share alike, and the other half to whomsoever the wife should appoint, and, failing thereof, to her nearest in kin, also equally, share and share alike. Mr Craig died in 1871 without issue, and without having executed any deed or testamentary writing subsequent to the said antenuptial contract.

Mrs Leighton or Craig died in September 1874, leaving a trust-disposition and settlement by which she conveyed her whole means and estate, including whatever she had power to dispose of, either through the death of her first or the death of her second husband, to trustees for behoof of certain parties named, of whom the claimant, James Craig, is the sole survivor. He is, at the same time, the sole next of kin of James Craig, her second husband.

The first question stated in the case is in substance whether Mrs Leighton,

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afterwards Craig, had power under her first marriage-contract to convey or make over, and did by her second marriage-contract effectually convey or make over to the Craigs, the one-half of the means and estate comprehended in her first contract, which had been thereby eventually destined to the Leightons. I am of opinion that she had no such power; that the power to sell, use, and dispose thereof for onerous causes was a power conferred for administration only, and accordingly it was coupled with a declaration that she should not have power gratuitously to gift or dispose of the estate to the prejudice of the legatees or nearest of kin of the first deceaser. In short, she was practically limited to a liferent of that portion of the estate, the fee being destined to the nominees of her husband, and failing such, to her nearest in kin. I concur, therefore, with what I understand to be the result arrived at by all your Lordships, that the first question ought to be answered in the negative, and I have thus far explained what I conceive to be the fair construction of the deed, not because there is any difficulty upon that point, but simply to make clear the observations I have now to make in answering the second and third queries, which raise the important question whether, under a destination such as we have in the post-nuptial contract between Mr and Mrs Leighton, the share which the husband had the power to dispose of, but did not dispose of, goes to his next of kin as at his own death, or to his next of kin as at the date of the death of his wife who survived him.

In the case of Lord v. Colvin the residue of the estate of the testator, Dr Cochrane, was destined to his two sons when they should attain the age of twenty-five, and failing them to the issue of a Mrs Moorhouse. These parties,—everybody, in short, named or described in the deed,—died before the period of vesting arrived. There was no destination of any kind beyond them, and, in these circumstances, the Court held that the parties entitled to take were the testator's next of kin as at the date of his death, or their representatives in their place. The destinations, which had never taken effect, were held to have been mere burdens on the legal right of succession, which flew off as the parties successively died, and ultimately left the estate as free intestate succession.

I expressed no opinion on that question on its merits. It appeared to me, for reasons which I explained very fully, that in one of the branches of Dick v. Gillies[1] the very question had been deliberately decided by the Second Division in the opposite way; and as the question was raised before us, not in a lawsuit in this Court, but by a case directed from Chancery, under the statute, for our opinion, which was to guide the English Court, I thought we ought to consult the other Division, so that the opinion might really be the opinion of the Court of Session, which otherwise it could not be said to be. In this I was overruled, and of course I now accept the opinion of the majority in that case as conclusive of the law wherever the succession is regulated, as it came to be there, *provisione legis*. The point was new, but I by no means suggest that it was otherwise than rightly decided.

The deed in this case is different in its terms. In Lord's case, failing Dr Cochrane's sons and their issue, and the issue of Mrs Moorhouse, there was no destination, either to the testator's own heirs or to any description of persons whatever. Here, on the contrary, failing the nominees or nominee of Mr Leighton, there is a destination to his nearest of kin equally, share and share

[1] July 4, 1828, 6 S. 1065.

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alike. That is the destination to which effect must now be given. The destination is therefore regulated, not *provisione legis*, but *provisione hominis*.

I see that in the second case of Lord v. Colvin I am reported to have said,—"If there had been in this deed, as regards that residue, an express destination, failing the sons and Mrs Moorhouse all without issue, to the heirs and assignees whomsoever of Dr Cochrane, I rather suppose the result would have been to give the residue to those who were the heirs of Dr Cochrane at the time of the failure of the issue of Mrs Moorhouse. In so far as there is any authority upon the subject, it goes to that." I am disposed to adopt and apply that observation to the present case. There is here, what there was not in Lord v. Colvin, an ultimate destination in favour of the testator's own heirs *in mobilibus*, for the deed expressly bears that failing Mr Leighton exercising the power of legating his half of the estate, "the same shall be paid or conveyed to his nearest in kin equally, share and share alike, whether they be males or females, or the said property be heritable or moveable." I think that plainly means his nearest in kin at the date of his death; and as William Angus, the party of the fourth part, is now in right of these next of kin, I concur in holding that the second query must be answered in the affirmative, and the third in the negative.

In regard to the remaining queries, I concur with your Lordship, and I have nothing to add.

Lord Ardmillan.—On the second question, I concur in the opinion that the fourth party, who, I understand, represents the nearest of kin at the death of Mr Leighton, is entitled to succeed; and that the fifth party, representing the nearest of kin at the death of Mrs Leighton, afterwards Mrs Craig, is not so entitled.

The decisions quoted, such as Lord v. Colvin, relating to intestate succession, do not, in my opinion, apply to this case, which is a case not of intestate succession, but of testate succession depending on the construction of a deed.

On the question of construction of the deed before us, I concur with your Lordship in the chair. The period for ascertaining the next of kin must, I think, be the same in the two cases,—the one where the legatee was named, and the other where the condition was purified, and there being no nomination of legatees, the next of kin succeed. As matter of fact, no such nomination of legatees was named, but the power to make it must affect the question of construction.

On the other questions I have nothing to add except the expression of my concurrence.

Lord Mure.—I am of opinion that the first question must be answered in the negative. On the point raised by the second and third questions I do not find it necessary to found on the case of Lord v. Colvin, as I do not think that it has any very direct application. That was a case of intestacy. Here the question turns upon the terms of a deed, in which the direction to the trustees is to divide the fund into two equal portions, and to convey one-half to any legatees whom the husband may appoint by a writing under his hand, and, failing such appointment, to "his nearest in kin." Under this clause I think that the nearest in kin whom the parties had in view must be held to be the nearest in kin at his death, because the term, in its ordinary sense, is equivalent to "heirs *in mobilibus*," who must be looked for at the date of the death of the party whose succession is in question; and when the other clauses of the deed are examined the intention becomes still more clear. Thus, an inventory is to

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be made up at the death of the first deceaser, and is appointed to be delivered to one or other of the trustees "for the use of the nearest in kin, or legatees, of the first deceaser," thereby clearly shewing that the nearest of kin at his death were, at that date, intended to be benefited by the succession. And the alternative provision in favour of his legatees points to the same construction. It would, I think, be unreasonable to suppose that the makers of the mutual settlement would enable each of them to name legatees, unless they were to be able to select them during their own lives. For if a party is to name a person, or describe a class of persons who are to take as legatees, not at his own death, but on the death of some one who survives himself, it may be for a considerable period, he cannot know for certain who his legatees will be. But I rest my opinion mainly on the broad terms of the destination in favour of the "nearest in kin" of John Leighton.

THIS interlocutor was pronounced:—" . . . In answer to the second question, find and declare that the fourth party is entitled to the fee of the share falling to the nearest in kin of John Leighton under the said postnuptial contract: In answer to the third question, find and declare that the fifth parties are not entitled to the fee of the said share," &c.

ANDREW FLEMING, S.S.C.—DAVID SPEID, S.S.C.—W. J. SHIRESS, S.S.C.—WEBSTER & WILL, S.S.C.—Agents.

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MRS EMMA ELIZA MUNRO FERGUSON AND OTHERS (Ferguson's Trustees), Pursuers.—*Keir.*

THE MAGISTRATES OF KINGHORN, Defenders.—*J. C. Smith.*

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Ferguson's Trustees v. Magistrates of Kinghorn.

Superior and Vassal—Reddendo—Conversion of Victual Feu-Duty—Bear or Barley.—The reddendo of certain lands in the county of Fife, held under a charter of date 1622, was a victual feu-duty of "three chalders bear, guid and sufficient stuff." After proof that the vassals had been in use for upwards of a century to pay this victual feu-duty converted in whole or in part at the rate of the barley fiars, at first, of Midlothian, and latterly of Fife, *held* (in accordance with Marquis of Tweeddale v. Aytoun, 4 D. 213) that the term "bear" occurring in deeds of the date of the original charter of 1622 applied equally to bear and barley, and that the usage of payment determined that the victual feu-duty was to be paid in barley, or converted at the Fife fiars prices for barley.

1ST DIVISION. Lord Shand. M.

THE trustees of the late Robert Munro Ferguson of Raith and Novar, and, as such, infeft in the lands and barony of Westfield, of which the lands of Rosse formed a part, raised this action against the Magistrates of Kinghorn, as representing the burgh, the vassals of the pursuers in the lands of Rosse, for recovery of byegone feu-duties.

The original charter by the Earl of Morton, then proprietor of the lands of Westfield, to the burgh of Kinghorn, was not produced.

The sasine upon this charter, dated 1623, was produced, but it did not set out the reddendo.

The earliest document found which contained a reddendo was a draft signature of confirmation, partly illegible, which was admitted to have been written between 1649 and 1651. The reddendo clause was,—"To be halden the said lands acres and pertinents y^{r}of be the said Bailies Counsell and Comunitie of the said Burgh and y^{r} successors of the said umq^{ll} Earl his heirs in the Baronies of Aberdour in feu farm and heritage forever zeirlie the said Bailies Counsell and Comunitie of the said Burgh and y^{r} successors to the said umquhile Earl and his said spouse and the longest liver of y^{m} twa and

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his heirs meall taillie and successors fore[d] three chalder bear guid and sufficient stuff betwixt ye feistes of zuill and candlemas with twenty six capones yeirlie at the feist of Peace in name of s[d] feu ye said Baillies and Counsell of the said burgh and y[r] successors," &c.

It was admitted that the burgh had been in use to pay, in accordance with the terms of the reddendo in this draft signature, a feu-duty of 3 chalders or 48 bolls victual, and a sum of £1, 1s. 8d. The question raised in the action was as to the rate of conversion of the victual feu-duty.

A state was produced, made up from the Raith rental-books and from the accounts and minutes of the burgh, shewing the annual payments by the burgh of Kinghorn to the proprietor of Raith in respect of the Rosse lands, for crops 1766 to 1869 inclusive.

From this it appeared that from 1766 to 1794 the victual feu-duty was partly paid in kind and partly converted, and that from 1794 downwards it was all converted.

That there were no fiars of barley struck in the county of Fife prior to 1789, and that from 1766 to 1789 the conversion was according to the Midlothian best barley fiars.

That from 1789 to 1816 the rate of conversion was always 6d. under the Midlothian best barley fiars, but considerably above the Fife barley fiars.

That from 1816 onwards the conversion was at the rate of the Fife barley fiars.

The burgh averred, but failed to establish by proof, that the payment of the victual feu-duty in barley had been made in terms of an agreement entered into for convenience sake, but which was not binding on them beyond their own pleasure.

The Lord Ordinary, on 29th June 1875, pronounced this interlocutor: —"Finds that the feu-duty payable by the defenders to the pursuers, the superiors of the Rosse lands, described in article 1st of the condescendence, is 48 bolls of barley, and £1, 1s. 8d. sterling in money, and that, in accordance with the usage for time immemorial, the grain feu-duty for crop 1870 should be converted according to the barley fiars prices for the county of Fife for the year, being at the rate of 25s. 7¼d. per boll: Therefore decerns against the defenders in terms of the conclusions of the summons: Finds them liable in expenses," &c.*

* "NOTE.— . . . . Having regard to the decision in the case of the Marquis of Tweeddale v. Aytoun, &c., 9th December 1841, 4 D. 213, and to the facts admitted and proved in this case, the pursuers appear to me to be right in their contention, and I do not think the question is attended with much difficulty. The original feu-charter of the lands, which appears to have been dated in 1622, cannot be found, and no mention of the feu-duty is made in the extract of the sasine, No. 10 of process, dated 9th and registered 20th January 1623, which followed on it. There appears to be no doubt that in this charter and sasine the victual feu-duty would be designated by the term 'hordeum,' and the argument of both parties proceeded on that footing. Beyond the rental-books and other books from which excerpts have been produced the only document in which the feu-duty is mentioned is the writing No. 12 of process, which appears to be the draft of a signature or proposed signature for a charter of confirmation by the Crown of the feu-charter and infeftment which had followed on it, in which the feu-duty is mentioned as three chalders bear, 'guid and sufficient stuff.' This document was recovered a number of years ago, as explained by Mr Barclay, from the papers of the late Mr James Rutherford of Ashintully, who was factor on the estate of Raith, and also town-clerk of Kinghorn. Whether such a document was ever completed or used in obtaining a charter does not appear. It may be assumed, however, that in the original charter and

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The defenders reclaimed.

Argued for them;—Though the defenders had paid in error during the past they were not to be prevented from having matters set right in the future. *Hordeum* was a word of doubtful meaning, and was sometimes used for bear and sometimes for barley, and, consequently, had to be interpreted according to circumstances, as in the Marquis of Tweeddale's case; but "bear" was not, like *hordeum*, a word of doubtful signification. Bear and barley were botanically two distinct plants, and, "bear" was never used to express barley or anything but bear. They were therefore entitled to have their feu-duty converted at the Fife fiars prices for bear.

Argued for the pursuers;—The victual stipend of 48 bolls bear should be converted as formerly at the rate of the Fife barley fiars. Bear, as used in charters of the 17th century, meant either bear or barley, according as the lands were capable of growing the one or the other.

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sasine the feu-duty was described as 3 chalders or 48 bolls 'hordei,' and it appears from the writings of earliest date produced, including the draft of the signature, which may, however, have been written many years after the charter and sasine, that the term 'hordeum' was used to designate bear in the sense in which that word was used at the beginning of the seventeenth century. In the case of the Marquis of Tweeddale the Court proceeded on the view that the terms 'hordeum' and 'bear,' respectively, were used generally to include not only that kind and quality of grain which is distinguished in the fiars prices as bear, but also barley, as belonging to one common genus. It is unnecessary to repeat the reasons on which the Court proceeded. The usage which was proved in that case was held sufficient to shew that the feu-duty was payable in the better class of grain described as hordeum or bear, viz., barley.

"In the present case the usage proved is even more distinct and conclusive than in that case. In the Raith rental-books the feu-duty for the earlier period for which the books are extant is described sometimes as bear and sometimes as barley, but for many years during the later period as barley only. Beginning with 1766, and from that date to 1794, the entries in these books and in the town-council minute-book, shew that the victual feu-duty, in so far as not delivered in kind, was annually converted into money at the Midlothian fiars prices for the best barley. As noticed in Lord Tweeddale's case, fiars prices for barley were fixed in the county of Fife for the first time in 1789. From 1794 to 1816, the whole feu-duty was paid in money, and the rate of conversion was sixpence less than the Midlothian barley fiars, this rate having been uniformly higher than the Fife barley fiars, and the difference having been sometimes considerable. Again, from 1818 till the present question was raised, being upwards of fifty years, the feu-duty has been regularly converted at the Fife barley fiars prices, and the entry in the Raith factor's book in 1818 refers to an agreement as the origin of the change then made, and afterwards given effect to. It is specially worthy of notice that in 1774, and again in 1788, as appears from the town-council minutes, the feu-duty payable was the subject of special investigation, and no question appears to have been raised as to the liability of the vassals at that time to pay at the rate of the Midlothian fiars for the best barley. In the state appended to the last of those minutes in which arrears are mentioned the feu-duty is described under the name barley.

"The result seems to be the proof of an invariable practice for upwards of a century which recognised barley as the victual leviable; and the probable explanation of the Midlothian fiars prices having been taken for so long a time, and even after fiars for barley were fixed in Fife, is that from the nature of the Rosse lands, and the facilities for taking the barley which they produced (and which in the draft signature is referred to as 'bear, guid and sufficient stuff'), to the Midlothian market, the tenants were able practically to realise Midlothian fiars prices. However this may be, the usage appears to me to have settled, beyond reasonable question at the present day, that the pursuers are entitled to have the victual feu-duty converted at the Fife fiars prices for barley."

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Whether the bear delivered was "guid and sufficient stuff" was to be judged of by the capabilities of the land; and that as the lands now grew barley and not bear, and as there was no contrary usage of payment in bear, or at the fiars price of bear, they were entitled to payment in barley, or at the rate of the Fife barley fiars.[1]

At advising,—

LORD PRESIDENT.—This case stands in a peculiar position, because we have not the original charter by the Earl of Morton to the burgh of Kinghorn to refer to. We have indeed the sasine upon the original charter, but unhappily in it the reddendo is not set out. It is necessary, therefore, to resort to other evidence in order to determine the case. However, that there was a reddendo stipulated is clear, and usage of payment is established. The only dispute is whether the reddendo, as ascertained by an old draft signature in Exchequer, is to be read as requiring the vassal to deliver to the superior three chalders of bear or three chalders of barley, construing it with reference to the circumstances of the present time. This draft signature is admitted by the parties to have been written between the years 1649 and 1651, and although it appears that nothing followed upon it, it is agreed that it shall be received as sufficient evidence of the reddendo.

What we have in this signature of confirmation is that the lands of Rosse are "to be halden the said lands acres and pertinents y^r^of be the said bailies counsell and comunitie of the said burgh and y^r^ successors of the said umq^ll^ Earl his heirs in the baronies of Aberdour in feu farm and heritage forever zeirlie . the said bailies counsell and comunitie of the said burgh and y^r^ successors to the said umquhile Earl and his said spouse and the longest liver of y^m^ twa and his heirs meall taillie and successors fore^d^ three chalder bear guid and sufficient stuff betwixt ye feistes of zuill and candlemas with twenty six capones yeirlie at the feist of Peace in name of s^d^ feu ye said bailies and counsell of the said burgh and y^r^ successors," &c.

Now, I confess I am unable to distinguish this case from that of the Marquis of Tweeddale, and as far as I am concerned, the ground of my judgment is expressed in a few sentences of Lord Gillies in that case. He is speaking of *hordeum*, and I may say that it appears to me that *hordeum* and bear, in charters of the date of the original charter to the burgh, viz. 1622 or thereby, are convertible terms. Lord Gillies says—"I think *hordeum* may mean either bear or barley, and that it is a mistake to suppose that these are different species of grain. They are only different varieties of the same species, just as there are different varieties of wheat or of oats. It would be absurd to maintain that if at the date of a charter only the worst variety of any of these grains happened to be grown in a country, therefore the payments should in all future time be estimated according to the price of that variety." That is, I think, sound common sense and good law as applied to charters of this kind and date. Applying it to the present case, I cannot doubt that barley such as grown in this part of Fife is to be the bear delivered under this charter.

LORD DEAS.—I agree with your Lordship in thinking that we have sufficient materials to enable us to ascertain what was the reddendo in the original

[1] Marquis of Tweeddale v. Aytoun, Dec. 9, 1841, 4 D. 213, 14 Scot. Jur. 83.

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charter. The draft signature produced is obviously a very old writing. Its very appearance would warrant us in looking at it, and we are aided by the admission of the parties that it was made at or about 1650. On the whole, it is pretty clear that the reddendo was as stated in that draft signature.

That being so, I am also of opinion that the word "bear," as there used, comprehends barley, if it appears that barley has come to be held by the parties as what was to be delivered to the superior. Now, it has been the usage of more than a century to convert this victual feu-duty according to the fiars prices of barley. It appears to have been at first converted according to the fiars prices of Midlothian, there having apparently been no fiars struck for barley in Fife until about 1789. From 1816 down to the raising of the present question it has been converted according to the Fife fiars. It might have been a question whether the conversion was to continue at the Midlothian or at the Fife fiars prices, but that question has not been raised, and we are therefore relieved from any embarrassment which it might have introduced.

The question in the case is whether, the reddendo specifying bear, the vassal is now to deliver or pay for barley, which is just a finer kind of bear. I do not understand it to be disputed that barley has been grown in Fife, and on this very land, for a great part of the period which has elapsed since the granting of the charter to the burgh. If grown in Fife at all it might be expected to be so in the neighbourhood of Kinghorn, which is well known to be among the best land in the county of Fife. That of itself is to my mind conclusive of the question. It is perfectly clear that by "three chalders bear, guid and sufficient stuff," was meant grain grown on the ground of the lands disponed, so that if any difference occurred between the superior and vassal about the quality of the grain tendered under the reddendo the superior would always be entitled to say, give me three chalders of that kind of bear which has been grown on the lands, or similar to what has been so grown, and I will be satisfied. That in a practical point of view seems really to be conclusive.

LORD ARDMILLAN.—I have felt this question to be one of interest. There is undoubtedly some nicety in deciding what is the original meaning of *hordeum*. But, looking to the long period in which barley or its commuted value has been in use to be paid, we must hold now, as was the unanimous opinion of the Court in the case of the Marquis of Tweeddale, that *hordeum* may mean bear or barley. I think it originally meant barley, but that it may mean bear as one of the inferior kinds of barley; and I find this to be borne out by the opinion, in the Marquis of Tweeddale's case, of Lord President Boyle, who, in addition to his authority as a jurist, was himself no mean authority on farming matters.

We must therefore read the old titles by the aid which we can get from the proof which we have of subsequent usage. If, as has been averred, there was at one time an agreement to convert the victual stipend into barley for convenience sake, that, of course, would to some extent take away the effect of the usage, as illustrating the construction. Where you have usage going back beyond the memory of living men, you are entitled to presume an identity of usage back to the date of the old charter. But if you find an agreement brought as the foundation and explanation of the usage, the case is different. Here I observe that an agreement is mentioned, but I find no such agreement proved, and still less do I find that it led to an altered usage. Payment has been practically made at the current rates of the county for barley, which is the

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species of *hordeum* grown in the district. I am therefore of opinion that the judgment should stand.

LORD MURE concurred.

THE COURT adhered.

DUNDAS & WILSON, C.S.—JOHN M. BELL, W.S.—Agents.

No. 69. Feb. 3, 1876. Morrison v. Harrison, &c.

JAMES MAIDMENT MORRISON (Merrett's Trustee), Pursuer.—*Balfour—Keir.*
THOMAS HARRISON, Defender.—*D.-F. Watson—M'Laren.*
THE FORTH AND CLYDE JUNCTION RAILWAY COMPANY, Defenders.—*R. V. Campbell.*

Partnership—Company—Companies Clauses Consolidation (Scotland) Act, 1845—Assignation—Transfer of Shares—Bankruptcy.—A person executed a transfer of railway shares and a year after his estates were sequestrated. After the sequestration the transfer was duly recorded by the transferee in the railway company's register of transfers. Many years after the registration of the transfer the trustee in the sequestration, who had not taken the steps to complete his title pointed out by the 19th section of the Companies Clauses Consolidation (Scotland) Act, 1845, raised an action of reduction and declarator against the transferee and the railway company, in which he claimed the shares, on the ground that, in virtue of the act and warrant of confirmation in his favour (which the Bankrupt Statute declared to be equivalent to an intimated assignation) the shares vested in him at the date of the sequestration. *Held* that the true criterion of the completion of a title upon a transfer of shares in a public company was not bare intimation to the company, but the reception of the transferee as a partner of the company according to the forms prescribed by the statute; and therefore that although the trustee, at the date of sequestration, was in a position to complete a title to the shares, as he had never complied with the statutory forms, he could not now displace the transferee, who had been duly entered in the company's register as the holder of the shares.

2D DIVISION. Lord Young. R.

THIS action was raised on 1st July 1875 by Mr J. M. Morrison, trustee on the sequestrated estate of George Merrett, against Mr Thomas Harrison and the Forth and Clyde Junction Railway Company.

The conclusions of the summons were for reduction of a memorial or entry in the company's register of a deed of transfer of fifty shares in the Forth and Clyde Junction Railway Company by Merrett in favour of Harrison, and for declarator that the pursuer, as trustee, had right to the shares.

Merrett's estates were sequestrated in 1856, the date of the first deliverance being 13th August 1856. The trustee originally appointed having died, the pursuer was appointed in his room in January 1875.

The transfer of the shares in favour of Harrison was dated 28th June 1855. It was not delivered to the secretary of the railway company, nor any intimation of it made to the company, until after Merrett's sequestration. On the 17th September 1857, about a year after the sequestration, the transfer was received by the secretary of the company, and a memorial thereof duly entered in the register of transfers of the company in terms of the Companies Clauses Consolidation (Scotland) Act, 1845.*

* The following are the sections of the Companies Clauses Consolidation (Scotland) Act, 1845, on which the question chiefly turned :—

Sec. 14.—"Subject to the regulations herein, or in the special Act contained, every shareholder may sell and transfer all or any of his shares in the undertaking, ... and every such transfer shall be by deed duly stamped, in which the consideration shall be truly stated; and such deed may be according to the form in the schedule (B) to this Act annexed, or to the like effect."

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The pursuer averred that the transfer to Harrison was in security only, and pleaded;—(1) The said transfer not having been delivered or intimated to the defenders, the Forth and Clyde Junction Railway Company, and a memorial thereof not having been entered in the register of transfers of said company until after the sequestration of Mr Merrett's estates, the pursuer is entitled to decree in terms of the conclusions.

Mr Harrison pleaded;—(2) The defender having acquired right to the said shares before his cedent's bankruptcy, was thereby empowered to complete his title by enrolment in the register of transfers, and the said memorial and enrolment are not reducible under the bankruptcy laws.

The railway company stated;—"The defenders, the Forth and Clyde Junction Railway Company, take no part in the question of the ownership of fifty shares in their undertaking raised in this action, and they offer no opposition to any decree as to the right to these shares, whether the same be in favour of the pursuer, or of the defender Thomas Harrison. They have only to explain that no declaration was lodged with them by the pursuer, or his predecessor in office, in terms of section 19 of 'The Companies Clauses Consolidation (Scotland) Act, 1845,' and of the practice of the defenders and other railway companies thereunder; that the transfer in favour of the defender Thomas Harrison was presented to and registered by them in the ordinary course of business, so far as they were concerned, under section 16 of the said Act, and that, in terms of said section 16, the share certificates were thereupon endorsed and delivered to the defender, the said Thomas Harrison. That according to the practice of the defenders and other railway companies, and the terms and intent of the said Act, the said certificates should be delivered up and cancelled before the said company can register the pursuer and issue new certificates in his favour."

Sec. 15 provides that transfers may be executed according to Scotch or English form.

Sec. 16.—"The said deed of transfer (when duly executed) shall be delivered to the secretary, and be kept by him; and the secretary shall enter a memorial thereof in a book to be called the 'register of transfers,' and shall endorse such entry on the deed of transfer, and shall, on demand, deliver a new certificate to the purchaser; . . . . and on the request of the purchaser of any share an endorsement of such transfer shall be made on the certificate of such share instead of a new certificate being granted; and such endorsement, being signed by the secretary, shall be considered in every respect the same as a new certificate; and until such transfer has been so delivered to the secretary as aforesaid, the vendor of the share shall continue liable to the company for any calls that may be made upon such share, and the purchaser of the share shall not be entitled to receive any share of the profits of the undertaking, or to vote in respect of such share."

Sec. 19.—"If the interest in any share have become transmitted in consequence of the death or bankruptcy or insolvency of any shareholder, or in consequence of the marriage of a female shareholder, or by any other lawful means than by a transfer according to the provisions of this or the special Act, such transmission shall be authenticated in writing as hereinafter mentioned, or in such other manner as the directors shall require; and every such declaration shall state the manner in which, and the party to whom such share shall have been so transmitted, and shall be made and signed by some credible person before a Sheriff or Justice, and such declaration shall be left with the secretary, and thereupon he shall enter the name of the person entitled under such transmission in the register of shareholders; . . . . and until such transmission has been so authenticated no person claiming by virtue of any such transmission shall be entitled to receive any share of the profits of the undertaking, nor to vote in respect of any such share as the holder thereof."

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And pleaded;—(1) The share certificates endorsed and issued in favour of the defender Harrison should be delivered up to the defenders' company before any decree is pronounced for the registration of the pursuer and the issue of new certificates in his favour. (2) The said company are entitled to expenses.

The Lord Ordinary pronounced the following interlocutor:—"Sustains the defences, and assoilzies the defenders from the conclusions of the summons, and decerns: Finds the pursuer liable in expenses," &c.

The pursuer reclaimed.

Argued for the pursuer;—Apart from statute, it was certain that the trustee, who in virtue of the act and warrant of confirmation in his favour held the first intimated assignation,[1] was preferable.[2] The argument for the defender was in effect that unless a transference was effected *modo et forma*, as pointed out by the Companies Clauses Act, it was ineffectual. The statute did not provide a complete code for the transfer of shares. It pointed out certain proceedings which might be followed, but it left all the common law methods of transmission untouched. The statute, indeed, expressly recognised bankruptcy as an effectual transmission of shares. The words of the 19th section, "have become transmitted," shewed that it was not the declaration which vested the shares in the trustee or other legal assignee. Having already so vested, the assignee had a certain method of completing his title for the purposes of railway bookkeeping, and for the purpose of relieving the former holder of liability to calls upon the shares, and giving the assignee a right to the share of the profits. It was not of much importance whether the provisions of the statute were held to be imperative or directory; for even if they were imperative, the precise consequences of not following them were pointed out (sec. 16). These forms were prescribed for the convenience of the company,[3] and it was *jus tertii* for any third party to plead the want of them.[4]

Argued for the defender Harrison;—The Legislature were dealing with a new and peculiar species of property. A transferable share in a public company represented only the right to become a member of the corporation. Accordingly, the Companies Clauses Consolidation (Scotland) Act, 1845, secs. 14–21, contained a complete code for the transfer of shares in such companies. The pursuer argued on the footing that intimation was something over and above the statute, whereas the statute regulated the mode in which intimation must be made. There was no authority for saying that a secretary of a railway company was entitled to refuse to make an entry of a transfer because some one had written a letter to him that he had got an assignation to the same shares. The very words of the Bankruptcy Act put the trustee in no better position than a transferee who had

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[1] 2 and 3 Vict. c. 41, sec. 78 (substantially repeated in 19 and 20 Vict. c. 79, sec. 102), enacted,—"The moveable estate and effects of the bankrupt, wherever situated, so far as attachable for debt, shall, by virtue of the act and warrant of confirmation in favour of the trustee, be transferred to and vested in him or any succeeding trustee for behoof of the creditors, absolutely and irredeemably, as at the date of the sequestration, with all right, title, and interest, to the same effect as if actual delivery or possession had been obtained or intimation made at that date; subject always to such preferable securities as existed at the date of the sequestration, and are not null or reducible."

[2] Bell's Com. (M'L.'s ed.), pp. 16, &c.; Hill v. Lindsay, Feb. 10, 1846, 8 D. 472, 18 Scot. Jur. 218.

[3] Copeland v. North Eastern Railway Co., 1856, 6 El. and Bl. 277; The Queen v. General Cemetery Co. (1856), *ibid.* 415.

[4] Weatherly v. Turnbull, June 3, 1824, 3 S. (N. E.) 61; Thomson v. Fullarton, Dec. 23, 1842, 5 D. 379, 15 Scot. Jur. 173.

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written such a letter, which was quite unavailing. The statute prescribed the mode in which the trustee must complete his title; and as in the case of heritable securities, he had to run a race of diligence with competing creditors. It was competent for a creditor to complete a security after bankruptcy by any step which did not require the bankrupt's intervention.

LORD JUSTICE-CLERK.—This is an important case, and as it touches upon questions of difficulty we might have taken time to consider our judgment. But I am so well satisfied with the argument addressed to us on behalf of the defender that I am prepared at once to affirm the interlocutor of the Lord Ordinary.

I do not think it necessary to hold that the Companies Clauses Act provides a code for the transfer of shares in the sense that any deviation from the form prescribed vitiates what is intended to be done. The statute points out a certain course which is in general to be followed where the transmission takes place *inter vivos*. Substantially, however, shares may be transferred by any mode habile in law to transfer personal property of that kind; but where this is not done in the form pointed out by the statute certain additional procedure is necessary before the company are bound to put the transferee on the register of shareholders. That which is essential under the statute is that the transferee shall be put on the register of shareholders, and the only question precedent to that is, whether the title to be put on the register of shareholders has been transferred by a habile deed.

When this, however, is granted, the case for the trustee is not advanced. He says that he holds an intimated assignation, and that is the case. He might so acquire a right to become a partner of the company, but the question is whether he is a partner. That he can only attain according to the rules of the copartnery which he seeks to enter. I think the observation made by the Dean of Faculty is sound, that the transferable share in a joint stock company does not by itself represent the full interest the partner has in it. It represents the right to become a partner in the company, and the right to become a partner is surrounded by conditions which the company are entitled and bound to observe. One of these is, among other formalities, that the deed of transfer is to be delivered to the secretary, and kept by him, before the cedent is divested of and the transferee can acquire the character of a partner. The ultimate result is to place the transferee not merely in the position of the holder of an assignation with intimation but of a partner with its rights and liabilities. It is quite plain, therefore, that an assignation to shares, though intimated, will not make the assignee a partner of the company.

In this case the defender Harrison completed his transfer by becoming a partner of the company twenty years ago. Since then he has been liable for the debts and obligations of the company, and the bankrupt has been liberated from them in respect of the defender's name being placed on the register. The trustee is not a partner, and never was. He has never taken the steps necessary for becoming a partner, and he cannot now displace the defender from that position.

LORD NEAVES.—I concur, and upon the same grounds.

Mere assignation is not the proper mode of completing a right of this kind. Assignation is the transmission of a *jus crediti*. In its original conception it was

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a mandate from the cedent to the assignee to recover a debt due to him. The purpose of intimation is twofold—to prevent the debtor from paying to his original creditor, and to shew that the assignee is henceforth to be held as the proper and sole creditor. These principles are not applicable to the transfer of a bilateral right like partnership, a position involving both active and passive consequences, both rights and liabilities. There must be some proceeding necessary to complete the transfer, amounting to a claim on the part of the transferee to exercise the rights of a partner, and to an agreement on his part to assume the liabilities of a partner. The mere appointment of a trustee in a sequestration does not confer upon him the position of a partner in every or any company of which the bankrupt was a member; and that position may often not be a safe or proper one for him to assume.

The transmission of shares in a company is a thing *sui generis*, to be governed not by the rules which regulate the transmission of a unilateral debt, but by the necessity of the transferee asserting the position of a partner. The statute here prescribes the mode in which this is to be done.

Lord Ormidale.—I am of the same opinion. The question which we have to decide relates to a species of property which has been for years growing into increasing importance, and it is certainly somewhat remarkable, if such a question as the present has, as it was said, not hitherto been brought into controversy either in the Courts of England or Scotland. If that be so, I can only account for it by supposing that the statutory provisions in regard to the mode of transferring shares have been held to be too clear and unambiguous to admit of serious doubt as to their true meaning and effect. And, not improbably, it was this consideration that, for a period of twenty years, prevented the present action from being raised.

I am quite clear, with your Lordships, that the defender Mr Harrison has a good and the only right to the shares in dispute. He held at the date of and for a considerable time before the bankruptcy a regular and unobjectionable transfer of these shares. It is true that the transfer was not registered, and that the bankruptcy and sequestration intervened before it was registered. But still registration was made, and the title of Mr Harrison thereby completed, before that of the trustee. There might possibly have occurred a race, such as has sometimes taken place, between a trustee for the general creditors in a sequestration and the holder of a heritable security not completed by infeftment. If a creditor holding such a security gets first infeft he will cut out the trustee. So here Mr Harrison, having got his right and title to the disputed shares duly completed by registration before the trustee or any one else, must, having regard to the statutory provisions bearing on the matter, be held to be the owner of them,—keeping in view that there was nothing unfair or fraudulent in anything he did. The trustee says that the act and warrant in his favour operated as an intimated assignation, and that this was enough to cut out Mr Harrison, as he had not previously intimated his transfer by presenting it for registration or otherwise. I cannot think there is anything in this. The only form or kind of intimation available in relation to the shares in question was the statutory one of giving in the transfer for registration and getting it registered. In any other view the railway company would require to keep not only a register of transfers but also a register of intimations,—a thing unheard of in reference to railway stock.

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Without saying more, except that I concur generally in the views which have been expressed by both your Lordships, I am of opinion that the Lord Ordinary's interlocutor ought to be adhered to.

LORD GIFFORD.—I am of the same opinion. The true completion of a transfer of shares in a joint stock or railway company, constituted under the public general statutes regulating railway and joint stock companies, appears to me to be the reception of the transferee as a shareholder of the company, so as to give him the rights and subject him to the liabilities of a partner. There may be a contract to convey shares in the company and to accept thereof and to become a shareholder, but that remains a mere contract or obligation until it is completed by the party actually becoming a shareholder. In that view I think the Dean of Faculty's argument is well founded, that bare intimation to the company, not followed by the transferee becoming and being received as a partner, is not the criterion of completion of the rights of the transferee. If so, the whole argument for the pursuer falls to the ground, for the pursuer's right has never been completed either by actual intimation or by the terms of the Bankrupt Act, which makes the act and warrant equivalent to intimation. The Bankruptcy Act makes the trustee's rights to the bankrupt's moveable estate as complete as if actual delivery, or possession, or intimation had followed. Delivery or possession is out of the question in a case like the present, where the right is the incorporeal right arising to a partner of a railway company. Delivery and possession are not applicable or appropriate to such a right, and accordingly the trustee maintains that his right is equivalent to an intimated assignation. But, even at common law intimation does not complete a right of this kind. It gives no right to the assignee to assume the position of a partner, though it may be effectual for certain purposes as an inchoate right. On the terms of the Companies Clauses Act this is still more clear. Until received by the company the assignee is not entitled to act as a partner, to uplift or draw dividends, or to attend and vote at meetings, nor will he be liable in calls or responsible for the debts of the company, or otherwise liable as a partner.

The circumstances of the present case are very much against the pursuer's claim. It would be extraordinary if the trustee could lie out for twenty years, avoiding all responsibility for the shares, it may be during their period of depression, and let Mr Harrison take all the risk of the company failing, and then after the shares have greatly risen (and this may possibly be the case) step in and claim the whole. This is an illustration of the propriety of the principle that admission to the company is the test of preference.

Counsel for the pursuer objected to expenses being found due to the railway company, on the ground that they had no interest in appearing. Expenses were only concluded for against them in the event of their appearing to defend the action.

LORD NEAVES.—The company had an interest to see that they were not obliged to keep a register of intimations.

THE COURT adhered, and found the pursuer liable in additional expenses to both defenders.

H. & A. INGLIS, W.S.—MILLAR, ALLARDICE, ROBSON, & INNES, W.S.—A. J. & J. DICKSON, W.S.—Agents.

No. 70.

Feb. 3, 1876. M'Tavish v. Commissioners of Caledonian Canal.

JOHN M'TAVISH (Collector of Poor-Rates for the Parish of North Knapdale), Pursuer and Respondent.—*Asher—Mackintosh—Maclachlan.*
THE COMMISSIONERS OF THE CALEDONIAN CANAL, Defenders and Appellants.—*D.-F. Watson—Pearson.*

Sheriff—Jurisdiction—Poor, collection of Assessment for—8 *and* 9 *Vict. c.* 83, *sec.* 88.—*Held* that in an action brought in the Sheriff Court by a parochial board for recovery of poor-rates, the function of the Sheriff is not ministerial to interpone judicial authority for recovery of the assessment but judicial, and that it is competent for the Sheriff to entertain and decide questions as to the legality of the assessment.

Observations on the cases of Calder v. Trotter, June 8, 1833, 11 S. 694, and Pollok v. Robertson, Nov. 12, 1833, 12 S. 14.

1ST DIVISION. Sheriff of Argyllshire. M.

THIS action was raised in the Sheriff Court of Argyllshire by the inspector of poor and collector of poor-rates for the parish of North Knapdale against the Commissioners of the Caledonian Canal, to recover, *inter alia*, the sum of £555, 18s. 3½d. as poor-rates due by the defenders for the years from 1865-66 down to 1872-73 inclusive, in respect of their being proprietors and occupiers of that portion of the Crinan Canal which was situated in the parish of North Knapdale.

The pursuer pleaded;—(3) The defenders having failed timeously to appeal against or object to the assessments imposed on them for the years from Whitsunday 1865 to Whitsunday 1869, are debarred from challenging the assessments for these years. (5) The assessments pursued for having been regularly and validly imposed, the pursuer is entitled to decree therefor, with interest and expenses as concluded for.

The defenders stated the preliminary plea;—(1) The action should be dismissed, in respect that the Sheriff has no jurisdiction to try the present question.

In support of this plea the defenders relied on the Acts 43 Geo. III. c. 102, sec. 37, and 44 Geo. III. c. 62, sec. 81, which they contended subjected them only to the jurisdiction of the Court of Session, and which had been renewed in general terms in subsequent Acts.

The defenders' main plea on the merits was—(3) The defenders should be assoilzied, in respect that the annual average cost of repairs, and other expenses necessary for the maintenance of the canal and its appurtenances, and the rates, taxes, and public charges payable in respect of the same, exceed the gross annual value of the subjects, and there is therefore no annual value in respect of which assessments can be imposed.

The Sheriff-substitute (Home) and the Sheriff (Irvine) repelled the preliminary plea for the defenders, and it was not farther insisted in.

Thereafter, the Sheriff-substitute pronounced this interlocutor:—"Having heard parties' procurators, and made avizandum, Finds, as regards the conclusion for poor-rates, that the Sheriff's duties are only ministerial, and that the defenders' pleas as to the assessments being imposed on too large a valuation cannot therefore be entertained in the Sheriff Court: . . . . Therefore decerns against the defenders for the sum of £555, 18s. 3½d. sterling of poor-rates . . . . with interest from the time of said assessment falling due, in terms of the conclusions of the summons: Finds the pursuer entitled to his expenses," &c.*

* "NOTE.—It seems to the Sheriff-substitute sufficiently settled by the cases of Calder v. Trotter, 8th June 1833, 11 S. 694, and Pollok, 12th November 1833, 12 S. 14, that the Sheriff's duties as regards the recovery of assessments under the poor-law, are purely ministerial, and he sees no reason to doubt that the law as laid down by these decisions is as much in force as ever, though he understood the defenders' procurator to suggest that this was not the case. It is therefore beyond his power to inquire into the justice of the assessment; the

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An appeal was taken by the defenders to the Sheriff, who affirmed.*

The defenders appealed to the Court of Session, and argued;—The Poor-Law Amendment Act of 1845 created an entirely new system of poor-law administration. The former Acts and Proclamations[1] had been swept away. They constituted what was really a criminal code against begging. They laid on the Sheriff nothing but a ministerial duty, and conferred no discretion upon him. The heritors and kirk-session were to stent themselves at their own discretion, and all that the Sheriff had to do was to give effect to their resolutions. But the Act of 1845 committed to a new body the power of assessing for the poor. The parochial board, as representatives of the ratepayers, while fulfilling all, and more than all, the duties of the heritors and kirk-session, were in a very different position. They were a statutory body whose functions and powers were derived solely from statute. They were subject, just like any other local board, to the Sheriff's jurisdiction, so far as not excluded by statute. They were empowered[2] to apply to him for a summary

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defenders' objections to it may possibly enough be perfectly good, but they cannot be entertained in the Sheriff Court." . . . .

* "NOTE.—The defenders plead that the deductions to which they are entitled under section 37 of the Poor-Law Amendment have not been made to the full extent, and they contend that had they been so made no assessable value would have remained on which rates could be imposed. The immediate question is, whether the matter of this defence may competently be inquired into in the Sheriff Court.

"It seems clear that where the parochial board adopts the summary mode of recovery authorised by section 88 of the statute the Sheriff acts ministerially rather than judicially. On production of sufficient evidence that the assessment remains unpaid warrant is usually granted as matter of course, and the only competent remedy is suspension of that decree.

"But does this necessarily hold where the parochial board, leaving the summary method authorised by the Act, proceeds by ordinary action in the Sheriff Court? Where, as in the present case, objection is taken, going substantially to the legality or illegality of the mode of assessment, and a question is thus raised, whether that which has been done is within the powers of the parochial board, it may be argued that the Sheriff must have jurisdiction to entertain and determine the point, 'because it truly resolves into the question whether or not the case is one which authorises him to interpose.'

"It appears to the Sheriff that there would be much force in this argument could the question be considered as still open; but the plea was urged unsuccessfully in two cases already referred to in the course of these proceedings, viz., Calder v. Trotter, 8th June, and Pollok v. Robertson, 12th November 1833. In the latter case the plea maintained for the defender had the high sanction of the Lord Ordinary, Fullerton, but failed to convince the Judges of the First Division, who unanimously altered the interlocutor. It is true that these judgments were given before the passing of the Poor-Law Amendment Act of 1845, but it does not appear that this affects their application. The parochial board comes substantially into the place of the heritors and minister in matters relating to the relief of the poor, and by section 40 of the Act remedy is reserved to any one who considers himself aggrieved by any assessment—'in the like form, and on the same grounds, as at the date of the passing of the Act was competent to any party who considered himself aggrieved by any assessment imposed under the statutes then in force for the relief of the poor.' Nor is it unimportant to observe that for the thirty years during which the Act has been in force, and amidst the many questions that have arisen under it, no decision has been pointed out controverting the principle involved in the earlier cases referred to."

[1] 1579, c. 74; 1672, c. 18; Proclamation of Privy Council, Aug. 11, 1692; *ib.* Aug. 29, 1693; *ib.* July 31, 1694; *ib.* March 3, 1698. See Appendix to Dunlop's Poor-Law, ed. 1854, p. 161.

[2] 8 & 9 Vict. c. 83, sec. 88.

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warrant or by way of small-debt action in order to recover rates. But there was nothing to prevent them appealing to his ordinary jurisdiction, and if they did so there was nothing to prevent him applying his mind to the case and disposing of defences and objections. If they wanted his ministerial interference merely they could always ask for a summary warrant. But if they proceeded by way of ordinary action they must shew that they were entitled to decree. The cases of Calder and Pollok, referred to on the other side, were obsolete, as having occurred prior to the passing of the Act of 1845.

Argued for the parochial board;—There was nothing to distinguish the position and functions of the Sheriff in relation to the administration of the poor-laws under the Act of 1845 from what they were prior to the passing of that Act. The Sheriff could act in the matter ministerially only, or as the executive of the assessing body. It had been so held conclusively in the cases of Calder v. Trotter,[1] and Pollok v. Robertson.[2]

At advising,—

Lord Deas.—In this case the parochial board of North Knapdale raised an action in January 1874 before the Sheriff of Argyllshire against the Commissioners of the Caledonian Canal, concluding, *inter alia*, for the amount of poor-rates which they had imposed on the commissioners for the years from Whitsunday 1865 to Whitsunday 1873. A record was made up in that action, and certain pleas in law, both preliminary and on the merits, were stated for the defenders.

The important question decided by the Sheriff was that his function under the Poor-Law Act was purely ministerial, and that question, which has been fully argued, is the only one with which we have now to deal.

The Commissioners of the Caledonian Canal maintain upon the merits that when deduction is made of their total outgoings for repairs, &c., nothing remains on which they can be assessed. The Sheriff and Sheriff-substitute did not enter into the question. They held that the Sheriff's function was purely ministerial to interpone judicial authority for recovery of the assessment laid on by the parochial board, and consequently they *simpliciter* decerned for the amount of poor-rates so assessed, and for the registration assessment, which last is no longer in dispute. In the note to his interlocutor giving effect to this view, the Sheriff-substitute says it seems to him to be sufficiently settled by the cases of Calder and of Pollok, that "the Sheriff's duties, as regards the recovery of assessments under the poor-law, are purely ministerial, and he sees no reason to doubt that the law, as laid down by these decisions, is as much in force as ever, though he understood the defenders' procurator to suggest that this was not the case. It is therefore beyond his power to inquire into the justice of the assessment." The Sheriff, while acknowledging the force of the opposite argument had the question been open, held himself foreclosed by the above decisions, and consequently affirmed his Substitute's interlocutor.

It becomes, therefore, necessary to inquire into the grounds of judgment in these two cases of Calder and Pollok, and whether that ground of judgment still remains applicable.

Now, the ground of these decisions, I think, was simply this,—that the heritors and kirk-session, in administering the poor-law, as it then existed, were substantially acting as a Court. They had a judicial jurisdiction as well as a ministerial

[1] June 8, 1833, 11 S. 694, 5 Scot. Jur. 420.
[2] Nov. 12, 1833, 12 S. 14, 6 Scot. Jur. 44.

function. There was no statutory power conferred on the Sheriff to review their decisions; and as, in the ordinary case, no inferior Court can review the decisions of another inferior Court, it followed that in the supreme Court alone could that review be competently obtained. That, I think, is the explanation of the decisions in the cases of Calder and of Pollok, and, looking to the position in which the heritors and kirk-session then stood, I think it was a sound ground of decision.

I do not propose to go over in detail the Acts of Parliament and Proclamations of the Privy Council on the subject of relief of the poor, which, acting on my suggestion, were so fully brought under our notice by the Dean of Faculty in his reply. But I am satisfied that the conclusion is a sound one that the heritors and kirk-session, while acting within their competency, were acting in a judicial capacity, and consequently that their decisions were not subject to review except in this Court.

That being so, the next question is, whether the parochial board have been placed, by the Poor-Law Amendment Act of 1845, in the same judicial position which was previously occupied by the heritors and kirk-session? There is no presumption in favour of that view. It is one thing to say that the Sheriff is not to review the decisions of another inferior Court, and quite another thing to say that he is not to review what has been erroneously done by a popular board, chosen, to a great extent, from among the general body of ratepayers, under a new and totally different code of laws. There are some matters expressly provided for in the Act to be dealt with by the Sheriff, and others to be dealt with by the Board of Supervision; and it may very well be that in the exercise of certain discretionary powers the parochial board may be subject to no review at all. But that is quite a different question from whether the parochial board is a Court of law, whose decisions cannot, for that reason, be reviewed elsewhere than in the Court of Session. The 40th section of the Act provides that nothing contained in the Act shall preclude any person aggrieved by an assessment from his remedy at law in like manner and on the same grounds as at the date of the Act, "but to the extent and effect only of exempting himself from payment of any surcharge which may have been made upon him." It would be very inconvenient if relief from that surcharge, however trifling in amount, could be obtained only in the Court of Session. The present question relates solely to alleged surcharges, and it is only as to these that we are called upon to decide. They happen to be large, but the smallness of their amount could have made no difference in the view taken by the Sheriff. If such a rule had been intended, I think it ought to have been and would have been distinctly expressed. The remedy by law reserved by sec. 40 to the party aggrieved in the like form as at the date of the passing of the Act must mean, in the absence of anything said to the contrary, in the appropriate form of an action at law in any Court competent at the date when the action is brought. There is nothing in the words here used to erect the parochial board into a Court of law if not so erected otherwise, and consequently it was not this section but section 88 which was mainly relied on in support of the Sheriff's view. Section 88 enacts that all rights and remedies applicable to the recovery of the public taxes shall be applicable to assessments for relief of the poor, "and the Sheriffs, Magistrates, Justices of the Peace, and other Judges may grant the like warrants for the recovery of all such assessments in the same form and under the same penalties as is provided in regard to such land and assessed taxes, and other public taxes: Provided always that it shall nevertheless be competent to prosecute for and

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recover such assessments by action in the Sheriff's Small-Debt Court." It was maintained that this section forms a code of procedure, and confines the Sheriff's duties to such as are ministerial merely, except in actions competent in the Small-Debt Court. At first sight there is some plausibility in this argument. But, unfortunately for its soundness, it goes too far. The parochial board might have applied to the Sheriff for a summary warrant, in which case his duty would, I presume, have been ministerial merely. But that is not what they did. They instituted an ordinary action by a summons in the ordinary Sheriff Court form, concluding not for a summary warrant under section 88 of the Poor-Law Act, but that the defenders ought to "be decerned to pay to the pursuer," the inspector of the board, certain specified sums, with interest and expenses of process. The board, through their inspector, concurred in making up a voluminous record by condescendence and defences, and revised condescendence and revised defences, on the merits of the claim, with pleas in law appended, in the course of all which there is not a word said about a summary warrant, and the 88th section of the statute is never once alluded to, either in the statements or pleas. Nor did the Sheriff-substitute grant a summary warrant under authority of that section. What he did was to decern against the defenders for £555, 18s. 3½d. of poor-rates, and £12 of registration assessments, with interest, "in terms of the conclusions of the summons," and to remit the account of expenses, which he found due to the pursuer, to the Auditor of Court to be taxed in ordinary form, and to this interlocutor the Sheriff *simpliciter* adhered.

But, in truth, the 88th section of the Act, in place of excluding the Sheriff's jurisdiction when appealed to, as it was here, by the parochial board, in an ordinary action, is, when the proviso is attended to, strongly the other way. The proviso, referring back to the power conferred of obtaining summary warrants, bears that "it shall nevertheless be competent to prosecute for and recover such assessments by action in the Sheriff's Small-Debt Court." It cannot be contended that, under this proviso, an action could be brought in the Small-Debt Court for a sum exceeding the very limited amount to which the jurisdiction of that Court is conferred. A plea to that effect would imply that the action in the present instance had been brought in the wrong Court, but would be obviously unfounded. A small-debt action may, however, in all cases be remitted by the Sheriff to his ordinary roll, which strongly implies that it is the statutory limitation of amount and not the nature of the claim which prevents it from originally coming into that roll. The natural construction of the proviso is that common law procedure in the ordinary Courts for recovery of the poor-rates not being excluded by the special powers of recovery conferred by the Act, the like procedure shall be competent where the sum is limited to the statutory amount in the Small-Debt Court, notwithstanding the peculiar nature of the claim and the other and more stringent remedies which might be resorted to. And this appears to me to be the reasonable and sound construction of the enactment. It was argued, indeed, on behalf of the board, that the Sheriff can have no jurisdiction in the matter in question, other than what is expressly conferred on him by the statute of 1845. I do not think that that is so. The only thing which excluded or rather sopited the Sheriff's jurisdiction prior to the Act of 1845 was that jurisdiction had been committed to another Court, namely, the heritors and kirk-session, whose decisions he could not review. But when that Court ceased to exist, his ordinary jurisdiction came into play without any enactment to that effect being required.

On the whole, I am of opinion that the Sheriff-substitute and Sheriff ought

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to have dealt judicially with the action, and that in so far as they have not done so their interlocutors ought to be recalled. On the merits, however, the amount sued for being large, and extensive inquiry being necessary, the action may properly enough be allowed to go on in this Court.

LORD ARDMILLAN.—This case is by no means unattended with difficulty. The action was commenced in the Sheriff's ordinary Court, at the instance of the parochial board, seeking to recover certain arrears of assessments. That action was resisted by the defenders, on the ground that the amount sued for was not due, in respect that large deductions should have been made from their valuation as appearing in the assessor's books, and that if these deductions were made nothing would remain on which to impose an assessment. The Sheriff-substitute has decided for the pursuers, and given decree *de plano* as craved, with expenses, and he explains in his note that the Sheriff's duties in regard to the recovery of assessments are purely ministerial. That judgment was appealed to the Sheriff, who affirmed it, and stated that he held himself bound by prior decisions. In short, the ground of the decision by both the Sheriffs is that an action for recovery of poor-assessments is an action in which the Sheriff is bound to proceed in his purely ministerial capacity, that he can decern for the sum concluded for and for expenses, but cannot dispose of any defences that may be stated.

At first sight this appears a strange result. I always thought that assessments in this country can be enforced only by bodies whose acts were reviewable by some superior body, or by a Judge who was required to apply his mind to the question. To say that a person is to be charged on a Sheriff's warrant to pay a sum in which he has been assessed by a parochial board, with no power to resist, or opportunity of shewing cause why he should not be so charged, is indeed, to my mind, very startling, and leads at once to the question, Is it really the case that in this matter the Sheriff is acting merely ministerially, as the executive of the parochial board? It is pretty clear that but for the cases of Calder and Pollok such would not have been the Sheriff's own opinion. He has yielded his own opinion to supposed authority. It is necessary therefore, at the outset, to consider those two cases, and the circumstances in which they were decided, to see if they apply as conclusive authority.

The true view, in my opinion, is that, prior to the passing of the Poor-Law Amendment Act of 1845, the heritors and kirk-session were in the position of an inferior judicatory, whose decisions were reviewable by this Court, but not by the Sheriff. When, therefore, the Sheriff proceeded, as he was bound, to enforce the resolutions of the heritors and kirk-session, he may be said to have been acting only in an executive or ministerial character, the judicial function residing, in the first place, in the heritors and kirk-session, and in the ultimate resort in this Court. Accordingly, as has already been explained, the Court held, and rightly held, in the case of Calder, which is the leading case, and of Pollok, both decided in the year 1833, that the Sheriff's function in relation to the assessment for the poor laid on by the heritors and kirk-session was purely ministerial.

I concur with your Lordship in holding that the parochial board, under the Act of 1845, does not in this respect occupy the same position in this matter as the heritors and kirk-session formerly did. Accordingly, we do not find that any resolution of a parochial board has ever been brought here directly for

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review. It is true, a parochial board may go to the Sheriff and get the Sheriff to interpose, *periculo petentis*, his authority, in order to enforce their resolution. If they do, the Sheriff issues his warrant very much as he did before the Act of 1845, and his warrant may be brought under suspension in this Court. But the Act of 1845 gave a parochial board power to go to the Sheriff otherwise than merely to obtain, at their instance and risk, an executorial summary warrant. The Act gave them power to appeal to him in the exercise of his judicial functions in one of his ordinary judicial tribunals—in the Small-Debt Court.

Now, the question here arises, does section 88 of the Act of 1845, which authorises the parochial board to apply for a summary warrant, or to raise action in the Small-Debt Court, create a code of procedure which cannot be departed from, or does it give the remedy of a summary warrant, which would not have been available without such statutory enactment, and then merely mention an action in the Small-Debt Court to obviate any misapprehension as to the competency of the procedure, without intending to create an absolute code? The pursuers brought the action. If this is an absolute code, their action is not competent. If it is not an absolute code, why should the Sheriff's judicial jurisdiction be excluded? The case, if in the small-debt roll, might have been transferred to the ordinary roll—a thing often done. I am clearly of opinion that the 88th section cannot be held as so absolutely a code as to limit the competency of procedure to the small-debt roll. The respondents at any rate cannot well contend that the 88th section creates a strict and inflexible code of procedure, for they themselves have deviated from it, and brought their action, not in the Small-Debt Court, but in the ordinary Court of the Sheriff. Therefore, they cannot say, and do not say, that such action is incompetent. Now, I am humbly of opinion that the Sheriff in his own Court is a Judge, the Judge Ordinary, and that his functions are judicial, unless it clearly appears that by the direct interposition of statute they are declared or rendered merely ministerial. I do not say that the Act of 1845 makes this procedure by force of statute an application to the Sheriff in his judicial capacity, but I do say that the Sheriff is a Judge, and that his deliverances in his ordinary Court are judicial, unless there is in the statute some provision operating as a direct exclusion of the judicial functions of the Sheriff. The action has, in my opinion, been competently raised in the Sheriff's ordinary Court, and so the respondents maintain, and if so, it is competent for the Sheriff, when called on to decide for one party, to see that he does justice between the parties by disposing of the defences.

I go no farther at present. I give no opinion as to the nature of those defences. The only decision that we can give now is that the Sheriffs have yielded to decisions not applicable, and have thus misapprehended their position under the statute of 1845.

Lord Mure.—I agree in the opinions expressed by your Lordships, and substantially on the grounds stated by Lord Deas—namely, that parochial boards do not act in a *quasi* judicial capacity in relation to this matter as the heritors and kirk-session did prior to the Poor-Law Amendment Act of 1845; and that the cases of Calder and Pollok have now therefore no application. It appears to me that the whole machinery for enforcing assessments and obtaining relief from surcharges which was in operation at the date of the passing of the Act of 1845 was altered by that Act. Formerly the Sheriff acted ministerially merely in enforcing payment of the rates laid on by the heritors and kirk-

session, and his duties were limited to that. But by section 88 of the Act of 1845 a complete change was effected in the mode in which assessments were to be recoverable. One method was introduced by that section under which the Sheriff was still to act merely ministerially in the same way as he acted in relation to the land and assessed taxes. But the section did not limit the mode of recovery to this. It provided for recovery in the Small-Debt Court by a small-debt action, which involves judicial investigation by the Sheriff of any defences that might be proponed. This makes it pretty clear that the Sheriff was not intended under the Act of 1845 to act entirely in a ministerial capacity. And the question that remains is, did the statute intend to exclude the right of action in such cases in the Sheriff's ordinary Court. I confess that I had at first some difficulty on this point. But on consideration I have come to be of opinion with your Lordships that the ordinary jurisdiction of the Sheriff was not excluded by this provision of the statute. And one ground upon which I have been led to this conclusion is that by authorising such recovery in a summary way the Legislature was, by implication at least, if not directly, sanctioning proceedings in the ordinary Court, because it is made competent for a Sheriff by the 14th section of the Small-Debt Act, in any case of difficulty, to order written pleadings and when he does so he is required to remit the case to his ordinary roll.

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The LORD PRESIDENT was absent.

THIS interlocutor was pronounced:—"Recall the interlocutor of the Sheriff-substitute of 29th April 1875 and the interlocutor of the Sheriff of 7th July 1875, in so far as they relate to the finding that, as regards the conclusion for poor-rates, the Sheriff's duties are only ministerial, and that the defenders' pleas as to the assessments being imposed on too large a valuation cannot therefore be entertained in the Sheriff Court: . . . . Recall *in hoc statu* the decerniture for the sum of £555, 18s. 3½d. sterling of poor-rates, and also the finding as to expenses; reserve all other questions *hinc inde* between the parties, and continue the cause in the roll; and reserve also all questions of expenses in the Sheriff Court and this Court."

MACLACHLAN & RODGER, W.S.—JAMES HOPE, Jun., W.S.—Agents.

FRANCESCO DALL' ORSO, Pursuer.—*D.-F. Watson—Trayner—MacLean.*
Messrs MASON AND COMPANY, Defenders.—*Balfour—A. J. Young.*

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Dall' Orso v. Mason & Co.

Ship—Charter-party—Demurrage—Lay-days.—A charter-party stipulated that the vessel should "proceed to a loading berth in Leith docks, as ordered, and there load in ten working days, as customary, a full and complete cargo of steam coals." On 16th April the master intimated to the charterers that the ship, then lying at a loading berth, was ready to receive her cargo. The charterers had, however, entered her in the dockmaster's books for a crane berth, for which the vessel had to wait her turn till 3d May.

In an action for demurrage, *held* that under the charter-party the charterers had the choice of a loading berth, but that the lay-days commenced to run from 17th April, when the loading might have been commenced.

1ST DIVISION. Ld. Craighill. M.

ON 22d March 1875 the vessel "Presidente Washington" of Genoa, being then on a passage from Berdianske to Leith, the owner, Francesco Dall' Orso, by his agents, Stevenson, Ressich, and Company, shipbrokers,

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Leith, entered into a contract of affreightment with the defenders, Messrs Mason and Company, Leith, for the carriage of a cargo of steam coal from Leith to Montreal.

The charter-party, *inter alia*, stipulated "that the said ship . . . shall, with all convenient speed, sail and proceed to a loading berth in Leith docks, as ordered, and there load in ten working days, as customary, a full and complete cargo of steam coals, not exceeding what she can reasonably stow and carry; and being so loaded, shall therewith proceed to Montreal, or . . . ; demurrage over and above the said lying days at 4d. per register ton per day."

The "Presidente Washington" arrived in Leith on 30th March 1875, and proceeded to discharge her cargo at a quay berth in the Albert Dock, Leith. On 7th April the master informed the charterers that he would require 50 or 60 tons of the cargo to be put on board as "stiffening," or ballast, to prevent the ship heeling over. This was done on 12th, 13th, and 14th April, and on 16th April the master gave notice to the charterers that the ship had discharged her inward cargo, and was ready to ship her cargo of coal under the charter-party of 22d March.

The vessel had been on 13th April entered by the charterers at the shore-dues office at Leith for "a crane berth," but as there were several vessels on the books before her, her turn to get under a crane did not come round till 3d May. In the meantime she lay from 16th to 28th April at the quay berth where she had discharged, but at the end of that time, as she was not loading cargo, she was ordered out to the buoys in the centre of the dock by the dockmaster. After getting under a crane on 3d May her loading was completed on 12th May.

Between 16th April and the date of the loading being completed the charterers received several complaints in writing from the agents and master of the vessel as to their delay in finding her a berth, and putting the cargo on board. On 23d April the captain suggested that as the turn for getting a crane berth seemed long of coming round, loading should be commenced by hand, but his suggestion was not attended to, and on 27th April he intimated that demurrage would be claimed if the ship was detained after the expiry of the ten lay-days.

The owner, F. Dall' Orso, raised this action against the charterers to recover £102, 18s. 4d. as demurrage under the charter-party for thirteen days, contending that the ten working days stipulated in the charter-party for loading the vessel commenced on 17th and expired on 29th April, and that the ship was on demurrage from 30th April to 12th May inclusive.

The defenders stated (Art. 1),—"According to the custom of the port of Leith cargoes of coal are loaded at the steam crane, where alone proper provision for such loading exists, and according to the custom of the said port the lay-days of a vessel chartered to carry coals as the 'Presidente Washington' was, do not begin to run until the vessel comes under the said crane to be loaded." (Art. 2) "The defenders, of this date (April 13, 1875), duly entered the said vessel in the harbour books, in order that she might obtain from the harbour authorities her turn for loading under the crane, but owing to the number of vessels which had already been entered for their turn the said vessel did not get under the crane until 3d May, and the lay-days under the charter-party then only began to run."

They pleaded;—(2) The vessel having been loaded within the number of days stipulated by the charter-party, as customary in the port of Leith, no damage or demurrage became due.

It was established by the evidence that the practice of loading vessels with coal by steam crane at Leith had only been introduced of recent years; that the number of crane berths was limited, and that there were

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plenty of other berths where the practice of loading by hand was still carried on; that it was the duty of the merchant or charterer to find a berth for the vessel chartered, and of the master to go to the berth selected, always subject to the orders of the dockmaster; that when a charterer selected a crane berth the vessel had to be entered in the dockmaster's books, and was only admitted to a crane berth in her turn; that it was both more expeditious and cheaper to load by crane than by hand; but that if a vessel was to be long delayed in getting to a crane berth it was always a question for the charterer whether he would load by hand or run the risk of demurrage.

The Lord Ordinary, on 12th July 1875, pronounced this interlocutor:—"In the first place, finds as matter of law that, according to the sound construction of the charter-party sued on, No. 6 of process, by which it was contracted that the vessel called the 'Presidente Washington' should, 'with all convenient speed, sail and proceed to a loading berth in Leith docks, as ordered, and there load, in ten working days, as customary, a full and complete cargo of steam coals,' the lay-days did not begin to run till the ship had reached the loading berth chosen, and to which she was ordered by the defenders, the charterers: In the second place, finds as matters of fact—(1) that the said vessel was ready to take in the stipulated cargo on 16th April last, and of this intimation was given by the master to the defenders; (2) that there are crane berths, and also other berths at which vessels are loaded by hand, at Leith docks; but though coal is frequently loaded, and gas-coal is almost always loaded, at these other berths, by much the greater part of the coals shipped at Leith are loaded at crane berths; (3) that though the 'Presidente Washington' was, as aforesaid, ready to take in cargo on 16th April, and though on 13th April, in anticipation of this, the defenders entered the vessel's name in the harbour books, that she might obtain from the harbour authorities a turn for loading under the crane, she, in consequence of the number of vessels which had previously been entered for their turn, did not get under the crane till 3d May; and (4) that upon that day a part of her cargo was taken in, and notwithstanding interruptions in the course of loading, her loading was completed on 12th May, which was within ten days from the day on which she entered her loading berth: Therefore sustains the defences, assoilzies the defenders from the conclusions of the summons, and decerns: Finds the defenders entitled to expenses," &c.*

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* "NOTE.—The meaning of that clause of the charter-party quoted in the foregoing interlocutor is really the only thing which is in controversy. If the pursuers' reading is to be taken, the defenders do not dispute that the demurrage claimed is due; and, on the other hand, should that of the defenders be adopted, the pursuers admit that the claim must be disallowed.

"The pursuer's reading is this. He says that, once notice was given that the ship was ready for cargo, the defenders were bound to find the berth at which she was to be loaded; and if from any cause—even a cause resulting from harbour arrangements, over which the defenders had no control—the berth 'as ordered' could not be obtained at the time, they must be answerable for the consequences. The defenders, on the other hand, say that they had the selection of the berth, and that, till the ship entered that for which she was ordered, the time for loading had not arrived.

"The Lord Ordinary's first impressions of the case were in favour of the pursuer's view of the contract, but he has seen cause not to adopt the opinion which originally he was disposed to entertain. What was done and said in Tapscott v. Balfour, decided 23d November 1872, and reported in Law Reports, 8 Common Pleas, p. 46, are the things to which this result is mainly to be ascribed. There the charterers had a choice of docks, as here the defenders

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The pursuer reclaimed.

Argued for him;—The Lord Ordinary's first view, as expressed in his note, was correct. The case of Tapscott v. Balfour,[1] upon which alone he founded his ultimate decision, was not against but in favour of the pursuer. Bovill, C. J., there laid it down,—"When a port is named in the charter-party as the port to which the vessel is to proceed, the lay-days do not commence upon the arrival of the vessel in the port, but upon her arrival at the usual place of loading in the port, not the actual berth at which she loads, but the dock or roadstead where loading usually takes place. If, when she arrives there, the place is so crowded that she cannot load, the loss must fall on the charterer; the shipowner has done all he was required to do when he has taken his vessel to the usual place of loading in the port." Accordingly, it was decided that the lay-days began as soon as the ship was in the dock, though she could not get to the particular berth selected for her by the charterer. That was exactly the view contended for by the pursuer in the present case.[2]

Argued for the defenders;—In Tapscott v. Balfour the words "as ordered," when applied to dock at a port where there were several docks, had been interpreted to mean that the charterers had the choice of docks, and that until the vessel entered the dock to which they ordered her the lay-days did not commence. All they asked was that the same meaning be given to the words "as ordered" when applied to loading berth. The words were not usual in a charter-party, and their occurrence in the present took the case out of the general rule. To sustain the pursuer's contention would be altogether to refuse effect to these words "as ordered," which were the ruling words in the clause.

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had of loading berths; one was chosen in due time, but into that chosen the chartered vessel could not enter till after an interval, 'because the coal agents employed by the defendants to supply the cargo had three vessels already in the dock, and two others in turn to go in.' In an action for demurrage on the charter-party, the Court held that the lay-days did not commence at the time when the ship was ready to enter the dock, but at the time when she got into the dock. If the words 'loading berth' be substituted for the word 'dock,' that case and the present, so far as the language of the charter-party is concerned, will be identical; and the actual variance, the Lord Ordinary thinks, is not a difference necessitating or warranting a different decision as to the meaning of the clause which is now the subject of controversy. Were it otherwise there would, so far as the Lord Ordinary can see, be a denial of the stipulated option, because, though a particular berth might be that desired, and be in consequence the one at which the vessel was ordered to load, that, possibly or probably, could not be selected unless under the penalty of incurring demurrage, not being open on the day on which it was expected she would be ready for cargo. Hardship has, as usual, been suggested on both sides, but the true view is that there is hardship on neither. The matter is simply one of contract; and, if the consequences of what has happened are in future not to fall on the ship, this must be prevented by a change in the provisions of the charter-party.

"The pursuer has here led evidence of an alleged usage at the port of Leith, but the Lord Ordinary thinks, in the first place, that the proof upon this point is not very strong, and, in the second place, that, even if it were much stronger, it could not control the words of the contract. These words are not ambiguous, and their plain ordinary meaning, whatever others may think, is that to which effect must be given by the Court."

[1] Nov. 23, 1872, L. R. 8 C. P. 46.

[2] Abbott on Shipping (11th ed.), p. 268, *et seq.*; Maclachlan on Shipping (2d ed.), p. 491; Randall v. Lynch, 12 East, 178.

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LORD ARDMILLAN.—This is an action brought by the owner of a vessel called the "Presidente Washington," of Genoa, which arrived in Leith on the 30th March 1875, and was ready on 16th April following to load an outward bound cargo, to recover demurrage from the charterers in respect they detained the vessel for thirteen days beyond the lay-days allowed by the charter-party. Intimation was duly given by letter on the 16th April by the shipmaster to the charterers that the vessel was lying ready to receive her cargo under the charter-party.

The charter-party, which was entered into on 22d March 1875, bore that the vessel should proceed "to a loading berth in Leith docks, as ordered, and there load in ten working days, as customary, a full and complete cargo of steam coals." Now, it is obvious that the words "as ordered," on which the case really turns, mean that the vessel, when arrived at Leith, and ready to go to a loading berth, is to be under the orders of the charterers—is to go to whatever loading berth in Leith docks the charterers direct. There she is to be loaded, and that in ten working days, after which demurrage is to be paid at a specified rate per diem. Demurrage is just the substitute for the freight which the vessel would or might have earned had she not been detained by the charterers. It is what the charterers must pay the owner for the time the vessel is kept by their conduct without earning anything else.

The defence of the charterers to this action for demurrage is that the lay-days did not begin to run when the master intimated to them that the ship was in Leith docks ready to take in her cargo, but only at a later date, viz., 3d May, when for the first time she could be brought to a berth where she could be loaded under a crane. The question, therefore, which we have to decide is whether the lay-days commenced to run when she was in the dock and reported as ready for her cargo, or whether they did not commence until she was brought under the crane.

There is no evidence of any practice of loading at Leith docks otherwise than by the hand or by cranes. There is no evidence of any practice of loading by lighters, though that may be occasionally done. But not only is loading by hand an old and well known method in constant use, but loading by crane is of comparatively recent introduction, and very far from universal. That being the case, the defenders say they were entitled to keep the vessel waiting without their paying demurrage until they, preferring to load by crane, arranged to get her alongside a crane berth. The Lord Ordinary's first impression was that that plea was not a good one, and that the pursuer was entitled to demurrage as sued for. But his Lordship came to be ultimately of opinion that, looking to the English decision in the case of Tapscott v. Balfour (L. R. 8 C. P. 46), his first impressions were erroneous, and he therefore decided in favour of the defenders.

I have come to be opinion that the first impressions of the Lord Ordinary were right. I think the case of Tapscott, though instructive, does not decide the point before us, and is not either in its terms or its spirit an authority for the defenders in the present case. When the master, on 16th April, intimated to the charterers that his vessel was lying in Leith docks ready to take in her cargo, it was the duty of the charterers to have lost no time in finding the vessel a berth where she could be rightly loaded. If she was detained without being loaded they must explain the cause of the delay, and unless the explana-

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tion relieves them they must pay demurrage. A reasonable explanation may possibly be given, but if no reasonable explanation is given they cannot be allowed to lay upon the owners the loss incurred by their delay. I do not think that any contrary proposition is to be found in the case of Tapscott. But were the defenders' contention to be sustained, I see no reason why they should not have kept the vessel for months instead of days without rendering themselves liable in demurrage. Such a result is manifestly unjust, and contrary to well recognised principles of mercantile law. The rule of honourable dealing between man and man is what chiefly makes the law in regard to mercantile transactions, and it must have its due effect in this case.

The Lord Ordinary thus describes the position taken by the parties to the case:—"The pursuer says that, once notice was given that the ship was ready for cargo, the defenders were bound to find the berth at which she was to be loaded; and if from any cause—even a cause resulting from harbour arrangements, over which the defenders had no control—the berth 'as ordered' could not be obtained at the time, they must be answerable for the consequences. The defenders, on the other hand, say that they had the selection of the berth, and that, till the ship entered that for which she was ordered, the time for loading had not arrived." That is, in plain terms, that the defenders had it in their power to detain the ship so long as they could not or would not find a berth to suit them. The Lord Ordinary's first impressions were in favour of the pursuer's view of the contract, and I am not suprised, for it seems to me to be in accordance with justice and common sense. I do not intend to go minutely into the case of Tapscott, which so materially influenced the Lord Ordinary's views; but I have read it carefully, and have come to the conclusion that it does not touch the proper question raised here.

Two extreme pleas were advocated in that case. The first was maintained by the owners to the effect that the lay-days commenced whenever the vessel was ready to enter the dock. That view was negatived by the Court, and it seems to me justly and rightly. The second was maintained by the charterers to the effect that the lay-days did not commence until the vessel was brought under the "spout" or "tip," a position similar to "under the crane" in the present case. This the Court held also to be untenable. Having thus negatived both extreme views, the Court fixed the lay-days to have begun when the vessel was not merely ready to enter, but was actually in the dock. In the present case the vessel was not outside the dock, and the owner is not claiming the lay-days to have begun when she was in the roads, and merely ready to be taken into the dock according to one of the extreme views advocated, but repelled in the case of Tapscott. That could not have been sustained. So, neither can the other extreme view, that the lay-days did not begin until she was, not only in the dock, but under the crane. The intermediate view, and I think the view taken in the case of Tapscott, when rightly understood, is the sound one, that the lay-days should be held to have begun from the day she was in the dock, and when notice was given that she was ready to take in her cargo; and demurrage must be awarded accordingly.

We have some attempt in the proof at leading evidence as to the practice at Leith in regard to loading and in regard to counting the running of lay-days. It is not satisfactory proof of practice, and I doubt whether any such practice, if proved, could, under the circumstances, have been held to rule this question. But I do find some of the witnesses saying,—"If I could not get a vessel to a

crane berth in reasonable time it would be a question with me whether I should pay demurrage or load by hand, and the answer would depend upon how long I might expect to be kept waiting for a crane berth, as it is easy to calculate how much more loading by hand will cost than loading by crane." Now, that is reasonable; and if that reasonable view be adopted, then *cadit quæstio*. The charterers had from the date of the notice that the ship was in the dock this option of loading by hand or waiting to get her to the crane, thus occasioning delay and inferring liability to pay demurrage. They have chosen the latter alternative, and must therefore accept the consequences. I think that is a just and sound decision of this case, and I am sure that it is in accordance with the broad principles of equity which must always rule in questions between merchants. I am, therefore, for altering the Lord Ordinary's interlocutor.

LORD MURE.—I concur with the Lord Ordinary in his first impression of this case. The terms of the charter-party are that the ship shall "proceed to a loading berth in Leith dock, as ordered, and there load in ten working days, as customary," &c. Taking these terms by themselves, it is, I think, plain that the charterers are to have the selection of the loading berth; but they must, I conceive, exercise that power of selection with due and reasonable consideration for the situation of the ship and the interests of the shipowners. The charterers' "order" must, in short, be one which the master may fairly and reasonably be expected to act upon and acquiesce in.

In defence against this action the charterers state that it is the custom at the port of Leith to load coal at a crane berth, and that according to this custom the lay-days do not begin to run until the vessel comes under the crane to be loaded. And the second and only specific plea in law maintained by the defenders in the record is rested expressly on this alleged custom. But I am of opinion that the defenders have failed to instruct any such custom, and that we must be guided in disposing of the case—and this was at the debate conceded by the defenders—by the terms of the charter-party alone.

The charter-party was signed on the 22d of March, and the vessel arrived at Leith early in the first week of April. Her arrival appears to have been known to the defenders, and they were also aware that she would be ready to take in her cargo by the middle of the month; for they had put in a considerable quantity of stiffening coal on the 12th or 13th of April at the berth where she was being discharged. On the 16th of April it was duly notified to them by the master in writing that he was ready to load; and as no attention was paid to this, he, on the 23d and 27th, writes complaining of the delay, when it turns out that the vessel had been entered for a crane berth to which access could not be had till the 3d of May.

Now, it is clear upon the evidence that although the vessel could not be got under a crane till that date she might have been loaded at the berth where the stiffening coal had been put in. And the question, accordingly, in these circumstances, comes to be—Was it reasonable that the vessel should be delayed for more than a fortnight because ordered to a crane berth? I am of opinion that it was not. She was lying at the time at a berth at which she could have been quite well loaded by hand within the lay-days. It was, therefore, for the charterers to choose, as deponed to by several of the witnesses, whether they would load by hand, or run the risk of incurring demurrage by

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waiting for a crane berth. They did not take the option of loading by hand, and must therefore, I think, be held liable in demurrage.

With reference to the case of Tapscott (L. R. 8 C. P., p. 46), relied on by the defenders, I have only to say that I should certainly be very averse, more especially in a question of this description, to come to any conclusion different from that arrived at in England. But I do not think that, in giving effect to the pursuer's claim, we are in any respect trenching upon that decision. That case was disposed of on a motion to enter up a verdict, where various questions of fact had been submitted to a jury, but where the plaintiff had omitted to raise any question before the jury as to the unreasonableness of the conduct of the defenders or their agent. In these circumstances, when it was pleaded on the part of the shipowners that they ought not to suffer from the unreasonable delay of the defenders' agent on the matter of loading, Chief-Justice Brett said, "If it were intended to rely on anything unreasonable and improper in the selection of the agent the counsel should have insisted on that question being left to the jury; but no such question having been submitted to them, and it being the usual course to employ an agent, we must now assume that there was nothing unreasonable or improper in the selection that was made." Here, however, we are dealing with the whole evidence in the case, and acting both as judge and jury, and are, therefore, entitled to say what was reasonable or not.

Lord Deas.—It is not disputed in point of fact that this vessel lay in Leith docks on the 16th April 1875 ready to receive a cargo, and that the charterers were made aware on that day that such was the case. Neither is it disputed in point of law that it was the duty of the charterers, on being made aware of that fact, to find her a berth. But it is contended, on the part of the charterers, that they had the choice of berths, and were therefore not bound to put the cargo on board until they had not merely selected a berth, but had obtained possession of that berth, and that if anything occurred to prevent them getting possession of the berth they had selected they were not to be liable for demurrage during the time they were kept out of it. No limitation is put on that contention of the charterers, and there is no reason why the principle, if admitted, should not apply to a very much longer delay than actually occurred here.

The Lord Ordinary has rightly said that no considerations of hardship on one side or the other can enter into this question. The true question is, what was the contract? But before we can give the charterers the benefit of their contention we must see that the contract was what they say it was. Now, the charter-party bears that the ship shall "proceed to a loading berth in Leith docks as ordered, and there load in ten working days, as customary." The argument of the charterers is founded mainly, if not entirely, on the words "as ordered." They say these words entitled them to order the ship to any berth they thought proper, and that until the ship got possession of that berth the lay-days did not begin to run.

That certainly does not appear to be a very reasonable construction of the charter-party, but if it is a sound one we cannot help its leading to consequences which may appear unreasonable. The Lord Ordinary would have construed the charter-party unfavourably for the charterers had it not been for the case of Tapscott v. Balfour (L. R. 8 C. P. 46), but he was of opinion that that case was decisive of the point, and led to an opposite conclusion. In that case, he says in his note, the charterers had a choice of "docks," as here they had of

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"loading berths," and "the Court held that the lay-days did not commence at the time when the ship was ready to enter the dock, but at the time when she got into the dock. If the words 'loading berth' be substituted for the word 'dock,' that case and the present, so far as the language of the charter-party is concerned, will be identical." And he goes on to add that he does not think there is any difference necessitating or warranting a different decision as to the meaning of the clause.

Now, the whole force of what the Lord Ordinary has thus said depends upon that word "if,"—if the words "loading berth" be substituted for the word "dock." But can the words "loading berth" be substituted for the word "dock"? Is it the same thing to hold when a choice of docks is given that the lay-days do not begin to run until the vessel is in the dock as to hold that where the choice of loading berths is given the lay-days do not commence until the particular berth which the charterer fixes upon becomes vacant? I humbly think not. I think the view that they are the same thing proceeds on an entire fallacy, which lies at the root of the Lord Ordinary's judgment. In truth, the decision in Tapscott v. Balfour has nothing to do with the present case. It was there held that the lay-days did not commence at the time when the ship was ready to enter the dock, but at the time when she got into the dock. But that is quite different from holding that after she got into the dock the lay-days were not to begin until she got under the crane in a particular berth. It appears that at Leith docks there are plenty of berths for loading by hand, to one of which the vessel might easily have got, and been loaded within the lay-days. Loading by crane is a method of recent introduction. No such practice of loading by crane has yet grown up as can affect the case; and if the defenders chose to wait till a crane berth was vacant they must just take the consequences and pay demurrage.

The LORD PRESIDENT was absent.

THIS interlocutor was pronounced:—"Recall the said interlocutor (of 12th July 1875): Find that the ten working days stipulated by the charter-party for loading the vessel in dispute commenced on Saturday, the 17th day of April 1875, and expired on the 29th of that month and year: Find that the vessel was not loaded between these dates, and that demurrage became due from and after the last of these dates: Find it admitted at the bar that the demurrage (if due at all) amounts to the sum libelled, with interest: Therefore decern against the defenders in terms of the conclusion of the libel: Find the pursuer entitled to expenses," &c.

PATRICK S. BEVERIDGE, S.S.C.—DRUMMOND & REID, W.S.—Agents.

No. 72.

Feb. 5, 1876.
M'Gill, &c. v. Bell's Trustees.

MRS M'GILL AND HUSBAND, Petitioners.—*Low.*
MRS BELL AND OTHERS (Bell's Trustees), Respondents.—*Pearson.*

Process—Poors-Roll—A wife and her husband, pursuers of an action of reduction of a deed on the ground of inadequate consideration, circumvention, and forgery, applied for admission to the benefit of the poors-roll. It appeared that they had one child living in family with them who earned 6s. a-week, while the husband's wages were £1 a-week. *Held*, in consideration of the nature of the allegations in the summons, and after a report of *probabilis causa*, that they were entitled to be admitted.

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M'Gill, &c. v. Bell's Trustees.

2D DIVISION.
Lord Young.
I.

MRS M'GILL, with consent of her husband, raised an action against Bell's trustees for reduction of a disposition by Mrs M'Gill and others of certain house property to which Mrs M'Gill had had a right of eventual fee. The grounds of reduction alleged were inadequate consideration, that the transaction had been carried through when the pursuer was in a state of mental weakness and in ignorance of her true rights, and also that the signature bearing to be that of the pursuer appended to the deed was a forged signature.

While the action was pending in the Lord Ordinary's procedure-roll the pursuers applied to the Second Division to be admitted to the benefit of the poors-roll, and a remit was made to the minister and kirk-session of their parish, who reported that Mrs M'Gill was fifty-two years of age and her husband fifty, that they had no property, and were entirely dependent on the wages earned by M'Gill, who was a working engineer, making on an average £1 per week. The report also added that they had two daughters, one of whom, however, was married and independent of them, while the other, who was thirteen years old, lived in family with them, but earned 6s. a-week as a mill-worker. The pursuers, upon this report, moved their Lordships to remit the cause to the reporters on *probabilis causa litigandi*, but the defenders opposed the motion, on the ground that the circumstances of the pursuers were not such as to entitle them to sue *in forma pauperis*.

This interlocutor was pronounced:—"Before answer to the objection stated at the bar, remit to the lawyers and agents for the poor to inquire into the circumstances and to report whether the applicant has a *probabilis causa litigandi*, and is otherwise entitled to the benefit of the poors-roll."

The reporters reported as follows:—"Having, in virtue of the preceding remit, considered the application and heard counsel, and also met with the applicant and her husband, beg humbly to report that, in our opinion, the applicant has a *probabilis causa litigandi*, and is entitled to the benefit of the poors-roll."

The pursuers accordingly renewed their motion, but the defenders opposed it, and argued;—The pursuers were in receipt of a larger income than had been possessed by any one who had been admitted to the benefit of the poors-roll hitherto.[1]

LORD JUSTICE-CLERK.—No doubt there have been conflicting decisions on this point, but these cases are always questions of circumstances, and for the consideration and discretion of the Court.

We have here a distinct allegation that this deed was forged, and that the value of the property in question is £2000. We sent the case to the reporters on *probabilis causa*, and they have reported that the pursuer has a *probabilis causa*. Without laying down any general rule, and expressly upon the ground of the gravity of the averments, I am for admitting this pursuer to the benefit of the poors-roll.

LORD NEAVES.—I am of the same opinion. The result of not admitting the pursuer to the poors-roll would apparently be that there would be no inquiry into this matter at all. The pursuer must of course be held to have a *probabilis*

[1] Drysdale v. A B, Dec. 19, 1829, 8 S. 276, 2 Scot. Jur. 129; Webster, Petitioner, June 4, 1858, 20 D. 1058, 30 Scot. Jur. 646; Walker v. Brown, Feb. 3, 1860, 22 D. 678, 32 Scot. Jur. 262; Collins v. King and Co., Feb. 28, 1867, 39 Scot. Jur. 257.

causa. I do not think that 25s. a-week is enough to enable a pursuer to bear the expense of such a litigation as this is likely to be. No. 72.

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LORD ORMIDALE.—I am unable, having regard to the precedents, to hold that every individual who has an income of 25s. a-week is entitled to the benefit of the poors-roll. But, in the special circumstances of this case, I do not dissent from your Lordships. A serious charge of forgery will, I understand, fall to be investigated, and yet, having this in view, the reporters have found that the pursuer has a *probabilis causa*. That gives a character to the present case which distinguishes it from those which usually occur.

LORD GIFFORD.—I agree upon the special ground of the nature of the litigation. I think that this is an element which may often be very material, and which must be kept in view, as well as the amount of wages or income which the applicant enjoys.

THE COURT pronounced this interlocutor:—"In respect of the foregoing report, find the applicant, in the special circumstances of this case, entitled to the benefit of the poors-roll, and remit to Messrs George Watson, advocate, J. H. Gillespie, writer to the signet, and Thomas Lawson, S.S.C., to conduct and carry on the cause."

DAVID ROBERTS, S.S.C.—WEBSTER & WILL, S.S.C.—Agents.

JOHN M'KERRON AND OTHERS, Petitioners and Appellants.—*Balfour—Keir.*
ALEXANDER MORISON GORDON, Petitioner and Respondent.—*D.-F. Watson—Asher.*

No. 73.

Feb. 15, 1876.
M'Kerron, &c. v. Gordon.

Road—Possessory Judgment—Interdict—Sheriff.—In 1815 district road trustees shut up a public road, and the proprietor of the solum enclosed, planted, and cultivated it, but the public continued to use it as a public footpath by forcing through the fences and walking on the cultivated ground. In cross petitions in the Sheriff Court for interdict at the instance respectively of the proprietor and some members of the public, the latter of whom challenged the legality of the proceedings of the trustees in shutting up the road, *held* that, although the public had proved possession of the footpath for seven years prior to the date of the petitions, that possession was not sufficient to entitle them to a possessory judgment, in respect that the proceedings of the road trustees, as shewn by their minutes, were *prima facie* evidence that the possession of the public was unlawful (*diss.* Lord Gifford, on the ground that the legality of the possession by the public did not fall to be considered in determining the possessory question).

2D DIVISION. Sheriff of Aberdeenshire. I.

ON 22d June 1872 Mr Gordon of Newton, in Aberdeenshire, presented petitions in the Sheriff Court of that county praying to have John M'Kerron, mason, residing in Insch, in the county of Aberdeen, and Robert Slorach and William Fraser, labourers, in the same neighbourhood, interdicted from trespassing on his lands of Ledikin and Bridge of Shevock. He averred that prior to 1815 a road leading from Insch to Old Rayne had passed through his lands, but that in 1813 a new turnpike road had been constructed by the district road trustees which afforded means of communication between these places, superseding the old road, and that by a resolution dated 29th May 1815 the trustees, in virtue of the powers conferred on them by 39 and 40 Geo. III. cap. 32,*

* This Act provided, *inter alia*, sec. 71—"That it shall and may be lawful for

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the Act of Parliament at that time in force with respect to the roads in the county of Aberdeen, had shut up and suppressed the old road. It was further averred that in consequence of the old road being thus shut up and suppressed Mr Gordon's predecessor had proceeded to break up the solum of the road, and had planted and ploughed it and erected fences across it. Placards setting forth that there was no road that way and that trespassers would be prosecuted were also erected, and were still kept up, and the foresters and servants of the proprietor challenged all persons found on the line of the old road.

M'Kerron and the other respondents lodged defences to these petitions, and also presented a petition for interdict against Mr Gordon and his tenants, praying to have them interdicted from obstructing the old road, and to have them ordained to remove the obstacles already in existence. They averred in their answers that the road had been a public road betwixt the burghs of Old Rayne and Insch from time immemorial, that it had been narrowed to a footpath where it passed over Mr Gordon's estate, and that it had been used by the public for the whole of that period, and specially so during the seven years preceding the erection of the obstructions complained of. The obstacles principally objected to were certain fences across the line of the old road, which they averred were erected in May and June 1872 by Mr Gordon or his tenants.

The respondents also denied that the procedure by which the trustees were said to have suppressed and shut up the old road was regular, stating that there had been no advertisement as required by the statute, and that the minute of the trustees was informal and vitiated by the interpolation of the words relating to this road without due authentication.*

Mr Gordon pleaded, *inter alia*;—(1) The said old Insch road, and branches thereof, that formerly existed upon the petitioner's said lands of Ledingham or Ledikin, having been formally and legally shut up as above set forth, and the petitioner and his predecessors and authors having ever since exclusively possessed the ground on which the said

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the said trustees to build fences and to shut up and suppress roads of every description which may appear useless or of little importance to the public; provided always, that notice of the resolution to shut up such road be given by advertisement at the churches of the parishes through which the said road passes, for two consecutive Sundays, one month at least before the said road shall actually be shut up; and that any person or persons who shall think himself or themselves aggrieved by such resolution may apply to the Sheriff-depute of the county of Aberdeen or his Substitute, who, if he sees cause, is hereby empowered to suspend the execution thereof until the next general meeting of the trustees, who shall finally determine thereon."

Sec. 77.—"Provided always that the proceedings of the trustees in the district meetings shall be subject to the direction and control of the general meeting, to whom any person or persons who think themselves aggrieved by said proceedings may appeal, and whose sentence shall be final. . . . ."

* The minutes relating to the road were as follows:—"Pitcaple Inn, 29th May 1815.—At the request of Mr Gordon of Newton a committee, to consist of Messrs Horn Elphinstone of Logie, &c., and Leslie of Warthill, with the heritors of the parish, was appointed for the purpose of inspecting certain roads and alterations thereof to be pointed by him—Mr Gordon, convener: And for shutting up the old road from Insch to Old Rain passing through his and Rothnay's lands, now useless—the same was ordered.

"April 1, 1816.—No reports. . . . . The clerk reported that the usual notice had been given at the parishes of Culsalmond and Insch for shutting the roads which formerly led from Insch to Old Rain, passing through the lands of Newton and Rothnay, as ordered by the district, upon the application of the proprietors."

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road and others existed as their absolute property under their titles thereto, he is entitled to exclude all others from in any way interfering with or entering and trespassing upon the same. (4) In any view, the ground on which the respondents trespassed as above mentioned having been in the exclusive possession of the petitioner for upwards of seven years in virtue of his written titles he is entitled to a possessory judgment."

The respondents pleaded, *inter alia*;—(1) That the road used by them on the occasions complained of being a public road by immemorial usage, they were and are entitled, as members of the public, to use it in the way they did, without molestation by the petitioner and others foresaid, or any other person. (2) That the respondents, as members of the public, in respect of the use and possession by the public of the said road for at least seven years as a public road previous to the molestation by the petitioner and others foresaid, are entitled to the benefit of a possessory judgment. (3) That the alleged proceedings of the road trustees, even if competently proved, did not of themselves shut up the road in terms of the statute so as to make it a shut up road from the date thereof. (4) The alleged minute of 29th May 1815 is inadmissible as evidence that the road has been shut up, being vitiated *in substantialibus* by interpolation and want of due authentication. (5) The alleged minute, even if admissible, does not prove that the road was shut up in terms of the Aberdeenshire Road Acts, section 71, then in force. (9) The road trustees never gave legal sanction to the shutting up of said road, and the same was never legally shut up or closed to the public. (12) *Separatim*, Even assuming that the old road from Insch to Old Rayne, as it passes through the petitioner's (Mr Gordon's) lands and Rothney's lands, was shut up in 1815 as alleged, the public have since acquired a public road or right of way there, to the extent of a right of footpath over it, by constant use for forty years or upwards, and such use was had of it by the public for the seven years immediately preceding the placing of the obstructions across it by the petitioners, as mentioned in these proceedings.

The Sheriff-substitute (Dove Wilson) allowed a proof, in the course of which the respondents established that there had been a certain amount of use of the road by the public, but that that use had been always challenged and objected to, but ineffectually, by the proprietor and his tenants. The minutes given above (footnote) were excerpted from the minute-book of the road trustees, and the portion of the minute objected to was proved to have been in the handwriting of the clerk of the road trustees.

On 21st August 1875 the Sheriff-substitute found the proceedings of the road trustees irregular and defective, and that the road had remained open as a public footpath, and accordingly refused Mr Gordon's petition for interdict, and interdicted him and his tenants from closing or obstructing the road as a public footpath.*

Mr Gordon appealed, and on 26th October 1875 the Sheriff (Guthrie Smith) recalled his Substitute's interlocutor, finding "it proved that in 1815 the road in question was shut up by the road trustees in virtue of the powers contained in the statute 39 and 40 Geo. III. cap. 32, that it was then enclosed within his grounds by the petitioner, and ceased to be used for carts and horses; that although there is evidence of its continued

* The principal ground of the Sheriff-substitute's finding as to the irregularity of the proceedings of the road trustees was that the committee appointed by the minute produced had never, so far as could be ascertained, and contrary to the usual practice of the trustees, as appeared from their conduct in connection with the shutting up of other roads, made any report, nor had any formal resolution upon such report been come to.

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use as a public footpath no such possession has been established on the part of the public subsequent to its suppression as would be sufficient to constitute a public right of way: Therefore in the petition at the instance of Mr Gordon repels the defences, grants interdict in terms of the prayer of the petition: Dismisses the counter-petition: Finds the petitioner, Mr Gordon, entitled to expenses."

The respondents appealed to the Second Division of the Court of Session, and argued;—(1) In order to obtain a possessory judgment—which was all the Sheriff could give them—it was sufficient to shew that there had been possession for seven years, and this they had proved. The mere fact that attempts had been made to obstruct the footpath would not preclude the vindicators of a public right from getting a possessory judgment.[1] (2) If possession, prior to the seven years, could be referred to to explain the nature of the seven years' possession, that also was in favour of the public.[2] (3) Mr Gordon was not entitled, in this process, to found upon proceedings of doubtful validity which took place sixty years ago. He must establish the regularity of the proceedings of the road trustees in a declarator, not in a summary process.[3] (4) Even supposing reference to these proceedings to be competent in this process, they were irregular, and any irregularity was fatal to their validity.[4] Advertisements must be made,[5] and the fact of statutory notices having been given must be proved.[6] (5) The word "road" had also been held not to include a public footpath, which was all that was claimed here.[7] The case of the Glasgow and Carlisle Road Trustees v. Tennant had no analogy to this one, as there no notices or resolutions were required.[8]

Argued for Mr Gordon;—(1) Possession, such as would entitle the respondents to a possessory judgment, must have the quality of a right about it as distinguished from trespass or mere toleration. Even though the possession might have been peaceable for seven years it was competent to go back further to shew that there was a vice in the possession.[9] After a road had once been properly shut up contentious possession would not create a right in the public, although, if it had not been shut up, contentious possession would be sufficient to preserve the right in the public. All the rights of the public in this road were extinguished by the proceedings in 1815-16, which were quite regular. (2) If the public were aggrieved they had a right of appeal under the statute, which they had not exercised, and could not now avail themselves of.[10]

At advising,—

Lord Ormidale.—The question to be determined in this case is one of some nicety, and not unattended with difficulty. It relates to an alleged public

[1] Wilson v. Henderson, Feb. 28, 1855, 17 D. 534, 27 Scot. Jur. 228; Calder v. Adam, March 2, 1870, 8 Macph. 645, 42 Scot. Jur. 319; Shearer v. Hamilton, Jan. 24, 1871, 9 Macph. 456, 43 Scot. Jur. 218.

[2] Johnston v. Murray's Trustees, March 5, 1862, 24 D. 709, 34 Scot. Jur. 350; Thomson v. Murdoch, May 21, 1862, 24 D. 975, 34 Scot. Jur. 482.

[3] Murray v. Arbuthnot, Nov. 29, 1870, 9 Macph. 198, 43 Scot. Jur. 98.

[4] Calder v. Learmonth, Jan. 27, 1831, 9 Sh. 343, 3 Scot. Jur. 218; Wallace v. Dundee Police Commissioners, March 9, 1875, *ante*, vol. ii. 579, Lord Deas.

[5] Murray v. Stewart, Nov. 14, 1839, 2 D. 12, 12 Scot. Jur. 161.

[6] Forbes v. Morison (Napier's Trustee), July 19, 1851, 13 D. 1404, 23 Scot. Jur. 656; Forbes v. Morison, Dec. 2, 1851, 14 D. 134, 24 Scot. Jur. 52.

[7] Pollok v. Anderson, Dec. 18, 1858, 21 D. 173, 31 Scot. Jur. 101.

[8] Glasgow and Carlisle Road Trustees v. Tennant, Feb. 3, 1854, 16 D. 521, 26 Scot. Jur. 216.

[9] Saunders v. Hunter, Feb. 26, 1830, 8 S. 605, 2 Scot. Jur. 283.

[10] Crawford v. Lennox, July 15, 1852, 14 D. 1029, 24 Scot. Jur. 629.

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right of footpath through the property of Mr Gordon of Newton, in Aberdeenshire, and has been raised in a summary application for interdict presented by Mr Gordon to the Sheriff of that county against the present appellants, to prevent their trespassing on his property. They have resisted Mr Gordon's application on the ground that in place of trespassing on his property they have merely used, as they were entitled to use, a public footpath which passes through his estate.

In support of their pleas the appellants presented a counter petition at their own instance, praying the Sheriff to interdict Mr Gordon and two other persons, farmers on his estate, from obstructing or interfering with the road in question, and this petition was conjoined with that at the instance of Mr Gordon, and a record was made up and closed in the conjoined process.

The Sheriff-principal, reversing the judgment of his Substitute, decided the case in favour of Mr Gordon, by granting the interdict craved by him and dismissing the counter petition. Against that decision the present appeal has been taken.

The plea chiefly relied on by the appellants was to the effect that in respect of their possession of the disputed road or footpath for seven years preceding Mr Gordon's application for interdict against them in the Sheriff Court, they were entitled to the benefit of a possessory judgment, and that beyond the seven years' possession the Sheriff could not competently inquire, it being left to both or either of the parties, if they desired it, to have any larger question tried and determined by instituting the appropriate action for that purpose in the Supreme Court.

As a general proposition, I am not to dispute that, beyond the possessory question, the right to a public way or road cannot be declared and determined in the Sheriff Court. But, in dealing with the possessory question, I take it to be clear that the Sheriff is entitled and bound to ascertain and consider the character of the possession which the party claiming the benefit of a possessory judgment has had; and that, for this purpose, the inquiry before him is not necessarily to be limited to the seven years preceding the institution of the action in which the question is raised. It may very well be that the party in possession, and who has had it for seven years, is entitled, in the absence of proof to the contrary, to have it presumed in his favour that his possession was lawful; but it does not follow from this that the contrary may not be proved to the effect of preventing a possessory judgment going out. So, accordingly, in the present, as in any other disputed right of way case, it is undoubted, and indeed it was not disputed at the debate, that it would be quite competent for the party resisting a possessory judgment to shew that the possession relied on in support of it had been the result of violence, intimidation, or other illegal acts; in short, that in place of it having been of a character to indicate that it took place in the exercise of a right, it was truly in persistence of a wrong.

In other words, to entitle a party to the benefit of a possessory judgment, his seven years' possession must be lawful, and not wrongful. And this principle can be illustrated and supported by various decided cases, some of them relating to roads, as will be afterwards shewn. But, first, let me briefly advert to the more material of the circumstances in which the question has arisen in the present case.

That the seven years' possession on which the appellants rely is of a very meagre and questionable description, can scarcely, I think, be disputed. The

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two last of their witnesses—and they may be taken as a specimen of them all—who speak to the road at all, Mr Patrick Cooper and the appellant M'Kerron, sufficiently shew this. The former states that he cannot positively say whether he had been on the road within the last ten years or not, except on one occasion professionally in connection with the present case. And the appellant M'Kerron says,—"I knew the road in dispute well, and walked it first about ten years ago;" and again,—"Till three years ago I had no difficulty in getting along the pathway, but obstructions were put three years ago in the wood." It is unnecessary, however, to pursue this matter further, as I am willing it should be assumed that on the appellants' proof, looked at by itself, they might be held, in the absence of all counter or rebutting evidence, to have made out such a *prima facie* case of possession as to entitle them to the benefit of a possessory judgment. And in regard to the title, in a technical sense, they required none, it being enough that they are some of the public having a right to use the public roads. In this respect the case is different from that of a servitude road, where no party can have a right to assert the use of it who is not, *prima facie* at least, *in titulo* of a dominant tenement. But to say that a party being one of the public, must have a title to insist on vindicating his right to use a public road, is to use language scarcely appropriate,—certainly not appropriate if by title is understood to be one of property in the technical meaning of that expression.

While, therefore, the appellants might have been entitled in virtue of their seven years' possession to the benefit of a possessory judgment, if nothing had been established on the part of the respondent Mr Gordon to shew that the possession was wrongful, a different result must follow if the appellants' possession has been shewn to have been of that character—to have been, in truth and reality, more of the nature of trespass than of right. That the road in dispute was prior to 1815-16 a public road, not only for foot-passengers, but also for horses and carriages, is unquestionable; but that it was about that time shut up by competent authority appears to me to be equally unquestionable on the facts as they are brought out in the proof, and correctly summarised by the Sheriff-principal in the note to his judgment. And in addition to what the learned Sheriff says on the subject of the shutting up of the road I have to refer to the cases of Crawford v. Lennox, 15th July 1852, 14 D. 1029, and the Glasgow and Carlisle Road Trustees v. Tennant and Others, afterwards cited for another purpose, where it was held that the proceedings of road trustees in shutting up a road cannot *ex intervallo* be objected to as informal and irregular, due notice having been given of them, as was done in the present instance, and no appeal against them taken to the Quarter Sessions, or, as provided for in the present case, to the Sheriff or his Substitute. Even supposing, then, that the proceedings of the road trustees in shutting up the road in question were exposed to the objections as regards their form and regularity urged against them by the appellants, it is clear, on the authority of the two cases referred to, that that would be no good or available objection in the present dispute.

Assuming, then, that the road in question was ordered and authorised by the road trustees to be shut up in 1815-16, and that in point of fact it was about that time shut up, as is, I think, very clearly shewn by the proof, it cannot, I think, be held that the attempts on the part of some persons thereafter to continue the use of it, constantly resisted and objected to as they were, have had the effect either of preserving the road as a public one, as it had previously been, or of constituting ot new a right of way in favour of the public. The

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resistance and objections on the part of Mr Gordon were of too marked and decided a description to admit of that. Without entering into details it is enough to remark that the ground over which the road had passed previous to its being shut up, was immediately or shortly afterwards in one part planted with trees, and in other parts ploughed up and obliterated, while dykes and fences were also erected, and from time to time renewed and kept up for the purpose of keeping out the public. It cannot therefore, I think, be taken from the appellants that the public had by prescriptive possession subsequent to the road being shut up in 1815-16 by the trustees acquired a new right of way for foot-passengers. They certainly had not that peaceable, lawful, and uninterrupted possession which would be necessary to enable them to do so.

If, indeed, the respondent had been unable to shew that there had been any shutting up of the road at all by competent authority, it might be presumed that the use of it by the public had a legal commencement, and it might in that case have been incumbent on Mr Gordon to have instructed, not merely that he had obstructed, but effectually prevented the use of it. But, as the case stands, it is to be presumed that any use there has been of the road by the public since it was shut up was illegal in its commencement, and, having regard to the respondent's resistance ever since, must be held to have been for the whole period downwards, including the seven years upon which the appellants found as giving them a claim to a possessory judgment, also of an illegal character, and so cannot entitle the appellants to the benefit of a possessory judgment. There is ample authority in support of this view. Thus, in the case of Maxwell v. Ferguson, 24th January 1673, Mor. 10,628, it was found in an action for intrusion, in reference to a claim to the benefit of a possessory judgment, that there can be none where the entry to possession, although long anterior to the seven years, was by intrusion. And in the case of the Countess of Dunfermline v. Lord Pitmedden, 15th December 1698, Mor. 10,630, it was held that to acquire the benefit of a possessory judgment there must have been *bona fides* in the beginning of the possession.

These cases, it is true, did not relate to a road or right of way, but that cannot affect the principle itself. So, accordingly, I find it has been applied in road cases. Thus, in the Glasgow and Carlisle Road Trustees v. Tennant and Others, 9th February 1854, 16 D. 521, where in an application for interdict at the instance of the trustees against certain parties who persisted in using a road which had been shut up in virtue of statutory powers, and removing obstructions which had been placed on it by the road trustees, the Court held, notwithstanding the respondents' allegation of immemorial possession, that as the road had been shut up by the trustees in the exercise of their statutory powers, the respondents could not found on their illegal acts of subsequent possession to the effect of entitling them to the benefit of a possessory judgment. And so also in Shearer and Others v. Hamilton, 24th January 1871, 9 Macph. 456, it was held that a road having been shut up, or declared to be shut up, by road trustees under their statutory powers, the public were not, by subsequent seven years' use of it, entitled to a possessory judgment. It is true that in the latter case the road belonged to the road trustees, while here it reverted to the private owner of the *solum* after it had been declared to be shut up, but I cannot see how this can affect the question of possessory judgment. There, as here, it was pleaded by the party claiming the benefit of a possessory judgment that it was enough that as one of the public he had been allowed to use the road

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uninterruptedly for seven years; but the answer to this, that the road had been declared to be shut up by lawful authority, which rendered any subsequent use of it by the public wrongous and illegal, was held to be good and sufficient.

The important point to be deduced from the cases which have been now referred to is, that it was held in them to be quite competent to look beyond the seven years' possession of the public in order to ascertain the character of the possession, or, in other words, to see whether it was lawful or not; and if competent to do so at all, I do not very well see how anything can depend on the number of years that may have elapsed since the road had been shut up, provided always that the subsequent use of it, from its commencement downwards, had been objected to and resisted. That being so, it cannot be said that the use of the road has been lawful, peaceable, and undisturbed; its character having, on the contrary, been wrongful and contentious from the beginning and throughout.

The case of Calder v. Adam, 2d March 1870, 8 Macph. 645, appealed to in the course of the discussion by both parties, brings out, I think, very well the distinction between cases where there has been seven years' uninterrupted possession without anything to shew that it was wrongful, and cases where the wrongful character of the possession has been shewn or offered to be instructed, in answer to a claim to the benefit of a possessory judgment. Thus, in that case Lord Benholme remarked—"It is true that seven years' possession will not always give a possessory title, for the possession may have been precarious or violent, or there may have been some vice in it. Here there is no such peculiarity, and the evidence is conclusive. There can be no doubt that the possession was possession as of a public road." And Lord Neaves concurred, observing that—"It is not every sort of possession that would be enough; and any possession proved might be rebutted or explained away." So I say that in the present case the possession relied upon by the appellants in support of their claim to a possessory judgment has been explained away and rebutted; or, in other words, has been shewn, and this quite competently, without the necessity of resorting to a process of reduction or declarator, which of course could be instituted only in the Supreme Court, to be of an unlawful character, and not such as to entitle the appellants to the benefit of a possessory judgment.

For these reasons, I am of opinion that the judgment of the Sheriff-principal is right, and ought to be affirmed.

Lord Neaves concurred.

Lord Gifford.—After the fullest and most careful consideration, I am sorry to find myself obliged to differ from the view and result now expressed by your Lordships, and although at one time I felt the case to be attended with a good deal of difficulty, I have ultimately come to be clearly of opinion that the respondents, M'Kerron and Others, are entitled to a possessory judgment, and to the continued use of the road in question, until the rights of parties therein are finally determined in an action of declarator or otherwise. I therefore concur in the result reached by the Sheriff-substitute, although not quite upon the same grounds as those upon which he has proceeded.

The question raised in these three separate processes of interdict is a purely possessory question. The Sheriff could only decide what is to be the interim state of possession of the footpath in question until the question of right be

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finally settled elsewhere. The Sheriff could not decide the question of permanent right; he could not determine whether there is or is not a right of footpath as claimed by the respondents, but he could only fix whether the footpath is in the interim to be shut up or not,—that is, whether the petitioner is to exclude the respondents from using the path till they make good their right in a declarator.

In like manner this Court in an appeal from the Sheriff has no greater power or no greater jurisdiction than the Sheriff had. We cannot now decide the question of right, however desirable it might be to do so. Even if we had jurisdiction to determine whether or not there is a right of way (which in this process we have not, for we are merely reviewing the Sheriff's judgment) we have not the materials to decide any such question, for the only proof which has been allowed, or which could have been allowed, by the Sheriff, was a proof of possession,—and of the possessory question alone we are in a position to judge.

In my view, therefore, the only question to be determined is, what has been the state of possession of the footpath in question for the last seven years preceding the present actions, or preceding the dispute which led thereto. Whatever that possession was it must be maintained and continued until the question of right be finally determined; for this is the very meaning of a possessory judgment. It means that the *status quo* shall be maintained *ad interim* until it be finally settled which party is in the permanent right, and hence the question for the Sheriff always is, not whether there exists right of way, but whether there has been a possession of way for the last seven years or not. If there has been possession—uninterrupted possession—for the last seven years, then that possession must be continued until the proprietor, by means of a declarator, shews that there is no right of way, and by this means stops farther possession.

It is true that in determining as to the proof of possession it is competent for the parties, and competent for the Court, to go farther back than seven years,—indeed to go back as far as is necessary. But the object of so going back is not to ascertain the question of right, but merely to ascertain the character of the possession,—that is, to ascertain whether the possessors claimed to possess as matter of right, or whether they did so by special permission or sufferance. If the possession was claimed and enjoyed as of right,—that is, if the possessors asserted a right and enjoyed it for seven years,—then that possession must be continued whether they had really a right or not. It is enough that the public claimed the right and enjoyed it. The Sheriff cannot ask, and cannot decide, whether they were right or wrong in making the claim. To go back beyond the seven years, in order to ascertain whether there actually existed a permanent right or not, would be to obliterate the distinction between a possessory question and a question of permanent heritable right. It would be to make the question of interim possession incidental to the larger question of permanent right, and it would practically give the Sheriff the right, and impose upon him the duty, of deciding the heritable question of right, in order that he might settle the mere question of interim possession. But this would be just inverting the law, and practically denying a possessory judgment, unless the party could establish at the same time a permanent right.

The only question, therefore, is, What has been the state of possession of the footpath in question for seven years preceding the present dispute? Whatever the state of possession has been, that state must be continued till other measures

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are taken, and in another Court than that of the Sheriff. All that the Sheriff has to do is to preserve the *status quo*—to keep matters in their present condition, that is, in the condition in which they have been for seven years, until the matter of right be finally ascertained.

I at first felt, with some of your Lordships, that the proof of possession for the last seven years was somewhat narrow; but on a more careful perusal of the proof, I am satisfied that it is quite sufficient to entitle the appellants to a possessory judgment. Indeed upon this point both the Sheriffs are at one. The Sheriff-substitute expressly finds, and I think he is borne out by the evidence, that the road has remained open and been used as a public footpath, and the Sheriff-principal, while admitting the possession, rests his judgment on the ground that it was "only a possession of a supposed road—a road which a public statute has declared" closed by virtue of proceedings taken sixty years ago. But, in my humble opinion, this is just to decide the question of right, and not to limit himself to a question of possession.

Turning to the evidence, I really can have no doubt that actual possession has been fully proved. Even the witnesses for the respondent, Mr Gordon, fully establish the possession. The tenants of the farms tell us that they could not stop the public, though they tried to do so. They were obliged to leave the path unploughed, otherwise the public would have trodden down the crop. It was in vain to put up fences, for the public always tore them down and passed freely through, and so on, the evidence embracing almost every incident which is available in establishing a right of way. John Jessiman, the existing tenant of North Ledikin, whose steading is close to the path in question, and who has been on the farm since 1823, says that "some people have used the road since 1823, and some have not. It has been in daily use all the time." And he explains that though he and his father tried to stop the people, they never were able to do so. This evidence is abundantly confirmed by the appellants' witnesses, and although it may be true that the number of persons using or requiring to use the road was limited, it seems perfectly clear that, at least by a considerable number of persons, it was claimed and enjoyed as a public footpath. Going back beyond the seven years, the evidence of the possession and its character, at least as a claimed public right, becomes all the clearer. Indeed, it appears that for more than forty years the right has been both asserted and enjoyed.

The only contradictory proof is a proof of complaint and protest on the part of the proprietors of the ground. It seems to be true that they always complained and protested that there was no public right of pathway; but so far from this being in favour of Mr Gordon I think it is very strong evidence against him, for it proves beyond the possibility of dispute the character of the possession—that the possession by the public was possession not by permission, but as a right; that is, the public claimed the right, and took it as their right—took it in spite of the proprietor's complaints and in defiance of his objections, and this is just the kind of possession which makes a public right, and that of the strongest kind. It is a mistake to say that the possession was interrupted. It was not interrupted; it was never stopped; it was merely challenged, and a challenge which is defied and disregarded is so far from being an interruption, that it is the best proof of uninterrupted possession as of right. The proprietor, when he found that his objections were unheeded, and his fences broken, and his fields trampled, should have resorted to interdict forty, or fifty, or sixty

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years ago. Having never done so till now, he cannot complain that in a mere possessory question the possession which the public have hitherto and for so long a period vindicated, or at least actually enjoyed, shall be continued till the matter of right be decided against them.

This is the ground upon which I am of opinion that the Sheriff-substitute's judgment is right, and that the possession of the public, such as it is proved to have been in time past, should be continued until the right to invert it shall be competently established. But one or two questions have been raised and very ably discussed in argument on which I should like to say a single word.

It was keenly and ably maintained that the road was duly and formally shut up in 1815, in virtue of the Act 39 and 40 Geo. III. cap. 32, being the Road Act applicable to the district. Now, I am not satisfied that this was so, or at least that the actual shutting up—I mean the shutting up *via facti*—ever went farther than its shutting up as a road for carriages or carts, and as to this the present appellants raise no question. So far as tolls were concerned, the road trustees had no interest except to secure the carriage traffic upon the new road, and if the proprietor did not take steps effectually to prevent foot-passengers using it, by resorting to interdict if necessary to prevent trespass and breaking of fences, he has himself to blame. But then, as already explained, I think the question as to the shutting up in 1815, and its legal effect, is not a question for the Sheriff or for this Court in actions to regulate interim possession in 1876.

But still farther, I am very clearly of opinion that even although it were absolutely and completely established that the road was well and effectually shut up in 1815, so as to make the *solum* of the road the unburdened property of Mr Gordon and his authors, this would not prevent the public from acquiring a right of way over it or over any other portion of his estate by possession claimed as of right and actually enjoyed for any period of forty years subsequent to 1815.

Sixty years have elapsed since 1815, and possession as of right for forty years constitutes a right of way. Such possession is alleged, and if in a proper action such possession is proved it seems to me to be quite in vain to allege a shutting up by road trustees at any time previous to the commencement of such possession. As well might the proprietor go back 100 years or 500 years,—it would be useless to do so if a right has been acquired during the last forty years. The shut-up road cannot be in a better position than any other part of the estate over which there never was a road at all. The statute cannot do more than give the *solum* to the proprietor unburdened. The proprietor may then do what he likes with it. He might undoubtedly make a grant of public road, and the law declares that forty years' possession as of right is equivalent to a grant. On this ground alone it seems to me unnecessary to inquire whether there was an effectual shutting up or not so far back as 1815.

As to whether there has been possession as of right for forty years or not, of course I give no opinion. That point has not been remitted to probation, and neither in form nor in substance have we any proof on the subject. That question would be the issue in the action of declarator, and it would be for a jury to answer it. But I am free to add, in point of law, that the kind of possession which, if continued for seven years, will warrant a possessory judgment, will, in such cases as the present, if continued for forty years, warrant a judgment affirming the permanent right.

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LORD JUSTICE-CLERK.—I agree with Lord Ormidale.

This is a possessory question, and depends on whether, if the possession proved for the last seven years had existed for forty years, it would have been sufficient in character and amount to establish the right claimed for the public. I do not agree with Lord Gifford that the only question for inquiry in such a case, where the benefit of a possessory judgment is claimed, is what was the actual state of possession, or that the Sheriff can only maintain the *status quo*, however violent or clandestine the possession may be. The possession must be of the character I have stated.

The possession proved in this case has been divided and contested during the seven years in question. The appellants have proved, on the part of the public, a certain amount of continuous use of this line of footpath, but a use opposed, resisted, and obstructed by the proprietor. The respondent, on the other hand, has proved possession of the *solum* of the road as private property by planting, enclosing, and cultivating it, and by acts of direct obstruction, attempted but not successful.

We have not to consider in this case how far such possession, continued for forty years, would have been sufficient to prove the public character of this footpath, without further light in regard to the nature of the mutual possession; for it is certain that in 1815 the road was not only public, but was under the management of the road trustees as a cart-road as well as a foot-road. The question is, whether it was shut up in that year. If it was not, then the respondent could only acquire an immunity from the public right by excluding the public for forty years, and proof by the public of such possession as has been proved in this case, would be amply sufficient to maintain the right. If, on the other hand, it was shut up in that year, then the public could only acquire the right claimed, by the consent, expressed or implied, of the proprietor; and such resistance on his part to the public use of the road, and assertion of his own private right as he has here proved, would be clearly sufficient to exclude any presumption of acquiescence or consent.

Holding, therefore, the question to be whether in the circumstances of this case the possession proved for the possessory period was of such an amount and character as would, if continued for forty years, have established the public right, I am of opinion that this question entirely depends on whether the road was or was not shut up by statutory authority in 1815.

That question we can only consider in its bearing on the possessory right. It is a question on the title, and I regard it only in its *prima facie* aspect, leaving the absolute right to be tried in any appropriate process. But, *prima facie*, I think we must hold that the road was shut up. The original resolution of the trustees was no doubt ambiguously expressed and irregularly entered on the minutes. But it was clearly adopted afterwards. We must give faith to the minutes when they bear that the clerk reported that due advertisement had been made; and as no appeal was taken, and the road was in point of fact shut, as far as it reasonably could be so, I think the burden of establishing the reverse in a declarator is thrown on those who maintain the public right, and that the possessory right must remain with the respondent.

THE COURT pronounced this interlocutor:—"Having heard counsel for the parties on the appeal, find, in point of fact, that in and prior to the year 1815 there existed on the line in question a

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public road for carts and foot-passengers, under the charge of the district road trustees: Find that it appears from the minutes of the trustees that in the year 1815 they resolved to substitute, and did substitute, a new road for that which had previously existed, and that thereupon the trustees resolved that the old road should be shut up, and this, after due advertisement, was done: Find that since that time, and during the last seven years, the respondent has used the *solum* of the road claimed, by planting, enclosing, and cultivating the same: Find that during the same period of seven years the public have used the line in question as a public road, obtaining access thereto by climbing over the fences, or forcing a passage through them, and by walking over the cultivated ground: Find that the possession so proved by the appellants is not sufficient to entitle them to the benefit of a possessory judgment: Therefore dismiss the appeal, affirm the judgment of the Sheriff appealed against, and decern: Find the respondent entitled to expenses, and remit to the Auditor to tax the same and to report."

WEBSTER & WILL, S.S.C.—AULD & MACDONALD, W.S.—Agents.

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Craig v. Peebles.

JAMES CRAIG, Pursuer.—*D.-F. Watson—Lang.*
JOHN KIDD PEEBLES, Defender.—*Balfour—J. P. B. Robertson.*

Reparation—Probable Cause—Relevancy.—A pursuer will not be allowed an issue of malice and want of probable cause when the Court are satisfied from the pursuer's own statements that the defender had probable cause.

Reparation—Public Prosecutor—Probable Cause.—A Justice of Peace Court convicted a person, who held a public house certificate, of selling spirits without a certificate, in respect of his continuing to sell spirits within the licensed premises eight days after they had been rendered uninhabitable by fire. The conviction was afterwards suspended by the Court of Justiciary on the ground that the Justices had mistaken the law.

In an action of damages raised by the suspender against the procurator-fiscal on the ground that he had presented the complaint maliciously and without probable cause, *held* that the above facts, as disclosed in the pursuer's statement, shewed that the case was a fair one for trial, and negatived the pursuer's averment of want of probable cause, and that the defender was entitled to absolvitor.

SEE Craig v. Peebles, June 16, 1875, *ante*, vol. ii., Justiciary Cases, p. 30.

2D DIVISION. Lord Young. I.

This was an action by James Craig, spirit dealer, against John Kidd Peebles, procurator-fiscal at Airdrie, concluding for £500 of damages on account of proceedings taken against the pursuer under the Public-House Acts.

The pursuer set forth in his condescendence that in April 1874 and again in April 1875 he obtained a certificate from the Justices to keep a public-house at West Merryston, in the parish of Old Monkland and county of Lanark, for the sale of spirits, wine, porter, ale, beer, cider, and other exciseable liquors, the first certificate being in force for a year from and after 15th May 1874, and the second for a year from and after 15th May 1875, and that for each year he obtained an excise license.

The condescendence proceeded,—"The house which the pursuer was licensed to keep as a public-house, and in which he was licensed to sell the said spirits, wine, porter, ale, beer, cider, perry, and other exciseable liquors as aforesaid, was in or about the month of May 1875 partially destroyed by fire, during the period for which his certificate granted in April 1874, and license from excise obtained in virtue thereof, were in force." . . . "The pursuer, immediately after the said fire, put the

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said public-house, so far as then possible, into a habitable condition, and resumed his business therein under and in terms of his said license; and after having made an arrangement with the Excise department for leave to carry on the said business in the said premises until the same should be put in a thorough state of repair, or the said stock in hand disposed of." (Cond. 2) "Notwithstanding the said license and the said steps and proceedings taken by the pursuer, and also notwithstanding the fact that the defender was in the full knowledge of the said license, and the said steps and proceedings taken by the pursuer, the pursuer was on 13th May 1875 served with a complaint at the instance of the defender, charging him with 'an offence within the meaning of the "Public-Houses Acts Amendment (Scotland) Act, 1862," section 17th; in so far as on or about the 8th day of May 1875 the said James Craig, defender, did, within the broken walls of an old public-house which was burnt down, situated in West Merryston in the parish of Old Monkland and county of Lanark, unlawfully traffic in whisky or other exciseable liquors, without having obtained a certificate in that behalf in terms of said Act.'" . . . "At the time when this complaint was made the defender well knew that the pursuer was carrying on business in terms of his certificate and license in the said public-house, and that he was legally authorised to do so."

Upon this complaint the pursuer was convicted of the offence libelled, and sentenced to pay a fine of £7, with £2 of expenses, and failing payment to be imprisoned for six weeks.

A suspension having been brought in the Court of Justiciary, the Court on 16th June 1875, suspended the conviction and sentence.[1]

The pursuer alleged;—(Cond. 8) "It was well known to the said defender that the said complaint itself did not charge the pursuer with any offence known to or punishable either by the common law of Scotland or the statutes libelled in the said complaint, and that the pursuer was perfectly innocent of such offence. But notwithstanding, the defender caused him to be tried, convicted, and imprisoned, all as more fully above set forth. The said whole proceedings were undertaken, done, and carried out by the defender from the beginning to the end thereof illegally, wrongously, oppressively, maliciously, without probable cause, and brought by said defender before a Court, which in the circumstances was not empowered or entitled by law to deal with the same, the Justices of the Peace having no power to adjudicate therein by statute or otherwise, the subject-matter whereof fell to be disposed of by the Excise under Act 6 Geo. IV. c. 81, sec. 11, and with the intention and design to injure the pursuer in his moral character, prospects in life, and reputation in his trade."

The pursuer further alleged certain facts tending to instruct malice on the part of the defender both in the course of the proceedings complained of and subsequently.

The pursuer pleaded;—(1) The whole proceedings complained of being wrongous, malicious, oppressive, without probable cause, and *ultra vires* of the said Justices of the Peace Court and of their officials, including the defender, and the same having been suspended, the pursuer is entitled to reparation for the wrong done to him. (2) The pursuer not having been charged with, nor guilty of any crime known to the law of Scotland, and the said conviction having been set aside, the defender, as instituting the said proceedings, and illegally, oppressively, wrongously, and maliciously procuring the pursuer's conviction and imprisonment, is liable in damages to the pursuer.

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[1] *Ante*, vol. ii., Justiciary Cases, p. 30.

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The defender founded on the 30th section of the Summary Procedure Act, 1864, and tendered £5, and the expenses of the present action down to the date of the tender.

The defender pleaded;—(1) The pursuer's statements are not relevant or sufficient in law to support the conclusions of the summons. (3) The proceedings complained of not having been taken by the defender maliciously and without probable cause, but, on the contrary, in the *bona fide* belief that it was his duty to institute and follow forth the said proceedings, and with probable cause, the pursuer cannot in any view recover more than £5 as damages; and, *separatim*, in respect of the tender of £5 of damages, and the expenses of the action to the date of lodging defences, above made, the defender is entitled to put an end to the action, and to have decree of absolvitor upon payment of the said £5 and expenses.

The Lord Ordinary pronounced the following interlocutor:—"Sustains the first plea in law for the defender: Assoilzies him from the conclusions of the action, and decerns: Finds the pursuer liable in expenses," &c.*

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* "OPINION.—This case, although the facts are novel, presents a question of general interest and importance.

"The defender prosecuted the pursuer before the Justices, on the Public-Houses Act, 1862, for selling spirits without a license, and obtained a conviction, which was subsequently set aside by the Court of Justiciary. Neither before the Justices nor in the Court of Justiciary was there any dispute about the facts, and the only controversy regarded the legal question, on which the Court of Justiciary, differing from the Justices, set aside the conviction. The accused party (the pursuer) acknowledged the sale within the specified premises as alleged, and relied in defence upon a current certificate, which undoubtedly applied to the premises at one time. The question was whether the premises having been burnt down to such an extent as to be quite uninhabitable (as they were in fact uninhabited), the certificate remained available to warrant the sale of spirits within the roofless walls. The Justices determined this question in the negative, and imposed the penalty. The Court of Justiciary, having another opinion of the law, quashed the conviction, and ordered the penalty (and expenses) to be repaid.

"The pursuer now sues the fiscal for damages, averring malice and want of probable cause in general terms. It is not alleged that the fiscal misrepresented or withheld any fact from the Justices; that he practised any artifice to mislead or prejudice them; or, in short, that he misconducted himself in any way, or presented the case otherwise than fairly to the consideration of the Justices, on the proved and indeed undisputed facts of it. Nothing capable of being characterised as malicious or without probable cause is imputed to the fiscal, except only the fact of instituting and prosecuting the complaint before a Court of competent jurisdiction. But the only objection to the prosecution is on the legal question which I have noticed, and this question was presented to the Justices upon the true and undisputed facts which raised it, and was decided by them to the best of their judgment. According to this judgment the pursuer had no defence on the facts, and was undoubtedly subject to the penalty which the Justices imposed. The prosecutor was competent, the complaint was relevant, the Court had jurisdiction, the procedure was regular, and the facts were fully and fairly presented by unobjectionable evidence. But the facts raised a novel question of law, which it was the province of the Justices to decide. After the judgment of the Court of Justiciary, it must of course be assumed that they decided it erroneously; but having taken part in the judgment of the Court of Justiciary and concurred in it, I must say for myself that I did not and do not regard the judgment of the Justices as of a character to warrant any strong expressions of disapprobation or surprise. I think the Judges all felt that it was a novel and important question, and we certainly heard a full argument before deciding it. The expression 'probable cause' is not a happy one to use with respect to an opinion or judgment on a question of law, but using it here to

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The pursuer reclaimed, and tendered a condescendence of *res noviter*, setting forth various alleged facts indicating malice on the part of the defender, which he stated had come to his knowledge since the record was closed.

Argued for the pursuer;—The rule in cases like the present was that where the fiscal had acted without warrant the pursuer was not obliged to put malice and want of probable cause in issue, but where the fiscal's proceedings were *ex facie* regular and under cover of law, the pursuer was only entitled to an issue if he undertook to prove malice and want of probable cause. There was no instance of a pursuer being refused an issue altogether, where, as in the present case, he was willing to take an issue with the words "maliciously, and without probable cause." While it was for the Judge to direct the jury as to what facts were necessary to prove

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signify that the view of the law which the fiscal maintained and the Justices upheld was not irrational, and was such as reasonable men in their position (or indeed in any position) might excusably entertain and act upon, I cannot hesitate to say that there was probable cause for it. It was certainly unusual, if not unprecedented, to sell spirits within the bare and roofless walls of a burnt-down house, and I cannot say it was unreasonable to take the opinion of the Justices on the question, whether the certificate continued available, notwithstanding of the change on the character of the premises for which it had been granted.

"I am therefore of opinion that this record presents no relevant case against the defender. I have already observed that no misconduct or unfairness in the management of the case is imputed to him; and notwithstanding the averment of malice, I must decline to entertain the action, in respect there was probable cause for the prosecution. The question of probable cause regards, and can only regard, the matter of law on which the guilt or innocence of the pursuer turned; and this it is, I think, for the Court to decide.

"I attach no significance to the averment that the defender 'knew' the law when he instituted the prosecution; and could not for a moment entertain the proposal to send it for trial by a jury as a question of fact. The Justices decided the point of law in one way, and the High Court in another; and although the Judges of the High Court were unanimous, no one, I suppose, would have greatly wondered had they differed in opinion. It must come to the question of probable cause, in the sense which I have explained, and which itself is a question of law for the Court. Assuming the law to be as decided by the Justices, there was undoubtedly probable cause for the prosecution, for on that assumption the accused was confessedly guilty. I cannot of course make that assumption except for the argument leading to the result which I have reached and dealt with, viz., that want of probable cause can only be alleged and maintained upon the character of the legal error.

"Had the question of probable cause depended on any disputed matter of fact, it would have been improper to decide it without taking the opinion of a jury on the fact, or without inquiry in some form; but it being clear that it entirely depends on the character of the legal error which was committed, I see no room for inquiry, or good reason for sending the case to trial.

"I regard the case as important because of its bearing on the liability of prosecutors to actions of damages for mistaking the law. Regularity of procedure is exacted of them under pain of damages, but a mistake on a point of law, as to which Judges may not unreasonably differ in opinion, is another matter, and to extend their liability to this extent, would, I think, prejudicially interfere with the administration of justice.

"I have only further to observe that sec. 30 of the Summary Procedure Act is in my opinion inapplicable. It relates only to the amount of damages recoverable in cases where malice and want of probable cause are not, as here, essential to liability. In such cases the clause provides that the damages shall not exceed £5, unless the pursuer shall aver and prove that the proceeding inferring liability was taken or done maliciously and without probable cause."

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want of probable cause, it was the province of the jury to determine whether these facts were proved.[1] It was impossible for the Court, without any investigation, to determine that question of fact against the pursuer. [Being asked by the Court where there was any fact stated on record tending to shew want of probable cause, which required to be investigated]—The pursuer undertook to prove that the destruction of his house was only very partial, that the change was not sufficient to give the fiscal probable cause for believing that it operated as a legal disqualification of the house as a licensed house. Even admitting that the existence or non-existence of probable cause was in this case to a large extent a question of law, that point had been raised in the case of Mains v. M'Lullich. The question of probable cause in that case was even more purely a question of law, yet an issue was granted.[2]

Counsel for the defender were not called upon.

LORD JUSTICE-CLERK.—The case which we have here, when divested of the technical and formal words which are set out on record, is this:—This public officer, the procurator-fiscal, presented a complaint against the pursuer of the present action for having contravened the licensing statute, in respect that he had sold spirits in premises for which he had not obtained the statutory certificate. It turned out that the ground on which the complaint was presented was that the house in respect of which the pursuer had obtained a certificate had been partially burnt down. The Justices sustained this as a sufficient ground for preventing the pursuer from selling spirits on the *solum* formerly occupied by the house, and within the broken walls. In a suspension, the Court of Justiciary, looking to the circumstances in which the complaint was presented, the sale complained of having taken place within a week of the fire, and to the fact that the pursuer held a certificate for the house, and that it did not appear that he did not intend to repair the house, held that the conviction could not stand, and that the license did not fall merely in respect of the injury to the premises. The pursuer now brings an action of damages against the fiscal, alleging no doubt in words, malice and want of probable cause. The question is whether he is entitled to an issue. The Lord Ordinary has held that he is not, because, admitting that the fiscal was actuated by malice, of which there is a sufficient allegation, there is no sufficient allegation of want of probable cause, which is also an essential element in such cases.

I am very far from saying that in ordinary circumstances, where an allegation of want of probable cause is necessary, a general allegation to that effect is not sufficient. Although it rests upon the pursuer of such an action to prove want of probable cause, it may be partly proved by the defender's inability to shew probable cause. But it would be of the worst example to allow mere words to become the foundation for a trial, where there is manifestly no substance in the allegation. In cases of alleged fraud the Court has often refused an issue, although the record was plentifully besprinkled with the words "fraud" and "fraudulently," where there was clearly no such statement of facts as would, if proved, amount to fraud. In the circumstances set forth by the present pursuer it is clearly impossible for him to prove want of probable cause. The question whether there was probable cause for presenting the complaint was one

[1] Urquhart v. Dick, June 10, 1865, 3 Macph. 932.

[2] Mains v. M'Lullich, July 9, 1861, 23 D. 1258, 33 Scot. Jur. 632; see also Rae v. Linton, March 20, 1875, *ante*, vol. ii. p. 669.

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partly of law, upon the construction of the licensing statutes, and partly of fact, partly also of legal inference from facts, on which persons, whether skilled or not, might reasonably differ. I was one of the Judges who decided the case in the Court of Justiciary, and I was far from thinking the question one free from doubt. Our judgment turned a good deal on the short time which had elapsed between the occurrence of the fire and the presenting the complaint. If the state of matters had been allowed to continue any length of time it is by no means clear that our judgment might not have been different.

I do not think it necessary to go into the other matters argued, how far want of probable cause is for the Judge to decide, and how far for the jury. I go upon the broad ground that, although the pursuer avers in words that the defender acted "without probable cause," it is manifest from the pursuer's whole statements that there is no substance in these averments.

LORD NEAVES.—I concur. It is important to observe the circumstances in which this action is raised. The suspension in the Court of Justiciary came before your Lordship in the chair, sitting along with Lord Young and myself. We set aside the conviction, but we indicated no opinion that the question raised by the complaint was not a fair one to try. An action of damages is now brought against the procurator-fiscal for bringing this judicial question before a competent tribunal, who decided it in one way, and the ground of the action is that their decision was overturned by another and higher tribunal. It is a rule, necessary for the protection of officials, and, indeed, of litigants in general, that a person instituting regular judicial proceedings is not liable in damages, unless it be averred and proved that he acted maliciously and without probable cause. I agree with your Lordship that upon this case, as disclosed by the pursuer himself, it is impossible that he can make out a case of want of probable cause. The pursuer admits, and was obliged to admit, that very material circumstances founded on in the complaint in question had emerged since he got his certificate. The house was burnt to a very considerable extent, to what precise extent is unnecessary to inquire. It was so damaged and changed in its condition that it became necessary for the pursuer to go to the Excise department for leave to do what it would have been at least doubtful whether he could do without that leave, viz., to be allowed to carry on his business in the premises as in a question with the Excise. This matter of selling spirits, however, is under a twofold jurisdiction, the Excise and the Justices. The Justices took the view that the change in the character of the premises was enough to compel the pursuer to desist from selling exciseable liquors therein until he should put the house in a condition approaching to the condition in which it was when the certificate was granted. That view involved matter of fact and matter of law,—matter of fact whether the house was materially destroyed, and matter of law whether, in consequence of that extent of destruction it was legally rendered unsuitable as a place for selling exciseable liquors.

As a general rule it may be enough for a person suing an action of damages of this kind against a procurator-fiscal to aver that what was done was done maliciously and without probable cause. But want of probable cause may mean want of probable cause in fact or want of probable cause in law. It is plain that the doubt or question here arises on the point of law. The complaint does not say that the house was levelled to the ground. On the contrary, it implies that the walls were still standing. There is nothing in the pursuer's statements

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materially different from this. His conduct in applying to the Excise shews that he considered it doubtful whether he was entitled to go on selling excisable liquors in the premises. The question was whether the pursuer was not bound first to put his premises in repair as a condition of carrying on his trade as in a question with the licensing Justices. In the Court of Justiciary we considered that a cessation of traffic should not be enforced, but we did not say there was no *probabilis causa* for the complaint.

There being, then, no dispute as to the facts, or, at least, there being sufficient undisputed facts to enable us to arrive at a conclusion, we are in a position to negative want of probable cause. The alteration on the state of the building made it not unnatural and not unreasonable for the public prosecutor in the discharge of his duty to try the question, which he did, before a competent tribunal and in competent form, though he did not ultimately succeed. It would be a strong and a harsh thing to say to a procurator-fiscal in such circumstances, that there was not a probable cause where the Justices found there was a good cause. The superior Court having found it insufficient does not infer that it was not probable.

With regard to malice, I do not much differ from the Lord Ordinary's view that if that had been all which it was necessary for the pursuer to aver the allegation is sufficient to allow him to go to trial. But want of probable cause is also essential. I may add, however, that the *animus injuriandi*, if meaning merely a wish to punish a man, who he thinks is breaking the law, is not wrong in a procurator-fiscal, for it is his duty to be a terror to evildoers.

LORD ORMIDALE.—I agree with both your Lordships. The pursuer would require to establish, if the case went to trial, both malice and want of probable cause. The allegations in support of the charge of malice in the record seem to be sufficient. Whether they could be established is a different matter. But in regard to the charge of want of probable cause, I think I am correct in saying that Mr Lang, in his able argument for the pursuer, was unable to point out in the record any substantial or material allegation of facts which requires to be investigated. If, then, nothing in support of want of probable cause is alleged, why should the case go further? In one of the cases cited in argument (Urquhart v. Dick) it seems to have been held that what constitutes probable cause is a question for the Judge, and not the jury, and that that is so cannot, I should think, be disputed, subject always to the remark that it may be for the jury first to ascertain and find the facts where they are disputed. But here, as there are no material facts to be ascertained, the question whether the pursuer acted without probable cause is one which can, and ought to be, determined now and at once by the Court. In short, I entirely concur with the Lord Ordinary when he says that,—"The question of probable cause regards, and can only regard, the matters of law on which the guilt or innocence of the pursuer turned; and this it is, I think, for the Court to decide." I have only to add that, in so deciding it, I have no difficulty in holding that the pursuer's charge against the defender of want of probable cause is untenable.

LORD GIFFORD.—I am of the same opinion. The question whether the prosecutor had or had not "probable cause" for raising and insisting in the proceedings complained of is, in this particular case, a pure question of law. The Lord Ordinary says,—"Neither before the Justices nor in the Court of Justiciary

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was there any dispute about the facts," and the same remark is true in the present litigation. There is no dispute as to the facts, or the material facts, upon which the complaint was rested, and it being admitted that the pursuer, in order to recover damages, must instruct, not only malice, but want of probable cause, the question is, can we not now decide the question of law, whether or not the prosecutor had probable cause for the prosecution? We are in just as good a position to decide this question of law as after a long proof, in which the undisputed facts would be disclosed, and it is highly expedient, if we can as safely and conclusively determine the question of law now, that we should do so, instead of waiting until there has been a jury trial. Now, I agree with your Lordships that, in point of law, the public prosecutor must be held to have had probable cause for raising and insisting in the complaint. The very fact that the inferior Court and the Court of review took different views affords of itself the strongest presumption that the law was doubtful, and that therefore the prosecutor did not proceed without probable cause. His cause was so probable that he actually succeeded in it before the Court of the first instance, and although the Court of review, the Court of Justiciary, held that he was wrong in law and quashed the conviction, this does not in the least shew that he had no probable cause to institute the prosecution. But, apart from this, I am very clearly of opinion, and in this I agree with all your Lordships and with all the Judges of Justiciary who quashed the conviction, that, although ill-founded, the prosecution was brought with probable and reasonable cause, and this by itself excludes the present action of damages.

THE COURT adhered.

ROBERT A. VEITCH, S.S.C.—CHARLES S. TAYLOR, S.S.C.—Agents.

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Feb. 17, 1876.
Dick v. Hutton.

MATTHEW W. DICK, Pursuer and Respondent.—*Asher—Young.*
JOHN HUTTON, Defender and Appellant.—*Rhind—Hunter.*

Proof—Oath of Party—Retractation of Reference.—It is competent for the Court to allow a minute of reference to oath to be withdrawn, but it is a question for the discretion of the Court, and leave will be refused, not only in cases where the party has made the reference from improper motives, but also where, in consequence of the reference (through delay or otherwise), the opposite party has been put to a disadvantage.

1st DIVISION. Sheriff of Mid-Lothian, &c.

M. W. DICK, spirit merchant, Edinburgh, sued John Hutton, Leith, in the Sheriff Court of Mid-Lothian, for payment of £33, advanced by the pursuer on the security and in part discount of a bill for £100, accepted by the defender, and indorsed to and held by the pursuer. The defence was in substance that the pursuer was not an onerous holder of the bill. The Sheriff-substitute (Gebbie), on 16th April 1875, pronounced this interlocutor:—"Finds that the defender can prove only by the writ or oath of the pursuer that he is not an onerous *bona fide* holder of the bill sued on, and allows the defender a proof accordingly."

On 4th May the defender lodged a minute referring the whole cause to the pursuer's oath, which the Sheriff-substitute sustained, and appointed the pursuer to appear and depone on the 21st. On that day, the pursuer being present, the diet was adjourned on the defender's motion till the 28th. On the 28th the defender lodged a minute of retractation of the minute of reference. On 2d June the Sheriff-substitute pronounced this interlocutor:—"Finds it in the circumstances incompetent to withdraw the said reference, and in respect the defender did not desire any other or

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further opportunity for taking the deposition of the pursuer, holds him as confessed, and decerns against the defender, in terms of the conclusions of the libel."

The defender appealed to the Sheriff (Davidson) who on 6th July pronounced this interlocutor:—"Finds that, by interlocutor of 16th April 1875, it was found that the defender can prove that the pursuer is not an onerous *bona fide* holder of the bill sued on only by the writ or oath of the pursuer; that the defender acquiesced in the said judgment, and it is now final; that accordingly he thereafter referred the whole cause to the oath of the pursuer, and the reference was sustained, and two several days were successively appointed for taking the oath of the pursuer, at both of which diets the pursuer attended for the purpose of deponing; that the defender then put in a minute retracting the aforesaid minute of reference, and in respect the defender does not now offer to prove his defence by the oath of the pursuer, or by his writ, repels the defences: Decerns against the defender in terms of the conclusions of the libel: Finds the defender liable in expenses."

The defender appealed to the Court of Session.

He argued;—Although the Sheriff-substitute's interlocutor of 16th April was final in the Sheriff Court, not having been appealed within seven days, it could be reviewed in the Court of Session. The defender, accordingly, maintained that he was entitled to a proof *prout de jure*. But, in the first place, he ought to be allowed to retract his minute of reference. That was always allowed to a party before the oath was emitted, unless some improper motive could be imputed to him,[1] such as that he had made the reference only for the purpose of causing delay. Here there was no colour for such an imputation. In the Act of Sederunt regulating Sheriff Court procedure the right of the party to withdraw a minute of reference was assumed as a matter of course.[2]

The pursuer argued;—It would not be fair to him to re-open this matter after ten months. The defender had his opportunity of appealing against the Sheriff-substitute's interlocutor, but he elected to acquiesce in it, and entered into a judicial contract with the pursuer referring the whole cause to his oath.

LORD PRESIDENT.—The question in this case is whether the appellant should be allowed to withdraw his minute of reference to the pursuer's oath. The result of the authorities is that it is competent to allow a party to withdraw a minute of reference, and it is also in the discretion of the Court to refuse such permission. It depends upon the circumstances of each case, and therefore we must look at the circumstances here.

On 16th April 1875, immediately after the record was closed, the Sheriff-substitute found that the defender could prove only by the writ or oath of the pursuer that he was not an onerous *bona fide* holder of the bill sued on. The action was to recover the balance of the contents of a bill for £100, and the chief defence undoubtedly was that the pursuer was not an onerous *bona fide* holder. Therefore the substance of the case, as regards the mode of proof, was

[1] Chalmers v. Jackson, Feb. 18, 1813, F. C.; Dickson on Evidence, ii. 927, and cases there cited.

[2] A. S., July 10, 1839, sec. 80.—"When any fact has been referred to oath of party, if, before emitting the oath, another means of proof be demanded, it shall not be allowed, except upon the person who made the reference previously paying the expense which the other party has been put to by this change of procedure. . . . . ."

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dealt with by that interlocutor. The defender was entitled to appeal to the Sheriff under sec. 19 of the Sheriff Court Act. I think there is a great deal of force in the view maintained by the defender's counsel that the 16th section must be read along with the 19th, and the result is that the Sheriff-substitute's interlocutor became final if not appealed within seven days, and that it was not brought under the review of the Sheriff by a subsequent appeal on the merits. Accordingly the alternative presented to the defender was quite distinct. He must either dispute the Sheriff-substitute's law or acquiesce in the mode of proof prescribed. If he resolved to dispute the judgment in point of law his only remedy was to appeal at once. If not, he must either undertake to prove the non-onerosity by writing or refer the matter to the pursuer's oath. He did adopt the latter course, and after due consideration—for it was not till more than a fortnight afterwards, on 4th May, that he lodged a minute referring the whole cause to the pursuer's oath. On the same day the Sheriff-substitute sustained the reference, and appointed the pursuer to appear and depone on 21st May. When that day arrived the Sheriff-substitute, on the motion of the defender, and of consent, adjourned the diet till the 28th. On the 28th the Sheriff-substitute was informed that it was the purpose of the defender to withdraw or retract the reference, and accordingly he was allowed to lodge a minute to that effect. But that having been done, the Sheriff-substitute found that it was in the circumstances incompetent to withdraw the reference, and in respect the defender did not desire any further opportunity of taking the pursuer's deposition, held him as confessed. The defender then appealed to the Sheriff, who held, as I think quite rightly, that the interlocutor of 16th April was final in the Sheriff Court; and in respect the defender did not offer to prove his defence by the oath of the pursuer or by his writ, he had nothing for it but to decern.

The defender now comes here by appeal. He desires to get behind all these proceedings, and asks the Court to consider and recall the Sheriff-substitute's interlocutor of 16th April.

But in order to reach this point we have to consider the question of this defender's right to withdraw his minute of reference. The right of a party to withdraw a reference depends not merely on his motives in making the reference but also to a great extent upon the consequences of his having done so. Now, suppose we were satisfied that the Sheriff-substitute had gone wrong and that the defender was entitled to prove by witnesses the non-onerosity of the bill, what would the result be? We should have to recall the whole interlocutors from 16th April downwards, and the case would begin again simply as it stood at the closing of the record. That would be a serious result, placing the payment of the balance of this bill under suspension during all this period. I think that cannot be permitted, and if the defender thinks he will suffer any hardship in the result he has himself entirely to blame for the course he took when the Sheriff-substitute's interlocutor was pronounced. I do not think a party is entitled to redress against his own folly and error at such cost to his opponent. Even if we allowed the pursuer his whole expenses it would not restore him to the position he occupied in April, because he was *then* entitled to decree, unless the non-onerosity was proved by his writ or oath.

In these circumstances we have a case in which we ought not to exercise the discretion of allowing the reference to be retracted. The defender ought not, in my opinion, to be allowed to withdraw from the judicial contract between the parties fixing the evidence on which the case was to be decided.

LORD DEAS, LORD ARDMILLAN, and LORD MURE concurred. No. 75.

THIS interlocutor was pronounced:—"Find that the appellant (defender) is not, in the circumstances of the case, entitled to retract the reference to the oath of the respondent (pursuer), contained in his minute of 4th May 1875; but in respect he now offers to proceed to take the deposition of the respondent on the said reference, appoint Saturday next, the 19th inst., at 12 o'clock noon, as a diet for the respondent to appear and depone on the said reference: Grant commission," &c. Feb. 17, 1876. Dick v. Hutton.

MILLAR, ALLARDICE, ROBSON, & INNES, W.S.—ROBERT MENZIES, S.S.C.—Agents.

WILLIAM GARTH THOMSON AND OTHERS, Pursuers.—*D.-F. Watson—Pearson.* No. 76.
MAGISTRATES OF RUTHERGLEN AND OTHERS, Defenders.—*Balfour—Darling.*

Feb. 17, 1876. Thomson, &c. v. Magistrates of Rutherglen, &c.

Burgh Election—Statute—Casus Improvisus.—The Royal Burghs Reform Act (3 and 4 Will. IV. c. 76), after giving directions for the election in royal burghs of new town-councils in November 1833 by the votes of electors, enacted that upon the first Tuesday in November 1834, and in every succeeding year, "one-third, or a number as near as may be to one third," of the whole council "shall go out of office," and that the third to go out of office in November 1834 should consist of the third who had the smallest number of votes at the election of 1833, and the third who should go out in November 1835 should consist of the third who had the next lowest number of votes at the election of 1833 (the majority of the council always determining, where the votes for any such persons shall have been equal, who shall be the persons to retire), and thereafter the third of the councillors so annually going out of office shall always consist of the councillors who have been longest in office." The Act contained no provision for the case of elections subsequent to 1835, where, in consequence of deaths or resignations in previous years, those longest in office at the end of the year should be less in number than a third of the council, and furnished no criterion for selecting the required number from the class next longest in office.

The Municipal Elections (Scotland) Act, 1870, 33 and 34 Vict. c. 92, dispensed with voting for town-councillors when the number of candidates did not exceed the number of vacancies, and enacted, sec. 5,—"That where in any burgh or ward two or more councillors have been elected on the same day under the provisions of this Act, or have been elected by an equality of votes under the provisions of the Election Acts, the majority of the town-council" "shall determine the order in which the councillors so elected shall retire."

In a question as to the compulsory retirement in 1875 of a town-councillor who had held office for two years only in a burgh where the number of councillors was eighteen, *held* (1) that the retirement annually of six councillors was imperative, although the number of those bound to retire in respect of their being longest in office was less than six, and that the deficiency fell to be made up from the class next longest in office; (2) that the Municipal Elections Act of 1870, in providing for town-councils fixing the order in which councillors should retire only in cases where councillors had been elected on the same day, without being voted for, or "by an equality of votes," had by implication recognised the rule of retirement founded on disparity of votes prescribed by the Royal Burghs Reform Act for the elections of 1834 and 1835 as applicable to subsequent elections; (3) that a vacancy caused by the death or resignation of a councillor who was not one bound to retire at the next annual election could not be reckoned among the vacancies required by the statute.

THE Royal Burgh of Rutherglen had, by the set of the burgh, and the Act 3 and 4 William IV., c. 76, eighteen councillors. By section 16 of the Act,* one-third of this number were required to retire annually. 1ST DIVISION. Lord Young. B.

* 3 and 4 Will. IV., c. 76, sec. 16, enacts,—"That upon the first Tuesday of November 1834, and in every succeeding year, one-third, or a number as near as

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In November 1874 five of the six councillors who had been elected in 1871 retired, John Scouler, who was the sixth, remaining in the council, in consequence of his having been appointed provost in November 1873.* Six new councillors were elected, five to fill the place of the five who retired, and one to fill the vacancy caused by the death of James Wallace, a councillor elected in 1872, who had died during the year 1874, before November.

Between November 1874 and November 1875 William Davidson, one of the councillors elected in 1872, died; also Robert Alexander, one of the councillors elected in 1873, resigned office. Neither of the vacancies thus caused by death and resignation was filled up *ad interim* in terms of the 25th section of the Act 3 and 4 William IV., c. 76.†

In November 1875 the four surviving councillors who had been elected in 1872, and who therefore had been three years in office, retired, John Scouler, who had now been four years in the council, remaining on for another year in virtue of his office as provost. Six new councillors only were elected, four to fill the place of the four councillors retiring, the fifth to fill the vacancy caused by the death of William Davidson, who had been elected in 1872 and had died in 1875, and the sixth to fill the vacancy caused by the resignation of Robert Alexander, who had been elected in 1873.

In November 1875 Robert Hamilton, who was the councillor having the fewest number of votes at election of those who were elected in November 1873, and who therefore had been two years in office, was elected a bailie of the burgh.

To set aside this appointment the present action was raised.

The summons concluded for reduction of the minute of the town-council of 5th November 1875, which set forth the election of Robert

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may be to one-third, of the whole council of each such burgh shall go out of office; and in the said year 1834 the third who shall go out shall consist of the councillors who had the smallest number of votes at the election of councillors in this present year. And in the succeeding year, 1835, the third of the councillors first elected under this Act who shall go out shall consist of the councillors who at such first election under this Act had the next smallest number of votes (the majority of the council always determining, where the votes for any such person shall have been equal, who shall be the persons to retire), and thereafter the third of the councillors so annually going out of office shall always consist of the councillors who have been longest in office, provided always that any councillors so going out of office shall be capable of being immediately re-elected."

* 3 and 4 Will. IV., c. 76, sec. 24, contains a provision "that the provost or chief magistrate, and the treasurer, shall always remain in office for the period of three years."

† Sec. 25 enacts:—"That if any vacancy shall in the course of the year occur in the council or magistracy or office-bearers of any such burgh by death, disability, or resignation, the same shall be filled up *ad interim* by the remaining members of the council by election, as hereinbefore provided, at a meeting to be called on five days' notice by the town-clerk, by intimation in writing to each of such remaining members of the council; but any councillor, magistrate, or office-bearer so elected *ad interim* shall go out of office on the first Tuesday of November next ensuing his election, and the vacancy thereby occurring shall be supplied at the next annual election of councillors and magistrates or office-bearers in such burgh, provided that if the vacancy shall have occurred in any burgh contained in the said schedule (C), such vacancy shall, at such annual election, be supplied by the ward of such burgh, by which the councillor who had died, or resigned, or been disabled, had been elected, and which shall, in this case, elect an additional councillor, unless the party so dying or disabled would then have gone out of office as one of the third hereby directed to retire."

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Hamilton as one of the bailies of the burgh, and for declarator that "the said Robert Hamilton was not duly and lawfully elected a bailie of the burgh of Rutherglen, and that the said Robert Hamilton, prior to the said 5th day of November 1875, had ceased to be a councillor of the said burgh, and that upon the foresaid date of his said pretended election as a bailie he was not then and that he is not at present one of the councillors of the said burgh."

The summons also concluded against Robert Hamilton and the other defenders in terms of the Act 3 and 4 Will. IV. c. 76, for penalties for having wilfully acted in violation of the provisions of that Act.

The pursuers maintained that both in November 1874 and November 1875 one more councillor than those who actually retired should have retired, that a full third of the council should have retired on each of these occasions, and six vacancies have been occasioned over and above the vacancy caused in 1874 by the death of Mr Wallace, and in 1875 by the resignation of Mr Alexander; that as there were not, either in 1874 or 1875 six councillors who had been three years in office, but only five in 1874 and four in 1875, besides Mr Davidson, it fell to the councillor who had fewest votes at election of those who had been two years in office to retire in each case; that in November 1875 Robert Hamilton was the councillor who had fewest votes at election of those who had been two years in office, and that he, therefore, should have retired, and was no longer legally a councillor when he was elected a bailie.

The defenders pleaded;—(4) On a true construction of section 16 of the Act 3 and 4 Will. IV., cap. 76, it is not necessary that more than one-third, or a number as near as may be to one-third, of the whole council of a burgh shall go out of office in each year. (5) There is no warrant in the statutes, or any of them, for compelling a councillor to retire merely because he has been elected by the smallest number of votes of his year. (6) Assuming it to be necessary that there should be a vacancy in the council in order to permit of the provost remaining in office beyond his natural term as a councillor, the magistrates and council are entitled to accept a vacancy caused by death or resignation as sufficient to meet that requirement.

The Lord Ordinary, on 12th January 1876, pronounced this interlocutor:—"Sustains the defences, assoilzies the defenders from the conclusions of the action, and decerns: Finds the pursuers liable in expenses," &c.*

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* "NOTE.—The leading conclusion is for reduction of the defender Robert Hamilton's election as a bailie of the royal burgh of Rutherglen in November 1875, on the ground that he was ineligible, not being a councillor of the burgh. He was elected a councillor in November 1873; and the question whether or not he was a councillor when elected a bailie in November 1875 depends on the soundness or unsoundness of the pursuers' contention that he ought to have gone out of office prior to the election of that year, under section 16 of the Act 3 and 4 William IV., cap. 76. This again depends on the construction of the statute as applicable to the facts averred by the pursuers.

"To take the facts first: These, as averred by the pursuers, and so far as material, appear to be, 1st, that by the set or usage of the burgh the full number of councillors is eighteen; 2d, that Hamilton was duly elected a councillor in November 1873, as one of the six then elected to fill the places of the third of the council who then went out as having been longest in office, he having the smallest number of votes of the six elected; 3d, that Scouler, a councillor elected in November 1871, was in November 1873 elected provost; 4th, that neither in 1874 nor 1875 did a full third of the council go out, under section 16 of the Act, but in 1874 only five, and in 1875 only four. The other facts will be most intelligibly stated after noticing the provisions of the

No. 76. The pursuers reclaimed. At advising,—

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LORD PRESIDENT.—The object of this action is to set aside the proceedings at the election of councillors for the burgh of Rutherglen in November 1875, and

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Act as explanatory of how it happened that six councillors did not go out under the Act in 1874 and 1875, but only five in the one year and four in the other.

"The most important clause of the Act, with reference to the present question, is clause 16, quoted in condescendence 5. It enacts generally that in November 1834, and in every subsequent year, 'one-third, or a number as near as may be to one-third, of the council' of each burgh shall go out of office. In 1834 the selection of councillors to go out was necessarily made from those elected in 1833, for there were no others, except, it may be, persons who had been appointed *ad interim* to fill vacancies under section 25, and who, if there were such, went out under the provisions of that clause. In 1835 the case was, to a certain extent, different; and it is to be observed that only councillors elected in 1833 are required to go out in 1835.

"The criterion in both years is 'number of votes,' the third having the smallest number being appointed to go out in 1834, and the third having the next smallest number being appointed to go out in 1835. There is no provision for the very unlikely, but still possible, event of the number of councillors who had been elected in 1833 being, before the election of 1834 or 1835, reduced by 'death, disability, or resignation,' below one-third of the whole number of councillors, according to the set or usage of the burgh, other than the words 'one-third, or a number as near as may be to one-third.' I should myself think these words sufficient to meet the case, and, had it occurred, I should think that it would have been so held rather than that any deficiency of a full third should be made up of councillors elected in 1834. It is necessary to consider this point in construing the words which I have quoted, which, according to the contention of the pursuers (with which I do not agree), refer only to the case of a burgh in which the whole number of councillors, according to the set or usage, is not exactly divisible by three.

"The part of the clause which has governed the matter since 1835 is in these words:—'And thereafter the third of councillors so annually going out of office shall always consist of the councillors who have been longest in office.'

"Taking the clause as a whole, I think the provision applicable to the first three years may be regarded as of the nature of a temporary expedient necessary to be resorted to, prior to the complete development in operation of the scheme of the Act, which scheme is, I think, clearly that every councillor shall have three years of office and no more, the machinery by which this is secured being, that in every year after 1835 'one-third, or a number as near as may be to one-third of the whole council,' and which 'shall always consist of the councillors who have been longest in office,' shall go out.

"After the scheme of the Act came into full operation, on the expiry of the first three years, the comparative number of votes by which any councillor was originally elected is no criterion for going out. This criterion, which is by the Act limited to councillors elected in 1833, has no application to councillors subsequently elected, for there is no rule of the common law that I know of which would warrant the Court in resorting to it.

"The next important clause of the Act is the 24th, which enacts that a provost or treasurer 'shall always remain in office for the period of three years.' This is in truth a qualification of section 16, for the admitted effect of it is to extend the duration of the office of councillor in the case of any person who may be elected provost or treasurer in his second or third year.

"Accordingly, Mr Scouler (a councillor elected in 1871) being elected provost in November 1873, his term of office as councillor was lengthened by two years, in terms of the foresaid statute, beyond 2d November 1874, at which date, had he not been elected provost, he would have fallen to retire' (condescendence 12).

"But the pursuers, while thus admitting that Mr Scouler was not required to go out in November 1874, although he was then one of the six councillors

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the election of Mr Robert Hamilton as a bailie of the burgh following upon that election of councillors, and to have it declared that Mr Hamilton was not (a full third of the council), who had been longest in office, contend that the full third ought to have been made up by putting out in his stead a councillor elected in 1872, and who was therefore not of those 'who have been longest in office,' and, in the absence of any other criterion of selection, suggest that of number of votes which had been enacted as the criterion for the elections of 1834 and 1835. The pursuers do not indeed seek any remedy for what was done in 1874, but only refer to it as an irregularity, and as 'the beginning of the system against which the pursuers have protested' (condescendence 14). In my opinion there was no irregularity. I think not only that the provost properly remained in the council, but that the statute was satisfied by the going out of the five councillors who were elected at the same time with him (November 1871), and were the whole councillors who had been longest in office, although less by one than a third of the council, that one being enabled to remain by section 24, which to this extent qualifies section 16.

"The point is only unnecessarily confused by referring to the death of Mr Wallace before November 1874. If his death occurred long before November the council may have erred in not making an interim appointment. But his place was filled at the election in November, just as it must have been had there been an interim appointment, and his death in no way affects the present question. The resignation of Mr Alexander before November 1875 (he having been elected in 1873) is an equally uninteresting and unimportant incident, and I pass it by accordingly.

"The pursuers' case really turns on the election of 1875—the question being whether or not the defender, Robert Hamilton (who was elected in November 1873), ought then to have gone out under section 16 of the Act.

"Now, leaving out of view the case of the provost (elected councillor in 1871), the councillors who had been longest in office were those (six in number) who had been elected in November 1872, and whose names are given in condescendence 10. Had these councillors all been alive and in office in November 1875 it is clear that they must all have gone out under section 16 of the Act. But two of them died before November 1875, that is, between November 1874 and November 1875. There were, therefore, only four in life to go out under the Act, and they went out. The other two having gone out by death, the question is, whether their turn to go out, under the Act, ought to have been supplied by selecting (on the criterion of number of votes) councillors who had been elected in 1873, and who were therefore not of the number of the council who had been longest in office. If my conception of the case and of the Act of Parliament is not fundamentally erroneous, the pursuers' contention here is so obviously untenable that I should waste words and consume time unprofitably by arguing the matter at large. Clause 25 was especially relied on in argument by the pursuers' counsel, but why, he failed to convey to my mind. In the case of death or disability the clause distinguishes between the case of a party who would at the next election have gone out under the Act and one who would not,—but to this extent only, that the person elected in room of the dead or disabled councillor shall in the latter case be elected as 'an additional councillor,' and in the other not. The language is inaccurate, but the meaning, which need hardly be expressed, is simply this, that where the party dying, resigning, or disabled, would not have gone out under the Act prior to the election of his successor, the election of his successor shall be deemed the election of an additional councillor—*i.e.*, additional to those required to fill vacancies caused by councillors going out under the Act, but, if otherwise, that no councillor shall be elected 'additional' to those required by such going out; or, in other words, that the circumstance of the going out of a councillor being anticipated by his death or resignation before the election shall make no difference with respect to the rights of his constituents to elect a successor.

"I have already sufficiently indicated my opinion that the death or resignation of a councillor not of the number of those who, as having been longest in

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lawfully elected a bailie, and that, prior to the date of his pretended election as bailie, he had ceased to be one of the councillors of the burgh.

The whole question turns on the regularity of the election of councillors in November 1875. There has been a good deal of reference back to the proceedings at the election of 1874, but it appears to me that we have nothing to do with them in dealing with the case.

The burgh of Rutherglen had by the set of the burgh eighteen councillors, and this number was not altered but confirmed by the Act 3 and 4 Will. IV. c. 76. After providing for the first election of councillors, which was to take place in 1833, the statute enacts that a certain portion of the councillors shall go out of office in each subsequent year, and their place be filled by election. It provides specially in section 16 for the first two years after the Act came into force, viz., 1834 and 1835, and then it provides generally that in every succeeding year one-third, or a number as near as may be to one-third, of the whole council shall go out of office. Now, the number of councillors in this particular burgh being eighteen, the practical application of this rule in the present case is that six councillors go out yearly and six new ones are elected in their place. Accordingly, we find that in the three years, 1871, 1872, and 1873, that course was precisely followed—six councillors went out and six were elected. But in 1874, when the time for the election came round, it turned out that, in the interval between that and the previous election, a gentleman had been elected provost who would have been one of the six to go out in November 1874. Now, the 24th section of the statute provides that the provost shall always remain in office for the period of three years, and that has been construed by universal practice, and very reasonably so, to mean that the provost is to have three years' tenure of office after his appointment to that particular office, irrespective of the date at which he was elected to the council and of the date at which he should have gone out of the council. Conse-

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office, are required to go out in the following November, is immaterial to the question. The place of such a councillor dying or resigning must, whether or not it shall have been filled by an interim appointment, be supplied by a new election in the following November, under section 25 of the Act, without reference to section 16. But the death or resignation of a councillor who, had he not died or resigned, would have gone out, under section 16, in the following November, is another matter. In that case also, an interim appointment may be made, but whether made or not, there is only one place to be filled when the November election arrives—thus, when in November 1875 it appeared that of the six councillors who, had they all lived, would have gone out, two were dead, I am very clearly of opinion that the vacancies to be filled were not raised to eight, but remained at six. Upon this view the election of 1875 proceeded. Six councillors were then elected in room of the six who had been elected in 1872, and who were then all removed from the council, two of them by death immediately before the election, and the remaining four by going out under section 16 of the Act. The case would not have been varied (although the pursuers seem to think otherwise) had the places vacated by death been supplied by interim appointments.

"The primary conclusion thus failing, the subsidiary conclusion must fail also. I must say, however, that in my opinion the subsidiary conclusion must fail in any view—there being no ground whatever that I can see for attributing to the defenders a wilful violation of the Act. My opinion that they have acted in accordance with the Act would probably be an answer to the imputation of wilful violation, even in the judgment of those who may think that I and they are in error."

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quently, Mr Scouler, the gentleman who was elected provost in November 1873, must remain in the council till November 1876. He had been elected to the council in November 1871, and therefore, in the ordinary course of events, he would have been one of the six councillors who fell to go out in November 1874, but, having been elected provost, he remained in, and, instead of six, only five councillors went out in November 1874. It was contended for the pursuers that another councillor ought to have gone out in his place. On the other hand, it was maintained for the defenders that the effect of the clause was simply this, that when the period arrived at which the provost ought to have gone out, one fewer than the usual number of councillors fell to go out, and one fewer to be elected.

This question was pressed upon our attention in the argument as being at the root of the irregularities alleged, but I really do not think that it is necessary to determine it, for whether the pursuers are right or wrong in their contention on this point, and whether the election of 1874 was regular and valid, or irregular and invalid, does not affect the validity of the election of 1875.

In 1874, as matter of fact, the defenders' construction of the statute was adopted, and five of the council went out instead of six. I give no opinion on the validity of the consequent election, but, for the purpose of deciding the case before us, I assume that the election of 1874 was in regular course. Now, in November 1875, the councillors who would naturally fall to go out were those elected in 1872, and if there had been six elected in 1872 still in the council, no difficulty would have arisen. But that was not the fact. The state of the facts was this, that of six who had been elected in 1872, one, a Mr Wallace, had died in 1874, and before November of that year, and another, Mr Davidson, had died in 1875, and before November of that year. Now, it appears to me that, according to the true construction of the statute, the gentleman who died in 1875 fell to be counted as one of the councillors going out of office in that year, just as if he had survived until November; but, on the other hand, that the gentleman who died in 1874 cannot be counted as one of those going out in November 1875, though his three years of office would have expired then if he had survived. I can find nothing to the contrary in the statute. For when he died in 1874 his place fell to be filled up, and was filled up, in November 1874, in addition to those of the five retiring councillors; and therefore it is impossible that he can be counted as one of those going out in 1875. His place was already filled up by a councillor, who was entitled to retain office until 1877.

The view which the Lord Ordinary has taken as to the election of 1875 is perfectly logical, and his reasoning would be irresistible, but unfortunately he has proceeded upon an error in fact, which vitiates his judgment, in not distinguishing between these two death vacancies. He takes them as both occurring in 1875, and draws his legal conclusion accordingly.

Now, this brings the matter to a very simple issue. Was it necessary or was it not, that six councillors should go out in November 1875, or was the statute satisfied with only five? To determine this question it is necessary to give particular consideration to the 16th clause, which provides for the retirement of councillors. It says,—"That upon the first Tuesday in November 1834, and in every succeeding year, one-third, or a number as near as may be to one-third, of the whole council" shall go out of office; and it is contended for the defenders that the meaning of these words, "a number as near as may be to one-third," is, that if there are not as many as one-third of the council who have been three years in office, you must take as nearly one-third as there are councillors who have

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been three years in office. Now, I cannot adopt that construction. No doubt the normal condition of the council, as contended for by the defenders, is this, that every member should have three years of office, and no member more than three years of office. But it is quite impossible in practice that that position of affairs should be maintained. It may happen that of those elected, say in 1872, not one remains in office in 1875, and yet the statute provides that one-third of the council shall go out in each year. According to the defenders' contention, there would be no one to go out then at all. That, certainly, cannot be the true construction of the statute, for it would leave the council unchanged for a whole year. But without going the length of supposing that all those elected in any one year have disappeared before their three years have elapsed, we may at least suppose that some two or three of them have done so. There would then remain only three or four to go out. Now, could three or four out of six be brought under the terms of the statute as "one-third, or a number as nearly as may be to one-third?" Moreover, it is just as clear that you will have, at some subsequent election, a much larger number than one-third who have been three years in office. For if at one election you have only two or three to go out, you will find a corresponding surplus in some following year; and so, instead of one-third to go out, you will have three or four more than one-third who would, according to the theory of the defenders, all have to go out at once. Therefore it is, I think, plain that this theory of the normal condition of the council cannot be perfectly carried out. It is impossible to arrange so that every councillor shall have three years of office, neither more nor less. Then, if you have more than one-third who have been three years in office, you must select who is to go out and who to remain. One way in which the difficulty might be avoided is this, namely, to hold that, when any councillor dies or retires during the currency of his term of office, the person elected in his stead only comes in to serve out his period of office. If that were acted upon it would obviate any difficulty. But that view has been authoritatively negatived in the case of Scott v. the Magistrates of Edinburgh,[1] and that decision has been acted on ever since, and it is impossible to go back upon it. It seems to me, therefore, that when the statute talks of one-third, or as near as may be to one-third, what it means is this, one-third, or as near to one-third as the number of councillors fixed by the set of the burgh permits. If the number is, as here, divisible by three, there is no alternative but that one-third must go out each year.

That being so, the proceedings at the election of councillors in November 1875 was plainly irregular. Only five went out, including Mr Davidson, who died in that year. It is true six new councillors were made, but one was elected to supply a vacancy caused by the resignation, in the course of the year 1875, of Mr Alexander, a councillor who had not been elected in 1872, and whose place, therefore, required to be supplied, in terms of the 25th section of the Act 3 and 4 Will. IV. c. 76, over and above those of the one-third retiring in ordinary rotation. The proceedings at the election of November 1875 were therefore irregular, as one more councillor ought to have gone out, and one more to have been elected.

But then the pursuers have also to make out that the councillor who ought to have gone out was Mr Hamilton. That is the very basis of the whole action. Now, that raises a question, to my mind, of much greater difficulty than the

[1] Dec. 21, 1838, 1 D. 347, 11 Scot. Jur. 239.

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other. It is a question of construction of the statute, and, if it were not that we are aided by light from subsequent legislation, I should have had great difficulty in sustaining the contention of the pursuers.

The 16th section of the statute provided that in 1834 (the first year after the Act came into operation) the third to go out should "consist of the councillors who had the smallest number of votes at the election of councillors" in 1833. And, farther, that in the following year (1835) "the third of the councillors first elected under the Act who shall go out shall consist of the councillors who, at such first election under this Act, had the next smallest number of votes, the majority of the council always determining, where the votes for any such person shall have been equal, who shall be the person to retire;" and thereafter, that is, in 1836 and subsequent years, "the third of the councillors so annually going out of office shall always consist of the councillors who have been longest in office." Now, all this is plain enough so far. At the second election, in 1834, the one-third going out were those who had the smallest number of votes at the first election in 1833. At the third election, in 1835, the one-third going out were those who had the next smallest number of votes at the first election in 1833. Then, if everything kept its normal course, according to the defenders' theory, it would follow that in 1836 the remaining one-third would go out. But that is not what the statute provides. It includes the remaining one-third in its general provision for the future, that "the one-third so annually going out of office shall consist of the councillors who have been longest in office." Now, it might very well happen that in 1836 the remaining one-third of those elected in 1833 were no longer all in office. Deaths or resignations might have occurred which could not be counted as equivalent to going out of office in 1836. Supposing that to have been the state of matters in 1836, what would have been the proper course to take then? If only three remained to go out of the six who had been elected in 1833, where would you have found the other three? Evidently they could only be found in the remainder of the council who had not been so long as three years in office. The question is, how are you to select among them who are to be, so to speak, the victims? Nothing is suggested in the statute as a criterion, except the number of votes at election. And yet, in the statute itself, that criterion is expressly applied only in the case of the elections of 1834 and 1835, and nothing is said about it with reference to any future year. But it is argued that the terms of the statute are "the third of the councillors so going out," and that the word "so" implies that the mode of selecting who shall go out, if selection is necessary, shall be as provided with reference to the years 1834 and 1835, in accordance with the number of votes.

Now, I should have had great difficulty in adopting that interpretation if it were not for subsequent legislation. But the statute passed in 1870 (33 and 34 Vict. c. 92), to amend the law as to municipal elections, throws light on the subject. It must be kept in view, in the first place, that under the Act 3 and 4 Will. IV. c. 76, no one could be elected without being voted for, either by means of signed lists or by a poll being taken. Even where there was no contest the councillors elected still came into office with a certain number of votes. The intermediate statute (the Municipal Elections (Scotland) Act, 1868 (31 and 32 Vict. c. 108) can hardly be said to touch the question, except that it provides for notice being given of the names of those who are to be put in nomination. But the Act of 1870, by section 3, makes a provision that when the number of persons nominated does not exceed the number of vacancies to be

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filled up there is to be no poll, and the persons nominated are simply to be declared duly elected. Consequently, in such cases there will be no voting, and the persons thus elected will come in, not in virtue of the votes they have received, but by reason of there being no opposition. This being a novel situation in the history of municipal elections, it is provided for by section 5 of the Act, which declares "that, where in any burgh or ward two or more councillors have been elected on the same day under the provisions of this Act, or have been elected by an equality of votes under the provisions of the Election Acts, the majority of the town-council (including the councillors so elected) shall determine the order in which the councillors so elected shall retire." Now, that is a very important enactment in reference to the matter before us, because it assumes, in the first place, that persons elected on the same day may go out at different times; and, in the second place, that if the persons so elected on the same day came in with unequal votes there is no difficulty as to the order in which they shall go out. For it is only in the case of no contest or of equality of votes that the majority of the council is to determine. Suppose, for instance, that of two councillors elected in November 1873 one had a larger number of votes than the other, and one is wanted to retire in 1875 to make up the proper number of retiring councillors, the section does not provide for that case, because it plainly assumes that it is provided for already. Where, therefore, there has been an election by votes, and the number of votes by which the different councillors have been elected is unequal, then the test of number of votes is the test to be applied to determine the order in which they are to retire.

I come, therefore, to the conclusion that section 16 of the Act 3 and 4 Will. IV. c. 76, is to receive this effect, that where, as in the present case, there is not a sufficient number of councillors three years in office to constitute the one-third of the council to go out, you must make up the deficiency by selecting from the next younger class of councillors; and that the principle of selection is to be this, that you are to take the member or members from that younger class who had the smallest number of votes, and, in a case of equality of votes or no contest, if only one is wanted, the majority of the council are to decide.

Applying this to the present case, it follows that the defender, Mr Hamilton, being of that younger class—that is, of those who were elected in 1873—the one who had the smallest number of votes, was the one who ought to have gone out; and, therefore, I am prepared to grant decree of reduction and declarator in favour of the pursuers, the conclusion for statutory penalties having been abandoned.

Lord Deas, Lord Ardmillan, and Lord Mure concurred.

The Court pronounced this interlocutor:—"Recall the said interlocutor: Reduce, decern, and declare, in terms of the reductive conclusions of the summons: Farther, find and declare that the defender, Robert Hamilton, had ceased to be a member of the town-council of Rutherglen prior to 5th November 1875, and was therefore on the said 5th November 1875 ineligible to the office of a bailie of the said burgh, and was not lawfully and duly elected a bailie of the said burgh, and decern: Further, decern and ordain the said Robert Hamilton to desist and cease from exercising any of the functions of a bailie or of a councillor of the said burgh: *Quoad ultra* of consent assoilzie the defenders, and decern: Find the pursuers entitled to expenses of process," &c.

Dewar & Deas, W.S.—J. & R. D. Ross, W.S.—Agents.

JOHN CHALMERS, Pursuer.—*Asher—Strachan.*
WILLIAM DIXON (Limited), Defenders.—*Trayner—J. P. B. Robertson.*

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Reparation—Culpa—Opus Manufactum—Nuisance.—A company of iron-masters in the course of their trade accummulated on their premises an enormous bing of refuse from an ironstone pit, composed of combustible materials, which, from some unexplained cause, took fire. In an action by a neighbouring farmer against the ironmasters to recover damages for injury caused by noxious vapours emitted from the burning bing, *held* (1) that the defenders by forming such an *opus manufactum* had rendered themselves liable for the consequences without proof of specific fault; and (2) that fault had been proved.

2D DIVISION
Ld. Craighill
I.

THIS action was raised on 2d February 1875 by John Chalmers, tenant of the farm of Heads, in the parish of Whitburn and county of Linlithgow, against William Dixon (Limited), iron-masters.

The defenders had for many years previous to the raising of this action been engaged in calcining ironstone at their pits at Fauldhouse, in the county of Linlithgow.

The pursuer alleged;—"In the course of these operations they have improperly and illegally accumulated in the neighbourhood of the pits an immense bing of blaes, or of other waste material drawn from their pits. The materials composing this bing are very inflammable, and through the carelessness and fault of the defenders, or of those for whom they are responsible, it was set on fire in the course of the year 1872, and has since been burning, and will continue to burn for a long time to come. The defenders made no attempt to extinguish the fire when the bing was first ignited."

He stated that whenever the wind was from the south-west, the prevailing current in that district, noxious smoke and vapours given out by the burning bing reached his farm of Heads, which was about a mile off, and were a cause of discomfort and ill-health to himself and his family, as well as of serious injury to his crops. The conclusions of the summons were for damages and interdict against a repetition of the nuisance.

The pursuer pleaded;—The pursuer having suffered loss, injury, and damage by and through the wrongful, illegal, and injurious acts of the defenders condescended on, is entitled to reparation as concluded for.

The defenders stated that they had followed the universal practice of iron-masters in depositing the waste material of their pits in bings, and that the bing in question had been formed in precisely the same way as the other bings, of which there were many, of the like material in the district; that the bing had ignited spontaneously, and although every effort was made to extinguish the fire these efforts had been unsuccessful, and that, although they had consulted an analytical chemist, no means were known to them whereby they could accomplish that end.

The defenders pleaded;—(1) The pursuer's statement is irrelevant, and insufficient in law to support the conclusions of the summons. (2) The igniting of the bing of blaes and refuse foresaid, and the smoke and gases emitted therefrom, and the alleged nuisance and injury to the pursuer caused thereby, not having been caused through the fault of the defenders, they are entitled to absolvitor. (4) It being impossible to extinguish or stop the burning of the bing of blaes foresaid, any interdict granted against it would be inept.

A proof was allowed, from which it appeared that the existence of fire in the bing was certainly known to the defenders' manager in September 1872, if not earlier. It was proved that the defenders' workmen were in the habit of depositing ashes from a furnace on the bing, and on one occasion before the fire broke out, though the witnesses could not speak to the date, ashes were thrown upon the bing so hot that the end

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of the hutch in which they were carried was burned out. When the bing, however, came to be examined, nothing in the surface was found to be marked with fire, and a great body of scientific evidence was led to prove that the ignition of the bing must have been caused by internal heat generated by the excessive wet of the summer of 1872. The firing of such bings from spontaneous combustion was proved to be a very rare occurrence, although there were one or two other instances that year in the district of bings having taken fire without any known external cause. The defenders' scientific witnesses all stated that in their opinion no ordinary prudence or foresight could have anticipated the burning of the bing from the causes to which they attributed it.

Nothing was done by the defenders to extinguish the fire till the beginning of 1873. By that time complaints had been made by the workmen and others of the nuisance created by the burning bing. The defenders, accordingly, attempted to extinguish the fire by pumping large quantities of water upon it. By this time, however, the fire had taken such hold of the bing that the water had no effect. After pumping for about six weeks the defenders, in March 1873, consulted Mr Robert Tatlock, F.R.S.E., who stopped the pouring of the water upon the heap, as rather aggravating the combustion, but was not able to suggest any feasible means of extinguishing the fire; and he and other witnesses for the defenders considered that it would not have been possible to put out the fire, even if this had been attempted at an earlier period, or if put out for the time, it would, in their opinion, have broken out again.

The Lord Ordinary, on 27th July 1875, pronounced an interlocutor, which, after detailed findings in fact, to the effect that the pursuer had suffered injury and discomfort from the burning bing to an extent for which £200 was a reasonable solatium, and that the bing took fire from spontaneous combustion, proceeded:—"Lastly, Finds, as matters of fact, that (9) The defenders were in fault in putting down the bing in question upon mossy ground, and in making it of a size unusually great, at an increased risk of fire from spontaneous combustion; and, *separatim*, in not employing means immediately after the ignition was discovered by which the fire might have been extinguished: Finds, as matter of law, that the facts being as above set forth, the defenders are liable in the damage suffered as aforesaid by the pursuer: Therefore, repels the defences; and decerns the defenders to make payment to the pursuer of the sum of £200 sterling, in terms of the first conclusion of the summons: *Quoad ultra*, in respect that the conclusion for interdict is not now insisted in by the pursuer, assoilzies the defenders from that conclusion of the summons, and decerns: Finds the defenders liable in expenses," &c.*

* NOTE.—(After an examination of the evidence)— . . . "The defenders were dealing with materials more or less dangerous. They were bound to know the extent of the danger, and the counteractive precautions which ought to be adopted, as the interest of others were concerned; and having acted in such a way as to aggravate the danger, and by so doing produced the results in which the present action has originated, they, in the opinion of the Lord Ordinary, are answerable for the consequences of the faults which have been committed.

"Numerous decisions, it may here be mentioned, were cited by counsel at the debate upon this question of fault; among which were Keith v. Keir, June 10, 1812, F. C.; Rankine v. Dixon & Company, March 19, 1847, 9 D. 1048; Kerr v. Orkney, Dec. 17, 1857, 20 D. 298; Tennent v. Glasgow (H. of L.), 2 Macph. p. 22; and Mackintosh v. Mackintosh, July 15, 1864, 2 Macph. 1357. All of these, as well as the comments upon them, have been considered by the Lord Ordinary; and the only other explanation which appears to him to be necessary is, that if the faults imputed to the defenders in this action are as have been

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The defenders reclaimed.

Argued for them;—If a person exercised an undoubted legal right, and damage was thereby caused to another, it was not to be taken for granted that he was responsible, but it was necessary that the party complaining should prove negligence or *culpa*.[1] The erection of the bing in question was not only a perfectly lawful use of the defenders' premises, but it was an ordinary and necessary part of the conduct of their trade. There was no allegation and no proof that they had neglected any precautions. The occurrence of the fire was shewn to be an unforeseen event, for which the defenders could not be made liable, except upon the theory that a man carrying on a lawful operation within his own premises was bound to insure his neighbours against any incidental injury, a theory which had no place in the law of Scotland.[2]

Argued for the pursuer;—The defenders had erected an *opus manufactum*, a vast mass of inflammable materials, which were foreign to the surface of the ground, and they were therefore bound to make good any damage resulting therefrom, even though no specific fault could be brought home to them.[3] But if *culpa* was necessary to make the defenders liable, *culpa* had been abundantly proved.

LORD JUSTICE-CLERK.—I am very clearly of opinion that the result at which the Lord Ordinary has arrived is correct, though I am not sure that I proceed exactly on the same grounds which weighed with his Lordship.

The admitted facts of the case are that the defenders erected upon their own ground an *opus manufactum*, composed of combustible materials. It is also proved that, if these materials did take fire "they emitted noxious vapours." Either by spontaneous combustion, or by the application of fire from without, this heap of blaes did take fire. It has gone on burning and giving out noxious vapours for three years, and it appears that it cannot be put out, and must go on burning till the fire is spent.

The question is, whether the defenders were entitled to put upon their lands a heap of refuse of this quality. If this had been the normal operation of the materials, which, without ignition were certain to give out noxious vapours, it would be quite unnecessary to prove negligence. The defenders might have been interdicted from making the erection at all. But it is said that the materials are only capable of creating damage under certain circumstances. The question thus arises, whether a man who conducts an operation on his own premises, lawful in itself, but which has a tendency to injure his neighbour, is liable for any injurious results, unless specific fault be alleged and proved.

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found, none of the cases referred to is at variance with the conclusion which has been adopted.

"These views of the case, if sound, are sufficient; but there is another ground of liability which the Lord Ordinary has introduced as a separate ground of judgment. . . . . The Lord Ordinary has come to the conclusion that the defenders must be held to be in fault in not having used means calculated to extinguish the fire, and that the fault is such as renders them answerable for the consequences, so far as these have injured the pursuer."

[1] Per Lord Justice-Clerk (Inglis) in Mackintosh v. Mackintosh, July 15, 1864, 2 Macph. 1357, 36 Scot. Jur. 678.

[2] Tennent v. Earl of Glasgow, March 3, 1864, 2 Macph. H. L. 22, 36 Scot. Jur. 400; Laurent v. Lord Advocate, March 6, 1869, 7 Macph. 607, 41 Scot. Jur. 329.

[3] Kerr v. Earl of Orkney, Dec. 17, 1857, 20 D. 298, 30 Scot. Jur. 158; Rylands v. Fletcher, July 1868, L. R., 3 E. and I. App. 330.

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I think the answer to this is to be found in the distinction between the ordinary uses of property, to which a neighbour is bound to submit, although they may cause incidental injury to him, and the construction of an *opus manufactum*, the bringing an article upon the land which creates a hazard which did not exist before. That distinction enables us both to reconcile the decisions and to arrive at a satisfactory result in this case.

The present case is a strong illustration of the distinction. The material which caused damage was entirely foreign to the surface of the land.

Such *opera manufacta* are only lawful where injury does not happen to the neighbours. This was laid down very clearly in Rylands v. Fletcher, L. R., 3 E. and I. App., 330. The owner of a mill constructed a reservoir on his own land. The water found its way through disused passages of old mines into the mineral workings of a neighbour. Now, the construction of the reservoir in that case was a use of the subject lawful in itself, but it was not the ordinary use of the land. It was the creation of a hazard which did not exist before, and it was accordingly held that it was only lawful so long as the neighbour was not injured. The case of Kerr v. Earl of Orkney was very similar. It was held that the duty of a person who constructs a dam upon his land is not merely to use all precautions, but absolutely to prevent the water escaping to the injury of his neighbour.

A good deal has been said as to the necessity of proving *culpa*. I think that *culpa* does lie at the root of the matter. If a man puts upon his land a new combination of materials, which he knows, or ought to know, are of a dangerous nature, then either due care will prevent injury, in which case he is liable if injury occurs for not taking that due care, or else no precautions will prevent injury, in which case he is liable for his original act in placing the materials upon the ground.

The case of Mackintosh v. Mackintosh, 2 Macph. 1364, certainly contains some observations on the part of the Lord Justice-Clerk (the present Lord President) which appear to favour the defenders' contention. But these observations must be taken in relation to the case with which his Lordship was dealing. It was an entirely different case from the present. Muir-burning is an ordinary and necessary part of the administration of a Highland estate. The case, therefore, did not raise the question with which we have here to deal.

The case of Earl of Glasgow v. Tennent, 2 Macph. H. L., 22, simply came to this, that the substitution of a wall for a hedge by the defender was not proved to have occasioned the injury complained of.

Then, is it necessary that the danger should be known or anticipated? I think the man who brings new materials upon his land is bound to know the nature of these materials. It would be a strange result if the man who knew their nature was liable, while the man who did not know their nature was to escape liability in consequence of his ignorance.

As to *damnum fatale*, I think that defence was substantially surrendered in the argument, and, at all events, there is no foundation for it in the evidence.

If, therefore, I am right in holding it sufficient to establish liability against the defenders that this heap was constructed by them upon their ground, and kept there, that it did take fire, and continued to burn, and did damage to the pursuer, it is not necessary to prove specific fault. Fault is necessarily implied in the result, and it is unnecessary to go further.

But upon the facts I take a somewhat different view from the Lord Ordinary. I think that the defenders shewed the greatest possible disregard for the interests

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of others; and, accordingly, if I were called to decide the question of fault, I should have no hesitation in coming to a verdict that there was gross and culpable negligence on the part of the defenders.

In the first place, I am not satisfied that ignition took place spontaneously. That is merely a theory, ingeniously supported. I find that a very improper act was committed by the servants of the defenders. They put hot ashes on the top of the bing. I am not inclined to inquire narrowly into the result of this. All I know is that sometime after this act was committed the bing was found to be on fire. We are now asked to say that this was not the cause of the fire, from appearances presented on examination long afterwards. I do not attach much value to such evidence. It is said that when the defenders came to examine the bing in the early part of 1873 the crust was cooler than the interior, and, therefore, it is contended that the fire could not have been caused by external application. But in that wet season it was not wonderful that the outside should have cooled down. No experiments were made until four or five months after the fire was discovered.

Again, the defenders had no excuse for not taking steps to extinguish the fire when they learned its existence. This observation is all the stronger because on a former occasion the witness Turner says that he saw the bing fired by hot ashes, and succeeded in putting it out. If an attempt had been made to extinguish the fire when it was first discovered it is quite possible that it would have been successful. The defenders, who knew of the existence of fire in September 1872 at the latest, allowed it to burn on for several months without any attempt to put it out. In this they were all the more culpable, because the burning did no harm to the company. They were getting rid of refuse at the expense of their neighbours. When they chose to lie by and make no attempt to put out the fire I cannot read with much patience an attempt, on a purely scientific hypothesis, to shew that no efforts would have been availing.

The damages which the Lord Ordinary has awarded are moderate in the extreme. I think we should adhere in substance to his interlocutor.

LORD NEAVES concurred.

LORD ORMIDALE.—Questions have been raised in this case, not only of much importance, but also of difficulty and nicety. Neither is it easy, I think, to reconcile all the opinions and decisions bearing on the subject to which we have been referred. I have come, however, to be of opinion that the result at which the Lord Ordinary has arrived is right. But I am not prepared to say upon the proof whether this fire arose from spontaneous ignition, or was caused by the application of some external agency. Nor do I think that it is necessary for the pursuer to clear up this matter. One thing is clear, I think, that the fire cannot be held to have been of the nature of *damnum fatale*, which Lord Westbury defines in the case of Tennent v. Earl of Glasgow as the result of "circumstances which no human foresight can provide against, and of which human prudence is not bound to recognise the possibility, and which, when they do occur, are calamities that do not involve the obligation of paying for the consequences that may result from them." All that can be said for the defenders in regard to this point is that the season of 1872 was an unprecedentedly wet season; but an unusually wet season was expressly held in Kerr v. Earl of

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Orkney not to be *damnum fatale*. Nor is it suggested that the fire was caused by the fault of any one not in the employment of William Dixon (Limited.)

But, whatever was the cause of the fire, it is enough for the disposal of the case that the defenders, in bringing up and storing upon the surface such an enormous mass of stuff as 200,000 tons from their mine, did an unusual and unnatural thing,—that is to say, they used the surface in an unusual and unnatural way, taking these expressions in the sense in which they were used by the Lord Chancellor in the case of Rylands v. Fletcher, cited at the debate. The defenders were no doubt quite entitled to take every ounce of mineral out of their lands and lay it down on the surface. There was nothing unlawful in their doing so, but it is quite a different question whether they were entitled to do so except at their own peril and risk, as regarded injurious consequences to their neighbours. It rather appears to me that they were not. I can hardly take it from the defenders, who have had great experience as iron-masters, and in the working of minerals, that they and their managers, or other head people, were ignorant of the nature of the materials they brought up and heaped in such a mass on the surface of their ground. On the evidence I think they must have known that that mass was composed, to some extent, of very inflammable and dangerous materials. But, supposing they were ignorant of this, that would not, in my opinion, afford them a valid excuse or defence in the present case. This, I think, clearly appears on the authority of the English case of Rylands v. Fletcher, as well as the case of Kerr v. Earl of Orkney in our own Court. In the former, which was ultimately decided in the House of Lords, it appears from the statement of the circumstances given by the Lord Chancellor that the defendants were not aware of the passages through which the water passed from their reservoir to the mineral workings of the plaintiff, and did the injury complained of. Indeed, that case in all its bearings and principles is remarkably similar to the present—only that there the damage was done underground by water, while here it was done above ground by fire. The argument for the defenders here is entirely met by the principles there laid down, both by the Lord Chancellor and Lord Cranworth. The latter said,—"If a person brings or accumulates on his land anything which, if it should escape, may cause damage to his neighbour, he does so at his peril. If it does escape, and cause damage, he is responsible, however careful he may have been, and whatever precautions he may have taken to prevent the damage. In considering whether a defendant is liable to a plaintiff for damage which the plaintiff may have sustained, the question in general is not whether the defendant has acted with due care and caution, but whether his acts have occasioned the damage. . . . For, when one person, in managing his own affairs causes, however innocently, damage to another, it is obviously only just that he should be the party to suffer. He is bound *sic uti suo ut non lædat alienum*. This is the principle of law applicable to cases like the present, and I do not discover in the authorities which were cited anything conflicting with it."

Such is the principle of liability laid down by the highest authority applicable as, I think, to cases such as that we are now dealing with, and it is on that principle, I think, the Lord Ordinary's judgment should be adhered to.

But if it had been necessary for the pursuer to have proved that there was *culpa* on the part of the defenders I think he has sufficiently done so. There was *culpa* on the part of the defenders in accumulating such a large inflammable

mass on their land. They were at least bound to have laid down the material in such limited heaps and in such a way as that it would be always under their control; and it does not matter whether they knew of the damage or not. If they did not, there was *culpa* on their part in not taking the best advice that could be got on the subject. If they had taken such advice they would certainly have been told that there was some danger in what they did. There was *culpa*, again, on the part of the defenders in not using the utmost diligence in extinguishing the fire when it was first discovered. One of the witnesses, Turner, says that he saw smoke in July 1872; another witness says August; and, beyond all doubt, the fire was known to the defenders' manager to exist in the beginning of September. Yet no steps at all were taken for suppressing it till January 1873. It will not do for the defenders to adduce witnesses now to say that it was impossible to extinguish the fire, however early measures had been taken for that purpose; for it is impossible to say what might have been the result if proper measures had been taken at the outset.

LORD GIFFORD.—I am of the same opinion. It is not disputed that the pursuer has suffered considerable loss and damage from the smoke and fumes of the burning bing, and no complaint is made as to the amount at which the Lord Ordinary has assessed the damages, and the only question before us is whether the damage suffered by the pursuer is such damage that the defenders are liable to make it good. It was urged with much force for the defenders that *culpa* or fault is the only foundation of liability; and the defenders, it is said, are not chargeable with *culpa* or negligence of any kind, and therefore cannot be made liable for the loss sustained. On the other hand, the pursuer, on the authority of the class of cases like Rylands v. Fletcher, maintains that the defenders are liable without proof of actual negligence, and must make good the loss, even although the ignition of the bing were held to be a pure accident. In short, there is here a conflict between the two principles—first, that a person is entitled to use his property for any lawful purpose, even although such use should be injurious to his neighbour, and without being liable in damages; and second, this other principle, that a person must so use his property as not to injure his neighbour's property. The mode of reconciling or applying these two principles may be delicate, and there are often cases in which it is very difficult to draw the line. But I agree with your Lordship in the chair that the distinction between the two classes of cases lies in the kind of use which a person makes of his own property. I am not sure whether the terms "natural use" and "non-natural use" are very appropriate, but the meaning at all events is clear. Some uses to which land or property may be put are primary and ordinary purposes, while other uses, though perfectly legal, are exceptional or occasional, or require special erections upon or special preparation of the subject. The ordinary use of the subject, if it be land, is cultivation. If, for instance, in ploughing or draining his land, a person creates loss to his neighbour by throwing a greater quantity of water upon him, or by depriving him of water which otherwise would have reached him by percolation, the neighbour so prejudiced will have no claim of damages, because ploughing and draining in the usual manner are natural or primary uses of the land, of which the neighbour cannot complain. But, then, a proprietor may use his subjects quite lawfully for another class of purposes, which are called secondary or non-natural. He may make a reservoir of water, for instance, on his land—quite a lawful use. But in that case he is

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liable if the dam give way and cause injury to his neighbour, even though it be not possible to bring home negligence or fault in the ordinary sense.

I rather think, however, that *culpa* is at the foundation of liability. *Culpa* is a flexible term. Much lighter fault may make a person liable in some circumstances than in others. Much greater liability attaches to a person who is using his property not for primary purposes, but for secondary, though lawful purposes, and by which his neighbours may be exposed to risks of damage.

Another way of looking at the matter is the distinction between the case where there is no *opus manufactum* upon the land and the case where there is such. What was done by the defenders here certainly comes under the category of *opus manufactum*. A person making such a use of his property must take very extraordinary precautions to secure his neighbour against injury. It is certain that the defenders did not take sufficient precautions. I do not inquire whether the defenders knew that there was danger in their operations. It is proved that there was danger, although it may have been a remote danger. The party who creates an *opus manufactum* is bound to provide not only against what often happens, but against what very seldom happens. I cannot, indeed, take it off the hands of these iron-masters that they were ignorant of the chemical nature of the substance which they were bringing up from their pit and depositing in the heap or bing in question. I think they had sufficient knowledge of its properties, but even if they had not, this would not excuse them, and does not affect their liability.

In short, whether the liability of the defenders is maintained on the broad ground that a person who makes a non-natural use of his property is under an absolute obligation to secure the neighbouring proprietor or tenant against injury, or upon actual *culpa*, the result is the same. The defenders are liable for the damage created by the burning bing, which bing they knew or ought to have known was a source of possible danger. I think it is quite impossible to hold that the ignition of the bing, and the consequent injury to the neighbouring farmer, was a *damnum fatale*, or was the act of God, which will not found any action of reparation or damages.

THIS interlocutor was pronounced:—"Recall the said interlocutor: Find that the defenders constructed on ground belonging to them a bing or heap of mineral refuse occupying about 2 acres of land and about 42 feet in height: Find that the material of which this bing was composed was of a combustible character, being to a considerable extent pyrites containing an admixture of sulphur: Find that in the course of the autumn of 1872, and not later than in September of that year, this bing took fire, and that the fire had not been extinguished when this action was raised in 1875: Find that the effect of this fire was to disengage certain noxious or injurious vapours, which inflicted serious damage on the farm occupied by the pursuer, and were productive of great discomfort to him and his family: Find that the liability of this bing to take fire was or ought to have been known to the defenders, and could have been easily ascertained by consulting any competent person: Find that no attempt was made by the defenders to put out the fire for several months after it was first discovered, and that when this was attempted it was found from the position of the fire and the size of the bing to be impossible: Find that, in these circumstances, the defenders are liable to the pursuer in the amount of

damages so occasioned to him: Find that it is not disputed that £200 is a reasonable amount at which to assess the damages so incurred; and find the defenders liable to the pursuer in that sum, and decern against them therefor: *Quoad ultra*, in respect that the conclusion for interdict is not now insisted in by the pursuer, assoilzie the defenders from that conclusion of the summons, and decern: Find the defenders also liable to the pursuer in expenses, and remit to the Auditor to tax the same, and to report."

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MORTON, NEILSON, & SMART, W.S.—MELVILLE & LINDESAY, W.S.—Agents.

THE LORD ADVOCATE, Petitioner.—*D.-F. Watson—Trayner.*
THE SCHOOL BOARD OF STOW, Respondents.—*Balfour—Keir.*
R. S. FRIER AND ANOTHER, Compearers.—*Mackintosh.*

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Review—Board of Education—Education Act, 1872 (35 *and* 36 *Vict. cap.* 62, *sec.* 28).—A school board resolved that it was necessary to provide additional school accommodation, and this resolution was confirmed by the Board of Education. Thereafter the school board resolved that in consequence of sufficient interim accommodation having been provided, the carrying out of the former resolution should be delayed. The school board having subsequently refused to comply with a requisition of the Board of Education to carry out their original resolution, the Court, on a petition and complaint at the instance of the Lord Advocate under sec. 36 of the Education Act, 1872, ordained the school board to comply with the requisition.

Observed, that the Court had no power to review the decision of the Board of Education as to the amount of school accommodation required, and that they would interpone their authority to the requisitions of the Board of Education unless it were shewn either that that board had never applied their minds to the resolutions of the school board, or that they had departed from the statutory procedure.

THIS was a petition and complaint by the Lord Advocate against the school board of Stow under the 36th section of the Education Act, 1872.*

1ST DIVISION. B.

On 28th October 1874 the school board resolved to provide additional school accommodation for the parish by erecting certain new buildings, and reported accordingly to the Board of Education, and on 23d December following the Board of Education intimated their approval, in terms of sec. 28 of the Act, of the above opinion and determination. On 9th April 1875 the school board came to the following resolution, which they intimated to the Board of Education:—"That Mrs Mitchell, having rented her school to the board, and there being in that and the parish school sufficient accommodation for all the children of the district, and looking to the high price of labour from the erecting of so many public schools, that the board delay in the meantime taking any further steps for the erection of new schools." The Board of Education replied that they could not acquiesce in this resolution. After some correspondence the Board of Education sent the school board a requisition requiring them to "perform the duty

* 35 and 36 Vict. c. 62, sec. 36. . . . "If at any time the said board (*i.e.*, the Board of Education) are satisfied that a school board of a parish or burgh have failed to maintain and keep efficient any school provided by them, or to provide such additional school accommodation as in the opinion of the board is necessary to supply a sufficient amount of public school accommodation in the parish or burgh, the said board may send them a requisition requiring them to fulfil the duty which they have so failed to perform; and the school board shall comply with the said requisition without undue delay; and if they fail, may be summarily compelled to do so by the Court of Session, on a petition and complaint at the instance of the Lord Advocate."

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which they have failed to perform." The school board declined to comply, and this petition was then presented at the instance of the Lord Advocate. The prayer was,—"To ordain the respondents forthwith to comply with the terms of said requisition, and in compliance therewith forthwith to proceed with the erection upon said site of the necessary public school accommodation for said parish, in terms of the resolution made and adopted at the meeting held by the respondents, as aforesaid, on 28th October 1874, and approved of, as aforesaid, by the Board of Education; to find the respondents liable in the expenses of this application and subsequent procedure."

Answers were lodged for the school board. They stated that after the resolution of 28th October and its confirmation by the board the circumstances had undergone a material change, owing to Mrs Mitchell of Stow, a heritor, having given up her private school to the board at a nominal rent, and owing to the enhanced price of labour. They stated further,—"The present proceeding has been adopted under section 36 of the Education Act, but it is submitted that it is inapplicable to the circumstances of the present case. The respondents have not failed to provide a sufficient amount of public school accommodation in the parish. They have expressed their willingness and taken steps to provide additional school accommodation, and have stated distinctly how they propose to attain their object. Their proposal to provide sufficient school accommodation in terms of the said reports appears to them to be reasonable, and would now have been carried into effect if the Board of Education had approved and had not insisted on adhering to their decision."

Messrs Frier and Brydon, a minority of the school board, lodged a minute concurring in the prayer of the petition.

Lord President.—The question we have to decide is a very clear one. The 27th section of the Act of Parliament provides that the first duty of the school board when they come into office is to ascertain and take into consideration the educational requirements of the parish, and if they find that there is an insufficiency of school accommodation, then they are to come to a resolution as to what is necessary to supply the deficiency, and when they have done so, they are to submit that resolution to the Board of Education for their approval. The Board of Education may approve or disapprove of it, or they may approve of it with qualifications and additions; or, if the school board does not do its duty in coming to a resolution upon the subject, the Board of Education may do it for them, and may require them to make such additions to the school accommodation of the parish as the circumstances seem to require; but in all these cases it is quite apparent, from the clauses of the statute that have been cited to us, that the ultimate judgment upon what is necessary for the accommodation of the parish rests with the Board of Education. It is a statutory board created for that among other purposes—nay, that appears to me to be the chief purpose for which it is created. Now, keeping this in view, let us consider the effect of the 36th section of the statute:—"If at any time the Board of Education are satisfied that a school board of a parish have failed to maintain and keep efficient any school provided by them, or to provide such additional school accommodation as in the opinion of the board is necessary to supply a sufficient amount of public school accommodation in the parish or burgh, the said board may send them a requisition requiring them to fulfil the duty which they have so failed to perform; and the school board shall comply with the said requisition without undue delay, and, if they fail, may be summarily compelled to do so by the

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Court of Session on a petition and complaint at the instance of the Lord Advocate." It is under that section that this petition and complaint is before us, and let us see what are the conditions upon which such a petition and complaint must rest.

The school board must report, and the Board of Education must be satisfied that there is a defect in the accommodation, and the school board must fail to provide the necessary additional accommodation, and a requisition must be made upon the school board by the Board of Education to go on and perform their duty; and if these things have all taken place, then there is sufficient ground for petition and complaint to this Court, and it seems to me that if these requirements of the statute are all fulfilled we have no choice but to grant the order that is asked for.

Now, what are the circumstances of this case? There has been, I do not say an attempt to misrepresent the matter in any way, but there has been an attempt to confuse it by reference to a variety of correspondence with which we have nothing whatever to do. The resolution of the school board with regard to the provision of additional accommodation is contained in their minute of the 28th October 1874, and the resolution is in these terms:—"That the site approved of by Sir Alexander Grant, and sanctioned or agreed to be given by Mrs Mitchell of Stow, for the erection of said new school buildings, be agreed to by this meeting, and that steps be taken for the erection of school buildings with all convenient speed." Then further:—"The meeting took up the plan already in hand received from Messrs Herbertson, Galashiels, together with their probable estimate of the expense to be incurred in erecting such a school as would accommodate 200 scholars; they also took up plan and probable estimate for new teacher's house, and agreed that the said plans and probable estimates be forwarded by the clerk to the Board of Education for suggestions and approval," and they appointed a committee to measure off the ground for the site. The Board of Education appear to have required answers to certain questions before proceeding to consider this resolution of the school board; and accordingly Mr Walker, the clerk to the school board, wrote to the secretary of the Board of Education, intimating the answers which the school board gave to the different questions; and among other things he said the "proposed new school would accommodate 200, in regard to which there are improved plans presently in the hands of Mrs Mitchell of Stow, which will afterwards be submitted to the board if wished for." Now, it is with the material so furnished by the school board that the Board of Education deal in their resolution of 23d December 1874. They considered the report dated 23d July 1873 and 29th October 1874, transmitted by the school board of the parish in terms of section 27 of the Education Act, along with other documents. The minute further bears that "the school board report as their opinion that the educational requirements of the parish exceed the provisions for supplying the same, and that their determination to provide additional school accommodation is as follows—(*a*) To erect at Stow, on a site to be given by Mrs Mitchell of Stow, and approved of by Sir Alexander Grant, a school capable of accommodating 200 pupils and teacher's dwelling-house; and (*b*) to dispose of the existing public school and teacher's dwelling-house." The Board of Education, in terms of section 28 of the Act, approved of the above opinion and determination, and authorised the school board to act upon and carry the same into effect forthwith. Certainly that is quite in accordance with the provisions of the statute. There is a distinct reso-

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lution by the school board, and a clear and distinct confirmation of that by the Board of Education. The statute says that when that has taken place the school board must go on forthwith to carry the plan into execution. It has been suggested that after the confirmation of such a resolution circumstances might so alter as to render it inexpedient or improper to proceed in terms of the confirmed resolution. I can quite understand the possibility of that. It is needless to suppose cases; but undoubtedly such a case might arise, and if so, I apprehend it would be the duty of the school board to reconsider the matter, and to submit the resolution that they might form upon such reconsideration to the Board of Education for their approval, by whom the same would be either confirmed or rejected. But is there any case of that kind here? Nothing in the least degree like it. What takes place after this confirmation of the school board's resolution is this, that on the 9th day of April 1875 there is a meeting of the school board, and the minute of meeting bears "that the board having agreed to rent Mrs Mitchell's school for a time for temporary accommodation, with the view of having ultimately both schools merged into one, and having formerly intimated to the Board of Education their determination to erect a school to accommodate 200 pupils, they now further determine to enlarge the plans to provide accommodation for 226 pupils, which they find will be ample enough for the district, and instruct the clerk to report accordingly to the board in Edinburgh, and request their consent to the same." Now, there is nothing in that which can be said to go back on the previous resolution. It is merely an extension of accommodation beyond that already resolved on and confirmed which is intended to be provided by the school board. But then this resolution was also submitted to the meeting and carried—"That Mrs Mitchell having rented her school to the board, and there being in that and the parish school sufficient accommodation for all the children of the district, and looking to the high price of labour from the erecting of so many public schools, that the board delay in the meantime taking any further steps for the erection of new schools." It seems to me that this resolution is simply in the face of the statute, which says that after a resolution providing additional accommodation has been carried and confirmed by the Board of Education the school board shall go on without delay to carry it into execution, and this resolution is that they shall not do so. Was that a resolution they could expect the Board of Education to consider or to give effect to? The Board of Education were bound to reject, after consideration, such a resolution as that, because it was against the statute. It was a resolution in violation of the duty of the school board as prescribed by the statute, and accordingly they are told repeatedly by the Board of Education that it was impossible to sanction the delay—that they cannot do so consistently with their duty. The rest of the correspondence, except in so far as it is a repetition of that, seems to me to have nothing to do with the question before us. Then the Board of Education, at last finding that the school board adhered to their resolution for indefinite delay, issued a requisition upon them in terms of the statute. It is printed in the papers before us, and seems to me to be in the proper form under the statute. That requisition has not been attended to by the school board, and it now falls upon us to order them to proceed in terms of the statute, and carry out their resolution of 29th October 1874.

Lord Deas.—It is right in a matter in which the public is so deeply interested that the view taken of it should be distinctly explained, but your Lord-

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ship has done that so fully that I need hardly say more than that I entirely concur.

The first question is, what power have we to interfere? Looking to the terms of the Education Act, 1872, and particularly to those of the 28th and 36th sections, it appears to me that we have no power to interfere with the action of the Board of Education in a matter of the kind now in dispute, except in two cases—first, if it were plain that the board had refused or failed to apply their minds to the question of school accommodation in the particular parish, so as to come to an intelligent resolution on the subject, we might interfere to correct that abuse; or second, if the board had gone contrary to or outwith the statute, we might, in that case, also interfere to set them right.

But, first, it is plain that the board did apply their minds to the question what amount of school accommodation was required in the parish, and took reasonable means to satisfy themselves on the subject before coming to a final resolution in regard to it. Latterly, they sent Sir Alexander Grant, a member of the board, to visit the locality and make what inquiries he thought necessary. His written report, it is true, contains merely the conclusions he had arrived at, but no doubt verbal explanations of his reasons were at the command of all his colleagues.

Second, it is equally plain that the Board of Education did not exceed the powers conferred on them by the statute, which expressly authorises them to make such a requisition as they actually made. The discretionary power of judging what extent of school accommodation is required is vested in the board and not in us. If the opinion of the school board be right, and that of the Board of Education wrong, that is no fault of ours. No bad faith is or can be alleged. It is a difference of opinion merely, and of that matter of opinion the statute has made the Board of Education the judges.

It is true the Board of Education cannot enforce their own resolution. But that is simply because they have no judicial authority. The Courts of law are alone vested with the power of the sword. The Board of Education must come, through the Lord Advocate, to the Court of Session for compulsory powers, but the merits of the question are not submitted to us, and the procedure being all right and regular, the only thing we can do is, in substance, to interpone our authority by granting the prayer of this petition.

LORD ARDMILLAN.—We are asked in this petition to interpone our authority to enforce the statutory requisition by the Board of Education, and to ordain the respondents to proceed with the necessary school accommodation. I do not say that we are bound to grant the prayer of the petition if the Board of Education has so far departed from the procedure laid down by the statute as to exclude their demand for a statutory remedy, or if they have refused the plain duty of considering any proposal made to them by the school board.

Now, this particular case is presented to us in two forms, one which seems more prominent in the proceedings, and the other which was chiefly argued at the bar. In the first place, the respondents urge that the Lord Advocate's demand for the *compulsitor* which the Court can give should be refused. They ask on the merits the sanction of the Court to resist the requisition of the Board of Education. That is a proposal to which we could not accede. But at the bar they have dexterously put a different case. They say that the Board of Education never considered the change of circumstances. But the respondents

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But, first, it is plain that the board did apply their minds to the question what amount of school accommodation was required in the parish, and took reasonable means to satisfy themselves on the subject before coming to a final resolution in regard to it. Latterly, they sent Sir Alexander Grant, a member of the board, to visit the locality and make what inquiries he thought necessary. His written report, it is true, contains merely the conclusions he had arrived at, but no doubt verbal explanations of his reasons were at the command of all his colleagues.

Second, it is equally plain that the Board of Education did not exceed the powers conferred on them by the statute, which expressly authorises them to make such a requisition as they actually made. The discretionary power of judging what extent of school accommodation is required is vested in the board and not in us. If the opinion of the school board be right, and that of the Board of Education wrong, that is no fault of ours. No bad faith is or can be alleged. It is a difference of opinion merely, and of that matter of opinion the statute has made the Board of Education the judges.

It is true the Board of Education cannot enforce their own resolution. But that is simply because they have no judicial authority. The Courts of law are alone vested with the power of the sword. The Board of Education must come, through the Lord Advocate, to the Court of Session for compulsory powers, but the merits of the question are not submitted to us, and the procedure being all right and regular, the only thing we can do is, in substance, to interpone our authority by granting the prayer of this petition.

LORD ARDMILLAN.—We are asked in this petition to interpone our authority to enforce the statutory requisition by the Board of Education, and to ordain the respondents to proceed with the necessary school accommodation. I do not say that we are bound to grant the prayer of the petition if the Board of Education has so far departed from the procedure laid down by the statute as to exclude their demand for a statutory remedy, or if they have refused the plain duty of considering any proposal made to them by the school board.

Now, this particular case is presented to us in two forms, one which seems more prominent in the proceedings, and the other which was chiefly argued at the bar. In the first place, the respondents urge that the Lord Advocate's demand for the *compulsitor* which the Court can give should be refused. They ask on the merits the sanction of the Court to resist the requisition of the Board of Education. That is a proposal to which we could not accede. But at the bar they have dexterously put a different case. They say that the Board of Education never considered the change of circumstances. But the respondents

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never asked them to consider that change, and they do not ask such consideration now, on the only footing permitted by the statute. It is always by the opinion of the Board of Education that this matter must be decided.

LORD MURE.—I concur with your Lordship. The duty imposed upon the Court by the 36th section of the statute is one of limited discretion, so limited as to amount, in the ordinary case, to little more than an executorial duty, because the statute has given the Board of Education full powers of settling what the school accommodation is to be. If, therefore, the procedure has in this respect been regular, and the school board refuses to comply with a requisition made upon them by the Board of Education, and that board comes here under the 36th section asking this Court to enforce their requisition, we are, I think, bound to do so. In the present case all the proceedings appear to have been regularly gone about under the 28th section, and I agree, therefore, in thinking that the requisition ought to be enforced. But I think it right to observe that under the 36th section there appears to me to be a certain amount of discretion left to this Court in disposing of such applications. "May be" compelled are the words of the clause. So that if, after a resolution of a school board has been confirmed by the Board of Education, a total change of circumstances were to arise relative to the school accommodation requirements of a parish, and the school board were in consequence, and in order to meet that change, to make a fresh proposal, which the Board of Education refused to entertain, I should be disposed to say that this Court might refuse to interfere and enforce the requisition until the Board of Education had duly considered and dealt with the new proposal. That, however, is not the state of matters under which the present application is made, and on that point I reserve my opinion.

THIS interlocutor was pronounced:—"Decern against the respondents in terms of the prayer of the said petition and complaint: Find the respondents liable in expenses," &c.

DONALD BEITH, W.S.—H. & A. INGLIS, W.S.—THOMAS SPALDING, W.S.—Agents.

No. 79.
Feb. 19, 1876.
Wilson v. M'Genn & Co.

JOHN WILSON (Liquidator of the Glasgow and District Co-operative Society, Limited), Petitioner.—*J. G. Smith—Henderson.*
P. S. M'GENN AND COMPANY, Respondents.—*M'Kechnie—Guthrie.*

Company—Voluntary Winding up—Extraordinary Resolution—Companies Act, 1862, *secs.* 51 *and* 129.—The Companies Act of 1862, sec. 129, authorises the winding up of a company voluntarily "(2) whenever the company has passed a special resolution requiring the company to be wound up voluntarily"—(by the Act no resolution could be deemed special until it had been carried at two successive meetings of the company); "(3) whenever the company has passed an extraordinary resolution to the effect that it has been proved to their satisfaction that the company cannot by reason of its liabilities continue its business, and that it is advisable to wind up the same." The Act requires both special and extraordinary resolutions to be preceded by a notice "specifying the intention to propose such resolution."

A company, by circular, gave notice to its shareholders that an extraordinary meeting would be held "to consider, and, if approved of, to sanction the voluntary winding up of the company." The notice also contained this statement—"The directors enclose a balance-sheet of the company's affairs, prepared by the auditor to this date. From the result of that balance, shewing a deficiency of £3898, 3s. 9½d., it will be apparent that it is hopeless to carry on the company with any prospect of success." The meeting passed a resolution in terms of sec.

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129, sub-sec. (3), and appointed a liquidator. No meeting was called to confirm this resolution.

In an application by the liquidator to have a creditor restrained from doing diligence against the company, *held* that the resolution was invalid, in respect that the notice did not shew that it was intended to propose an extraordinary resolution under sub-sec. (3), but merely a resolution under sub-sec. (2), which would have required confirmation at a subsequent meeting.

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1st Division. B.

THIS petition was presented in name of John Wilson, designing himself liquidator of the "Glasgow and District Co-operative Society (Limited)," against M'Genn and Company, creditors of the company, praying the Court to order the respondents to desist from following out an action of forthcoming against the company, or other diligence.

The respondents in their answers maintained that the resolution to wind up the company voluntarily, which had been adopted at a meeting of the company on 3d May 1875, was invalid, and that the appointment of the petitioner as liquidator was null and void, in respect that the notice of the resolution and the resolution itself, were not in accordance with the provisions of the Companies Act, 1862, sec. 129, sub-sec. 3.

The circular issued to the members of the company calling the meeting of 3d May 1875 was as follows:—"Notice is hereby given, that an extraordinary meeting of the shareholders in this company will be held in the Religious Institution Rooms, upon Monday the 3d of May 1875, at two o'clock P.M., to consider, and, if approved of, to sanction the voluntary winding up of the company. The directors enclose a balance-sheet of the company's affairs, prepared by the auditor to this date. From the results of that balance, shewing a deficiency of £3898, 3s. 9½d.,* it will be apparent that it is hopeless to carry on the company with any prospect of success, and that the directors are not warranted in asking the shareholders to advance any further sums by subscribing to the bonds, as proposed in a previous circular. JOHN BAILLIE, Secy.—Glasgow, 26th April 1875."

At the meeting of 3d May 1875 this resolution was carried unanimously:—"It having been proved to the satisfaction of this meeting that the company cannot, by reason of its liabilities, continue its business, resolve that it is advisable that the company be wound up, and this meeting requires the company to be wound up voluntarily accordingly."

The petitioner was then appointed liquidator.

The respondents contended;—The resolution to wind up the company voluntarily was intended to be an extraordinary resolution in terms of the third head of section 129 of the Companies Act, 1862.† Now, an ex-

* The balance-sheet brought out this deficit by debiting the company with the whole amount of its capital, viz., £5000. The company's liabilities other than to capital were only £2565, 13s. 9½d., while its assets were £3667, 10s. Though, therefore, a large portion of its capital was lost, the company was not insolvent in the sense of being unable to pay its creditors in full.

† Sec. 129 enacts—"A company under this Act may be wound up voluntarily—(1) Whenever the period, if any, fixed for the duration of the company by the articles of association expires, or whenever the event, if any, occurs, upon the occurrence of which it is provided by the articles of association that the company is to be dissolved, and the company in general meeting has passed a resolution requiring the company to be wound up voluntarily; (2) whenever the company has passed a special resolution requiring the company to be wound up voluntarily; (3) whenever the company has passed an extraordinary resolution to the effect that it has been proved to their satisfaction that the company cannot by reason of its liabilities continue its business, and that it is advisable to wind up the same: For the purposes of this Act, a resolution shall be deemed

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traordinary resolution must be passed "in such manner as would, if it had been confirmed by a subsequent meeting, have constituted a special resolution" as defined in the 51st section. But the 51st section* required among other things that notice of the meeting "specifying the intention to propose such resolution" should have been duly given. Now, the notice of the meeting of 3d May 1875 sent to the members specified as its object—"To consider, and, if approved of, to sanction the voluntary winding up of the company." That, if anything, was a notice of intention to proceed under the second head of section 129 by way of special resolution, and not under the third head by way of extraordinary resolution. Any member of the company receiving that notice was entitled to expect that a second meeting would be held to confirm any resolution to wind up the company passed at the meeting called by it, and that an opportunity of reconsidering the matter would be afforded to the members. To proceed by extraordinary resolution upon that notice at the meeting of 3d May was therefore incompetent, and the resolution passed was invalid and the petitioner's appointment as liquidator null and void.[1]

Argued for the petitioner;—The Act prescribed no exact form of circular which was to be followed in calling a meeting to pass an extraordinary resolution under the 3d head of sec. 129. It was sufficient that it should appear from the circular what was to be the "general nature" of the business to be transacted.[2] In England the appointment of a liquidator at a meeting, in calling which no notice that such an appointment was proposed to be made, had been sustained, which shewed that the statute was to be read leniently.[3] This case was different from the Bridport Brewery case, relied on by the respondents. The information given in the circular and balance-sheet clearly drew the attention of the members to the facts, and the probability of an extraordinary resolution being passed. The Bridport case had been commented on in England as going as far as it was advisable in the direction of strictness in construing notices.[4]

At advising,—

Lord President.—This is a petition presented by the liquidator of the Glasgow and District Co-operative Society (Limited), to restrain the respondents,

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to be extraordinary which is passed in such a manner as would, if it had been confirmed by a subsequent meeting, have constituted a special resolution as hereinbefore defined."

* Sec. 51 enacts—"A resolution passed by a company under this Act shall be deemed to be special whenever a resolution has been passed by a majority of not less than three-fourths of such members of the company for the time being entitled, according to the regulations of the company, to vote, as may be present, in person or by proxy (in cases where by the regulations of the company proxies are allowed), at any general meeting of which notice specifying the intention to propose such resolution has been duly given, and such resolution has been confirmed by a majority of such members for the time being entitled, according to the regulations of the company, to vote, as may be present, in person or by proxy, at a subsequent general meeting, of which notice has been duly given, and held at an interval of not less than fourteen days, nor more than one month from the date of the meeting at which such resolution was first passed," &c.

[1] Bridport Old Brewery Company, Jan. 12, 1867, L. R. 2 Ch. App. 191; Silkstone Fall Colliery Company, Nov. 19, 1875, L. R. 1 Ch. D. 38.

[2] Schedule I., Table A, cl. 35, annexed to the Companies Act, 1862.

[3] Oakes v. Turquand, July 22, 1867, L. R. 2 E. and I. App. 325; Buckley on Companies Acts (2d ed.), 269; Thring on Joint Stock Companies (3d ed.), 353.

[4] Wright's case, June 8, 1871, L. R., 12 Eq. Ca. 335 (Selwyn, L. J. p. 345); Buckley, p. 157.

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M'Genn and Company, creditors of the company, from following out an action of furthcoming. No objection has been stated to the competency in ordinary circumstances of such a petition. But the respondents meet it with a serious and important objection to the title of the liquidator. They say the company has not been validly put in liquidation at all.

The ground of the objection is that the resolution to wind up the company, dated 3d May 1875, was invalid. This resolution was passed under the 3d sub-section of the 129th section of the Companies Act, 1862. Under that section there are just three cases in which a company can be wound up voluntarily. The first case is when the company comes to an end in terms of the articles of association. The second is, when the company has passed a special resolution for winding up, and the third is where the company has passed an extraordinary resolution to certain effects. The difference between the second and third case is very important. In the second case a company may be wound up voluntarily "whenever the company has passed a special resolution requiring the company to be wound up voluntarily." Now, according to the 51st section of the Act, in order that a resolution should be a special resolution, it must be carried by a majority of three-fourths of the members of the company present at a general meeting "of which notice specifying the intention to propose such resolution has been duly given," and it must also be confirmed by a majority of the members present at a subsequent general meeting of which notice has been duly given, held at an interval of not less than a fortnight, and not more than one month. Therefore a resolution to wind up under the second head of section 129 cannot be effectual unless it is carried by a three-fourths majority at one meeting, and confirmed by a majority at a second meeting, and unless proper notice of the intention to propose the resolution has been previously given.

In the third case, a company may be wound up voluntarily "whenever the company has passed an extraordinary resolution to the effect that it has been proved to their satisfaction that the company cannot, by reason of its liabilities, continue its business, and that it is advisable to wind up the same." And it is farther enacted, that "any resolution shall be deemed to be extraordinary which is passed in such a manner as would, if it had been confirmed by a subsequent meeting, have constituted a special resolution as hereinbefore (*i.e.*, in the 51st section) defined."

Now, this is the case with which we have to deal. The difference between it and a winding up under the second head of the 129th section is that the resolution, if carried by a three-fourths majority at a general meeting called for the purpose, does not need confirmation at a subsequent meeting, but then the resolution must be to the effect that it has been proved to the satisfaction of the meeting that the company cannot, by reason of its liabilities, continue its business. It is not enough that the meeting resolve that the company be wound up voluntarily. That is the way of proceeding under the second head. The meeting must positively affirm that it has been proved to its satisfaction that the company cannot, by reason of its liabilities, continue its business, and that it is advisable to wind up the same.

Now, the resolution which was passed in the present case at the meeting held on 3d May last was quite unobjectionable in its terms. The precise words of the 3d sub-section of the 129th section are not indeed used, but the terms are quite as near them as is at all necessary. So far, therefore, no valid objection lies to the proceedings. But then it is urged that no notice was given to the

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shareholders prior to the meeting of any intention to propose such resolution, and there can be no doubt that such resolution requires notice and very distinct notice of the intention to propose it. Notice "specifying the intention to propose such resolution" is by the 51st section required in the case of a special resolution, and an extraordinary resolution requires the same particulars of procedure, excepting only the subsequent meeting for confirmation. Everything, therefore, depends on the terms of the notice given. Now, the terms of the notice were these:—"To consider, and, if approved of, to sanction the voluntary winding up of the company." Now, stopping there, it appears to me that that is just such a notice as would be required for proceeding under the second head of the 129th section. And if that is so, then it is clear that the resolution carried at the meeting of 3d May was worth nothing unless confirmed at a subsequent meeting. What follows is not a notice of a resolution to be proposed at all, but merely information afforded to the shareholders who are called to attend the meeting. It is as follows:—"The directors enclose a balance-sheet of the company's affairs, prepared by the auditor to this date. From the result of that balance, shewing a deficiency of £3898, 3s. 9½d., it will be apparent that it is hopeless to carry on the company with any prospect of success, and that the directors are not warranted in asking the shareholders to advance any further sums by subscribing to the bonds, as proposed in a previous circular."

Now, that reference to a previous circular is a reference to a proposal that the shareholders should subscribe some additional capital. That was a matter which had no bearing upon the proposal to wind up the company, nor has it upon the present question. The essential information given to the shareholders was that the balance-sheet shewed a deficiency of £3898, and that the affairs of the company were in a hopelessly bad condition. That is, however, somewhat ambiguous and misleading information. No doubt the balance-sheet does shew a deficiency of £3898, but that is brought out after debiting the company with its whole capital of £5000. That, then, is all the information given to the shareholders who are invited to attend the meeting. The only resolution of which notice is given is a resolution to wind up voluntarily. But then we are told that it is submitted to the shareholders as a reason for so doing that it is impossible to carry on the company with any prospect of success, and that that makes the notice equivalent to a notice that it is intended to proceed under the third head of the 129th section. Now, is that notice, even taken as a whole, a notice of a resolution to be proposed to the meeting "to the effect that it has been proved to their satisfaction that the company cannot, by reason of its liabilities, continue its business, and that it is advisable to wind up the same?" It does not appear to me that it is, or that it in any way answers the requirements of the statute. I think that a shareholder receiving that notice was quite entitled to suppose that the resolution intended to be proposed to the meeting was one for winding up under the second head of the 129th section, and that therefore a second meeting to confirm such resolution was required.

Under these circumstances, I am of opinion that the resolution to wind up is invalid, and the petitioner's appointment consequently null.

Lord Deas, Lord Ardmillan, and Lord Mure concurred.

This interlocutor was pronounced:—"Sustain the objection stated for the respondents to the title of the petitioner, dismiss the petition, and decern: Find the respondents entitled to expenses, and decern."

Mitchell & Baxter, W.S.—Robert Steven, W.S.—Agents.

THE ACCOUNTANT OF COURT, Reporter. No. 80.
LAUCHLAN M'KINNON (Grainger's Curator), Compearer.—*Asher.*

Feb. 23, 1876.

Curator Bonis—Investment on Security of Rates—Trust.—Investments by a *curator bonis* secured respectively either (1) on rates leviable under the Aberdeen County and Municipal Buildings Act, 1866, and the Sheriff Court Houses Act, 1860, or (2) on rates leviable under the Aberdeenshire Road Act, 1865, *approved of.*

Grainger's Curator.

1ST DIVISION. Lord Rutherfurd Clark. B.

LAUCHLAN M'KINNON, *curator bonis* to George Alexander Grainger, invested a sum of £4500 belonging to the ward on mortgages by the commissioners under the Aberdeen County and Municipal Buildings Act, 1866, and the Sheriff Court Houses Act, 1860. The whole sum borrowed by the commissioners was £15,852, 4s. 8d., and they proposed to pay off this sum by an assessment of one-sixth of a penny per pound in each year in the course of thirty years. In 1875 the buildings had been completed for about six years, and about £4000 had been paid off. The rate of assessment authorised by the Acts was unlimited.

The curator invested another sum of £6500 belonging to the estate of the ward by lending it to the Aberdeen Road Trustees under the Aberdeenshire Road Act, 1865. The turnpike road debt amounted at the passing of the Act to £43,000, the whole of which sum was borrowed and the debt paid off. The borrowed money remaining due in 1875 amounted to £28,600, so that the debt had been reduced by £14,400. By sections 46 and 83 of the Act the trustees were empowered to borrow money to pay off the debt, and to assign in security for payment of it the assessment authorised to be levied under the Act, and to grant mortgages for the sums borrowed. By section 47 the money so borrowed was to be applied to the payment of the debt, and to no other purpose whatever. The annual assessment for payment of interest of the debt exceeded £3000 considerably. For the year ended Whitsunday 1875 it amounted to £3,364, 15s. 4d. By section 82, the assessment was recoverable in the same way as the land tax and assessed taxes were.

The rate of interest in both investments was 4 per cent.

The estate of the ward amounted to about £20,000.

The Accountant of Court in his report (dated 12th January 1876) required the curator to realise these investments, but, at the desire of the curator, requested instructions from the Lord Ordinary. The report, while stating the Accountant's opinion that the securities were unexceptionable, bore:—"The investment of funds under judicial management is not regulated by statute, and no special authority, as regards investments, is conferred by the Pupils Protection Act, other than that specified in the 13th section thereof, which is somewhat general in its terms. But by the decisions of the Court the general rule has been held to be, that judicial factors appointed under the Pupils Protection Act can only invest the money of their wards in (1) consols or other national funds; (2) heritable securities; (3) deposits, or operating accounts, with one of the chartered banks in Scotland. . . . .

"The Lord Ordinary will observe that, though it may be very desirable that greater latitude should be given for the investment of funds under judicial management, it is essential for the guidance of factors, and of the Accountant of Court, that the power of investment shall be regulated by fixed and clearly defined rules. The securities taken by the factor in this case are of a class that is now numerous in Scotland, and if they are sanctioned by the Court, the probable effect may be, that a large amount of funds now and in past years invested in consols, on heritable securities,

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or in bank at a low rate of interest, will be transferred to such trust mortgages as have been taken in this factory, as the greater facilities of investing, and the higher rate of interest that can be obtained on the latter, will always form strong inducements for such transfer."

The Lord Ordinary reported the case verbally to the Court.

The curator argued;—There is no decision limiting the class of securities which a curator was entitled to take. Even if the Court had in former times made such a rule, it did not apply to modern times, when there was more difficulty in getting heritable securities.[1]

LORD PRESIDENT.—If there were any statutory rule, or any absolute rule founded upon decisions of this Court, that money under factorial management could be invested only on heritable security or in Government stocks, or in bank deposits, I am afraid we could not, in accordance with such rule, sanction the investments made by the *curator bonis* in the present case. But there is no such rule; and while the Court have in former times been in the habit of limiting factorial investments to the classes of securities I have mentioned, they have never laid down any rule that they will sanction no other kind of security. But, even if the Court had done so, I should not have been willing to be bound by their decision, for, although it may have been expedient at one time to lay down such a rule, it may be inexpedient at another time. We know that investments in Government stocks are not convenient investments for trust-funds, and that heritable securities cannot always be obtained, the demand for them exceeding the supply. Persons who are bound to invest only in heritable security are thus frequently compelled to leave large sums of money uninvested in bank. Now, in that state of the market for securities, it comes to be a very important question whether we should refuse to allow a curator to invest money upon a security which is demonstrated to be at least as good as a first class heritable security, seeing that he can get the one kind of security but not the other. All considerations of expediency and convenience certainly point one way, and I confess I am but little disposed to resist an argument founded on them, in a matter in which the Court are entitled to exercise their discretion

Now, what are the facts actually before us? In the first place, the *curator bonis* has invested the sum of £4500 on the security of certain assessments leviable by the Aberdeen County and Municipal Buildings Commissioners, as commissioners under the Sheriff Court Houses Act of 1860. This, which I understand to be a public statute, empowers the commissioners to levy an assessment by means of which the whole of the money borrowed by them will ultimately be paid off. The money originally borrowed was £15,852, but upwards of £4000 have already been paid off by means of the assessment. The assessment is a very light one, viz., at the low rate of one-sixth of a penny per pound, but it yields an annual sum more than sufficient to pay the interest of the debt still outstanding, and will at length pay off the whole debt. Now, I cannot say that that is not equal to the very best heritable security that can be had.

[1] Haldane and Lindsay, Dec. 23, 1848, 11 D. 286; A, Dec. 21, 1848, 21 Scot. Jur. 73; Lindsay, Dec. 21, 1848, 21 Scot. Jur. 73; Lindsay, March 10, 1849, 21 Scot. Jur. 365; A v. B, June 29, 1854, 16 D. 1004; Robertson's Trust, June 29, 1854, 26 Scot. Jur. 547; Morison, Dec. 5, 1856, 19 D. 132, 29 Scot. Jur. 234; Forsyth, Jan. 28, 1853, 15 D. 345, 25 Scot. Jur. 205; Pupils Protection Act, 1848, 12 and 13 Vict. c. 51, sec. 13; English Trust Acts, 1859 and 1867, 22 and 23 Vict. c. 35, sec. 32; 30 and 31 Vict. c. 132, secs. 1 and 2; Edinburgh City Act, 1838, 1 and 2 Vict. c. 55, sec. 77.

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It is perfectly clear that the commissioners will do their duty, and as public trustees they may be compelled to do it. It is, however, needless to speculate on the means of preventing a failure in duty, as that is obviously not within the scope of probability. As regards this loan of £4500, I may say, therefore, that it seems to be as well secured as money can be, while it yields a return of four per cent, quite as much as heritable securities.

As regards the other investment, viz., of £6500 on the security of the assessments under the Aberdeenshire Road Act of 1865, it stands in a somewhat different position, as that is not a public but a local Act. But that does not affect the nature of the security. A considerable part of the sum originally borrowed has been paid off, the trustees are empowered to levy rates, and these rates are assigned in security of the debt. This investment, therefore, seems to me to be in substantially the same position as the other one to which I have adverted.

I purposely confine myself to saying that these are exceptionally good securities, which the curator was justified in taking; for it is very difficult to lay down any general rule or principle. All, therefore, that I can say is, that where, by virtue of Act of Parliament, such securities as those now in question are obtainable, they are as eligible as heritable securities, and may safely be taken by a *curator bonis*.

LORD DEAS.—This appears to me to be one of the most important general questions that have occurred for a long time. It is obvious that any unreasonable limitation of the kind of securities that may be lawfully accepted or continued to be held by curators for lunatics or persons under age, or by judicial factors, must be highly detrimental, and in some cases ruinous to the parties beneficially interested. Three kinds of securities have been specified as alone proper to be judicially sanctioned, viz. investments in the public funds, deposits in banks, and heritable securities. But it appears to me that it is quite out of the question to hold that there can be any absolute and permanent rule on such a matter, which must necessarily be affected, from time to time, by the changing and progressive state of the country, and the development of its monetary, agricultural, and commercial concerns. I agree, therefore, in what I understand to be the view taken by your Lordship, that although the Judges of this Court may occasionally have recognised some such rule for the time being, we cannot be bound to adhere to it in the altered circumstances of the present day.

There is no Act of Parliament on the subject, and no principle involved, except that we ought always to look to the permanent benefit of the ward. In so far as practice is concerned, the object has been to give effect to that principle, not to fix a hard and fast line which may have the very opposite effect. That the capital shall not be lost may be conceded to be one of the most important considerations involved. But the loss of the appropriate income, especially when it is required for the pressing purposes or necessities of the ward, is a sacrifice not to be made wherever it can be avoided, if the capital be reasonably secure. The three specified modes of investment may be held to give reasonable, but they cannot be said to give absolute, security for the capital. The public funds have at many periods fluctuated largely, and when realisation becomes necessary it has been nothing unusual to find the capital so invested largely diminished. And although failure ultimately to recover bank deposits in full may be a rare and improbable occurrence in Scotland, it is not rare to find such deposits yield-

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ing a mere pittance of interest, and sometimes (although exceptionally) none at all. Heritable securities have often turned out inadequate from diminution in the value of the subjects, or totally ineffectual from some flaw in the title. Besides, as we all know, the extraordinary increase of capital in this country seeking investment has rendered it all but impracticable to obtain first-class heritable security for sums of no great amount, and which the lenders cannot guarantee to remain uncalled up for a period of years, as the great life insurance companies do, and who thereby obtain a virtual monopoly of that class of securities.

I am satisfied that since I sat on this bench cases have from time to time been disposed of on the footing that there was no absolute rule on the subject, although, being circumstantial, they may have not been reported; and in this I am borne out by the opinion of the last Law Commissioners (comprehending among them experienced and eminent lawyers), to the effect that the Court was not limited by any fixed rule, but might act in the matter as seemed most expedient. That is precisely the view which I take of the question. It is entirely one of expediency, and wherever that is the nature of the question, the course to be sanctioned must necessarily vary with the circumstances. An inflexible rule would be most inexpedient. The father of a family may have invested his funds in such a way as his experience has suggested as most likely to be beneficial to his family; and, on the footing of his investments yielding a certain annual income, he may have left to his widow a specified proportion of that income, and directed the rest to be applied for the maintenance and education of his numerous young children, equally among them, till they attain majority. Now, if by a dispensation of Providence one of the family becomes a lunatic, and is placed under curatory, or if the trustees appointed by the father decline to accept, and a judicial factor is appointed, surely it is the reverse of expedient to hold that the whole investments must be immediately realised, and the proceeds invested either in the public funds, or on heritable security, or deposited in bank, although the result may be that the income is no longer adequate to support the widow and maintain and educate the children, or even to keep them out of absolute poverty. As your Lordship has observed, investments in the public funds are often highly inconvenient. They can only be held in an individual name, and they are thus open to be attached by the *bona fide* creditors of the individual. Then, good heritable security is, as I have said, difficult to get, and attended with trouble and responsibility in the selection. The consequence is, that a large amount of money held by judicial factors and curators is allowed to lie in bank, to the great loss and disadvantage of the wards.

As regards the particular securities now in dispute, the Accountant of Court reports that he is satisfied they are in themselves unexceptionable, and his only reason for directing them to be called up is that the Court has not hitherto sanctioned securities of that class. I agree with the Accountant in thinking that the securities are in themselves unobjectionable, and this being so, I am of opinion that there are no grounds, either in law or in practice, for ordering the curator to call them up.

Lord Ardmillan.—We are here dealing with this particular case, in which the curator has expressed his opinion favourable to the securities. As I read the opinion of the Accountant of Court, he concurs with the curator that the securities are satisfactory, and as sufficient as heritable security. Now, I am of opinion that there is a distinction between recognising a general rule that cura-

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tors may, and generally should, invest in a certain class of securities, and laying down an inflexible rule that they may not and cannot legally invest in any other class of securities. I should hesitate very much to say that curators may, at their own hand, make investments in any but the three recognised kinds of security. But the general rule is, in my opinion, not inflexible; and where we have the concurrence of the curator and the Accountant of Court as to the desirability and sufficiency of the security, the Court may, if, on consideration, they think right, sanction the investment. This is not the case of a curator investing in perilous security for the sake of a high rate of interest. The investments here are manifestly prudent and on good security. There is nothing of the nature of speculation. In such a case as this we should not uphold the rule as inflexible. I guard myself against saying that we should at once cut down the general rule. I think there is a general rule which tends to make curatorial administration cautious, but it is not so inflexible as to prevent the Court granting such an application as the present one on good grounds being adduced, and on such concurrence as we have here.

LORD MURE.—I have for some time been disposed to think, regard being had to the changes which have been going on in the money market, that, in dealing with questions of this description, it would be necessary to enlarge the class of securities on which money belonging to pupils, and to beneficiaries under trusts, has been in use to be invested. By the Acts of Parliament which have been referred to, this has already been done in regard to trust funds. And by section 13 of the Pupils Protection Act it appears to me that there is not only no express limitation as to the kind of security which may be taken in such cases as that now before us, but that a discretion is given to the Accountant, in dealing with such matters, to fix what securities may be proper. He is "to consider the investments of the estate and sufficiency thereof;" and when, as here, the Accountant has done this, and reports that in his opinion the securities under which the money has been advanced by the curator are "unexceptionable," I agree with your Lordships that these investments ought not to be disturbed. In so far as I am able to form an opinion from the information before us, they appear to me to be investments on which the most prudent investors would not hesitate to lend their money.

THE LORD ORDINARY pronounced this interlocutor:—"The Lord Ordinary having advised with the Lords of the First Division of the Court, instructs the Accountant to withdraw the requisition on the *curator bonis*, contained in his report of date 12th January 1876, to realise (1) the investment of the sum of £4500 on mortgage by the commissioners under 'The Aberdeen County and Municipal Buildings Act, 1866,' and 'The Sheriff Court Houses Act, 1860;' and (2) the investment of the sum of £6500 on mortgage by the trustees acting under 'The Aberdeenshire Road Act, 1865,' and to sanction the said investments."

MORTON, NEILSON, & SMART, W.S.—Agents.

No. 81.

Feb. 25, 1876.
Cruickshank, Fraser, & Co. v. Caledonian Railway Co.

CRUICKSHANK, FRASER, AND COMPANY, Pursuers and Respondents.—*Fraser—M'Kechnie.*
CALEDONIAN RAILWAY COMPANY, Defenders and Appellants.—*D.-F. Watson—R. Johnstone.*

Proof—Implied Admission—Process—Production—Carrier.—In an action against a railway company for non-delivery of goods, *held* that a denial by the company that they received the goods was not an implied admission that they did not deliver them to the consignee.

2D DIVISION. Sheriff of Lanarkshire. I.

CRUICKSHANK, FRASER, AND COMPANY sued the Caledonian Railway Company in the Sheriff Court at Glasgow for (*inter alia*) the price of a cask of sperm oil delivered to the defenders or their servants at Glasgow on or about 7th November 1873, "to be carried and delivered by them to James Robertson, merchant, Carnoustie, but which had not yet been delivered."

The record was closed on the summons and minute of defence, which, with reference to this part of the case, bore:—"A denial that the defenders, on or about 7th November 1873, received from the pursuers a cask containing sperm oil, to be carried to James Robertson, or any one else; and explained that the defenders never received, and have no knowledge whatever of said cask." There was also a general denial of the pursuers' allegations.

After the record was closed the pursuers put in process a receipt by the defenders for the cask in question. At the proof two partners of the pursuers' firm deponed that the cask had been delivered to the defenders, and had not been received by Robertson. Robertson was not called as a witness.

The Sheriff-substitute (Guthrie) found that it was not proved that the cask was not delivered to Robertson, and assoilzied the defenders.

The pursuers thereafter presented a petition to the Sheriff (W. G. Dickson) for leave to examine Robertson, which the Sheriff refused, and subsequently adhered to his Substitute's interlocutor on this branch.*

The case having been brought by appeal to the Court of Session upon another branch of the case, their Lordships adhered upon this point, observing that the pursuers could not found upon the defenders' statement as an implied admission that they did not deliver the cask to the consignee, especially as they had not put in process before the record was closed the receipt which was in their own hands, and that they should either have got a specific admission of non-delivery from the defenders, or called Robertson to prove the fact.

ADAMSON & GULLAND, W.S.—HOPE, MACKAY, & MANN, W.S.—Agents.

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* "NOTE.—The Sheriff has some difficulty, because the defenders' denial that they received the cask to which it refers may be said to involve an admission that they did not deliver it to the consignee Robertson. But it is thought that the more correct construction of the defence, especially considering that the defenders are a public company, without personal knowledge of the facts, is, that it is simply a denial of the grounds of action, leaving the pursuers to prove them. If the case had been in the Court of Session, the pursuers would have had to take an issue—Whether (1) they delivered the goods to the defender for transmission to Robertson? and (2) Whether the defenders failed to transmit them? and they would have had to prove both these facts in order to get a verdict. The same principle requires the pursuers in this Court to prove both the facts which are essential grounds of their action; and their failure to prove the second is fatal to them."

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Feb. 29, 1876.

GEORGE SUTHERLAND, Petitioner and Respondent.—*Balfour—Alison.*
JAMES THOMSON, Respondent and Appellant.—*D.-F. Watson—Jameson.*

Sutherland v. Thomson.

Road—Public Footpath—Obstructions—Gates.—Held (1) that the proprietor of lands through which a public footpath ran, or his tenant with his leave, was, as in the case of servitude roads, entitled, for grazing purposes, to put swing wicket gates across the footpath, provided that the gates were not of an obstructive character; (2) that this right being one *meræ facultatis* could not be lost *non utendo;* (3) that it was within the jurisdiction of the Sheriff to grant interdict against interference with such gates recently erected, although for the seven preceding years, and from time immemorial, the public had enjoyed the use of the footpath without gates.

Observed (*per curiam*) that the right of the public in a public footpath is confined to a right of free passage, and that the *solum* of the path belongs to the proprietor of the lands through which it runs.

Observations (*per* Lord Gifford) as to the powers of the Sheriff to regulate possession.

2D DIVISION. Sheriff of Perthshire. I.

IN April 1874 George Sutherland, tenant of Peel Farm, in the parish of Tibbermuir, presented a petition to the Sheriff of Perthshire against James Thomson, farmer, Almondbank, setting forth "that a footpath runs from the Perth and Madderty road towards the parish church of Tibbermuir in a south-westerly direction through a portion of said farm, and along the south-east edge or border of a field presently under pasture grass, lying between said footpath and the said Perth and Madderty road, which footpath is used principally on the Sundays by persons resident in the north-east division of said parish going to the parish church: That in the management of his farm the petitioner finds it necessary to put sheep and other stock to graze on the said pasture-field; and to admit of this being done, it is necessary to erect two small swing-gates across the footpath, one near the north-east end and the other near the south-west end of said footpath, and the petitioner has his landlord's consent and authority to the erection of such gates: That two of these gates were sometime ago erected by him, and were so constructed as to prove no obstruction whatever to the parties who have occasion to pass along the said footpath."

The petitioner then narrated that these gates had on more than one occasion been recently broken down within a few days after they had been erected, and that the respondent Thomson had been concerned in their demolition, and craved the Sheriff to interdict Thomson from removing or injuring the gates which he (the petitioner) had re-erected, or was immediately about to re-erect, and to find Thomson liable in £20 damages.

Thomson entered appearance, and a record was made up. The petitioner did not dispute the right of the public, or of the respondent as one of the public, to use the footpath, and, on the other hand, the respondent did not deny that he had on at least one occasion been a party to the removal of the gates. The respondent stated that the path had been in use from time immemorial without any gates or obstructions whatever until the petitioner had recently attempted to put gates across it; and further, that these gates were a serious obstruction and inconvenience, especially to the congregation returning from Tibbermuir parish church, of which the respondent was a member.

After some procedure the Sheriff-substitute (Barclay) remitted to Mr James Ritchie, civil engineer, Perth, to inspect the locality, and report—"First, what are the erections which the pursuer made, and which were objected to and interfered with; second, whether the same are, on the one hand, necessary to the fair enjoyment of his possession, and, on the other hand, not unnecessary interruptions to the free passage of the public

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in the use of the road; third, if the erections so made answer not the conditions embodied in the immediately preceding point of inquiry, then to report what other and preferable modes he would suggest to suit both said conditions."

Mr Ritchie reported that the erections which the pursuer made, and which were objected to and interfered with, were two swing-gates, moving in wickets, thus,  ; that gates across the footpath at these points were necessary to the fair use of the field by the petitioner, especially when the field was occupied by grazing stock, unless the whole footpath were fenced off entirely from the field, which could be done by the erection of a single fence along the north side of the path, the other side being fenced already; that the gates were to a certain extent obstructions to the passage of the public, but that he was not able to suggest a gate which would enclose the field and prove less obstructive to the public in the free use of the path than a wicket-gate properly constructed of the description which had been objected to.

Neither party objected to Mr Ritchie's report, and the Sheriff-substitute approved thereof, "so far as the same refers to the construction of the swing-gates, the subject of the action," and authorised the petitioner to renew the same at Mr Ritchie's sight and to his satisfaction. The gates were accordingly re-erected at the sight and to the satisfaction of Mr Ritchie.

Thereafter, after a proof, which shewed that the gates were not an obstruction to a single person, but that they occasioned a delay when there was a crowd of people returning from church, the Sheriff-substitute pronounced the following interlocutor:—"Finds as facts, first, there is and has been for upwards of seven years a road through the farm of the pursuer, extending from one public highway to another public road, and which road has been chiefly used by the public in passing to and from the parish church of Tibbermuir, but also for other purposes, and during that period no interruptions have existed by gates or otherwise to such free passage; second, the pursuer, without warrant of law, erected two swing-gates, one at each extremity of said public road, which more or less interfered with the freedom of passage over said road; third, the defender, directly and indirectly, without warrant of law, was concerned in the demolition of the said swing-gates: Therefore in law, finds the defender, as one of the public, and in use of the road, is entitled to a possessory judgment and to have said road kept free from obstruction by gates or otherwise: But finds the defender was not justified, without warrant of law, in interfering with said gates, and having the same removed or demolished: Therefore assoilzies the defender from the conclusion of the action, reserving to the parties their rights of declarator, or for the regulation of the said road for the interests of all concerned: Finds the defender entitled to expenses (subject to the modification of one-fourth of the taxed amount in respect of his unwarrantable interference with the gates)," &c.

On appeal, the Sheriff (Adam) pronounced the following interlocutor;—"Sustains the appeal for the petitioner, and recalls the interlocutor appealed from: Finds (1) that a public footpath runs through a part of the farm of Peel, in the occupation of the petitioner, and that the petitioner on more than one occasion before the present proceedings were instituted erected, with the consent of the proprietor, swing-gates across this footpath; (2) that these gates were broken down and removed, and that the respondent was concerned in and a party to the demolition and removal of the gates; (3) that these gates were necessary for the proper use of the petitioner's farm, and were so constructed as not to be unnecessarily obstructive to the public in the free use of the path; (4) that the gates now erected in place of the gates so removed or destroyed are in like manner

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necessary for the proper use of the petitioner's farm, and not unnecessarily obstructive to the public in the free use of the path: Finds, in point of law, that the petitioner was entitled to erect these gates across the foot-path, and that the respondent was not entitled to remove or destroy the same: Therefore interdicts, prohibits, and discharges the said James Thomson, respondent, from removing or in any way injuring the swing-gates which the petitioner has erected across the said footpath: Finds the respondent liable to the petitioner in the sum of £5 as the loss and damage the petitioner has sustained in consequence of the gates erected by him having been interfered with and removed by the respondent: Finds the petitioner entitled to expenses," &c.

Thomson appealed to the Court of Session.

Argued for the appellant;—There was a broad distinction between the jurisdiction of the Sheriff as regards a servitude road and as regards a public right of way. In the case of a servitude road he was empowered by statute[1] to determine, as fully as the Court of Session could do, both feudal right and the mode in which the right was to be exercised. But in regard to a public right of way he could only pronounce a possessory judgment. His duty was to determine, in the first place, whether the public had a colourable title to the road, and, in the second place, to ascertain in what way the right had been possessed. So soon as possession was proved, or the right admitted, all that the Sheriff could do was to maintain matters *in statu quo*. It was not within his jurisdiction to say what privilege a right of way conferred upon the public, nor to determine how far the proprietor of the adjacent lands could encroach upon the right of the public. The right of the proprietor to put up anything of the nature of an obstruction across a public footpath could only be tried in the Court of Session. Further, assuming that the question was competently raised in the present process, it must be decided in favour of the public. No doubt there were many cases in which the public acquired a right to a road with gates or stiles across it. In such cases the maxim applied *tantum præscriptum quantum possessum*. But here there was no dispute as to the way in which this right of the public had been exercised. There had been no possession of the gates on the part of the proprietor or his tenant, the petitioner. There was no allegation of possession except for a few days. What the Sheriff was asked to do, and what he had done, was to invert the *status quo*. The principle that a servitude must be exercised in the way least burdensome to the servient tenement had no application to a public road. A public right was a separate right of property, and not a mere incumbrance on the neighbouring proprietors. The *solum* belonged to the public.[2] It "is *res communis*, it is *inter regalia*, and (in many cases) it is part of the *solum* of the country which has never been appropriated."[3] In any view there was a large and important question of heritable right between the two parties, which there was no pretence for trying in a possessory question.[4]

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[1] 1 and 2 Vict. c. 119, Sheriff Court Act, 1838, sec. 15.

[2] Per Lord Glenlee in Forbes v. Forbes, Feb. 20, 1829, 7 S. 441.

[3] Per Lord Curriehill in Thomson v. Murdoch, May 21, 1862, 24 D. 982 (first paragraph), 34 Scot. Jur. 482. See also opinions of Lord President (M'Neill) and Lord Deas in the same case.

[4] *Appellant's authorities.*—Stair, ii., 7, 10; Erskine, ii., 9, 12; Harvie v. Rodgers, H. of L., July 8, 1828, 3 W. and S. 251; Macdonald v. Watson, Feb. 23, 1830, 8 S. 584, 2 Scot. Jur. 260; Forbes v. Forbes, Feb. 20, 1829, 7 S. 441; Calder v. Learmonth, Jan. 27, 1831, 9 S. 343; Hay v. Earl of Morton, Dec. 5, 1861, 24 D. 116, 34 Scot. Jur. 61; Thomson v. Murdoch, May 21, 1862, 24 D. 975, 34 Scot. Jur. 482.

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The petitioner supported the interlocutor of the Sheriff.[1]
At advising,—

LORD NEAVES.—The question raised in this case is one of importance, and has been argued to us with great ability and great anxiety. It is said to be new, but principles have already been fixed in similar questions that go far to determine the proper decision of the case. The action orignated in the Sheriff Court by a process of interdict by the respondent Sutherland against the appellant Thomson, praying that the appellant should be interdicted from removing or injuring certain swing-gates erected across a footpath traversing the petitioner's farm, and which the appellant had broken down and destroyed, but which have now been replaced by two gates across the footpath, for the protection of which the application was presented.

The material facts as to the erection of the former gates by the petitioner and their destruction by the appellant are admitted, and the question raised is mainly one of law as to the petitioner's right to erect such gates, or the appellant's right to pull them down. If this were the case of a servitude road it would seem to be attended with no difficulty. The case of Wood v. Robertson, quoted at the bar, seems to be conclusive on the point. The Sheriff there found that while the right of road existed and could not lawfully be obstructed by the party through whose land it passed, yet "as no harm or obstruction can happen to the complainer or his tenants by swing-gates being put upon this road, provided they are not locked or fastened in any manner to prevent passengers from opening the same at all times," the Sheriff, "with that restriction, allows the gates complained of to be put up." This decision of the Sheriff was brought under review of this Court by advocation, and was affirmed, with this variation, that three gates should be allowed instead of four, as being sufficient for the petitioner's protection, and that therefore the fourth gate was unnecessary.

By this judgment several points were determined which deserve attention. 1st, There was there a right of way passing through another man's property which the proprietor was not entitled to obstruct, but as to which it was held to be no obstruction to put upon it a certain number of swing-gates that could be opened by passengers when they travelled along the road. 2d, Those gates had not existed for any definite length of time, but had only been recently thought necessary, and the application made to the Sheriff was for interdict against the erection of these gates or any other on the road. 3d, Though in this way there was no reason for a possessory judgment in favour of the gates, the Sheriff's jurisdiction was sustained so as to authorise their erection, and protect them when erected.

The present case, if it were on all fours the same as the case referred to, would, of course, be ruled by it as a precedent, but it has one point of difference, which raises the question now at issue, and which is one of nicety as well as of importance. The road in dispute in the case of Wood was a servitude road, while the road here in question is a public footpath. I admit that this is not a trifling or immaterial distinction, and that in some questions it might lead to a decision being pronounced in the case of a public road different from that which would be given in the case of a servitude road. But it does not follow that in all cases

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In the case of Wood the Court observed that "the erection of gates on a public road was a practice which had prevailed in some parts of the country," but they added, that such a practice "had never been tolerated by the Court." It may be that there has been no decision recognising the legality of the practice, but as little has there been any decision to the contrary. The question then comes to be, whether there is any reasonable ground in the case of a public footpath for depriving the proprietor of the privilege of protecting his property from unnecessary injury by putting up gates which, confessedly, in the case of servitude roads, have judicially been held to be no obstruction. In both cases the parties possessing the right are entitled to pass freely, and nothing more belongs to them. It is held that a gate which opens is no obstruction to a free passage, and it would be mere legal pedantry to hold that on this point what is sufficient in the one case is not sufficient in the other. A gate which opens is either an obstruction or it is not. If it is an obstruction it ought not to be permitted in the case of servitude roads; if it is no obstruction, individual members of the public seem to have no interest and consequently no right to complain of it.

It has been suggested that in a case of servitude the servient tenement is entitled to the more indulgence in consequence of this being a burden which the dominant tenement can only impose and enforce in the mildest manner

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In the case of Wood the Court observed that "the erection of gates on a public road was a practice which had prevailed in some parts of the country," but they added, that such a practice "had never been tolerated by the Court." It may be that there has been no decision recognising the legality of the practice, but as little has there been any decision to the contrary. The question then comes to be, whether there is any reasonable ground in the case of a public footpath for depriving the proprietor of the privilege of protecting his property from unnecessary injury by putting up gates which, confessedly, in the case of servitude roads, have judicially been held to be no obstruction. In both cases the parties possessing the right are entitled to pass freely, and nothing more belongs to them. It is held that a gate which opens is no obstruction to a free passage, and it would be mere legal pedantry to hold that on this point what is sufficient in the one case is not sufficient in the other. A gate which opens is either an obstruction or it is not. If it is an obstruction it ought not to be permitted in the case of servitude roads; if it is no obstruction, individual members of the public seem to have no interest and consequently no right to complain of it.

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compatible with the enjoyment of its general right. But if considerations of this kind are to receive effect it is also to be kept in view that in the case of a public road the public itself has an interest that nothing shall be done that prevents the full enjoyment of property in general. It is for the interest of the public that all the land in the country should be made available, so far as possible, for the production of food, and any unnecessary impediment to its cultivation or use is a public evil. If a gate across a public footpath tends to facilitate cultivation of the adjoining land, either by promoting it or making it less expensive, there is no reason why the public should complain of this nominal interference with their supposed rights. The very object of such a case is to save the necessity of elaborate and expensive enclosures. If the gates here were not allowed, additional fences in a lateral direction might be needed to a large extent.

A plea has been maintained by the appellant that it was incompetent for the Sheriff to enter on this question at all, that he can only judge of possession, and if there has not been a gate for seven years he cannot interfere. But this is a plain mistake, and the case of Wood is an authority to that effect. It is true that in the Sheriff Court the substantive right to a public road can only be judged of according to possession. But the regulation of that possession, and the exercise of any incidental rights connected with it, do not require seven years to support them. In the same way, where the property is not in dispute, the rights resulting from that property may be exercised at any time, as these are *res meræ facultatis*, and if not inconsistent in themselves with the only right belonging to the other party, they may be exercised or neglected at the pleasure of the party to whom they belong. The right to put up gates is only a function of the permanent right of property, and if it does not injure the other parties they have no interest or status to prevent it. In several cases, accordingly, the Court have established the right of the proprietor of the *solum* of a public road to regulate its course and put up gates that caused no obstruction.

It is true that the public has some rights of property in the road, and this may infer a certain right to the *solum* so far as necessary for the road, but it does not divest the proprietor of the ground otherwise. The minerals are his, if he can work them without injuring the road, and in the same way other operations must be competent to him if they be "*innocuæ utilitatis.*" The practice of the country of having gates on public roads where useful and harmless is a testimony to the correctness of this view.

The party objecting to the gates urges that this is a church road. This rather weakens his case than strengthens it. A church road more nearly approaches a servitude road in its character than other public roads. It is a road for the parishioners to go to church, and if there is no obstacle to their going to church their rights are satisfied.

If the appellant could and did allege that the gate was obstructive or unnecessarily inconvenient, we should have been disposed to listen to that, as was done in Wood's case, but no such demand has been made.

I am therefore for dismissing the appeal, and affirming the judgment of the Sheriff.

Lord Ormidale.—After the very full and lucid exposition of the law of this case given by Lord Neaves, and in which I very much agree, it will not be necessary for me to add many observations. I am anxious, however, to state my own views of the leading points which have been pressed in argument, and

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especially in regard to the true nature of a right of way, such as that in question. I am all the more desirous to do so, as I could not help thinking during the discussion that the qualities ascribed to a public footpath, like that with which we are now dealing, were of a more substantial and proprietory character than truly attaches to it.

The case resolves itself into two main questions—1st, Had the petitioner any right at all to put gates across the footpath? and 2d, supposing that he might have had such a right in some circumstances, was he entitled to do so in the present instance, seeing that the path had been entirely open and without gates for seven years previously? In stating these as the questions on which the determination of the case chiefly turns I am not to omit noticing, before I conclude the further contention of the appellant, that the gates which the respondent put up were in themselves objectionable.

It appears to me that with reference to all these matters it is of great importance clearly to keep in view the true nature of a public footpath such as that in dispute. And I shall premise my observations on this point by remarking that the footpath in question is not said to have had its origin in any grant or conveyance of land, from which it could be inferred that the public had acquired anything in the nature of property *a centro usque ad cœlum*. It is not alleged that the right of the public to the footpath was of a different character from that which may be acquired by immemorial use of passage.

The leading case, illustrative of the true nature of a public right of way, is that of Galbreath v. Armour, July 11, 1845, as decided in the House of Lords, 4 Bell's App. 374. The question there arose in this way. Mr Galbreath was superior of the small town or burgh of Dalintober, the houses or villas in and near which were held of him under feu-dispositions declaring the boundaries to be the streets of the town. Some of the villa proprietors combined for the purpose of erecting a gas-work and introducing gas into their houses. It was proposed to lay the pipes underneath the public road or street of the town. Galbreath applied to the Sheriff for interdict against them, contending that the *solum* belonged to him, and that the public had only a right to pass over it. The Sheriff refused interdict, and the case was brought by advocation to the Court of Session. Lord Cockburn (Ordinary) recalled the Sheriff's interlocutor and granted interdict. The case having then come into the Inner-House, the Court, before further procedure, ordered an issue to be tried before a jury for the purpose of ascertaining what was the precise nature of the road or street in dispute. The jury returned a verdict that it had been for forty years and upwards of the nature of a public highway under the control and superintendence of the road trustees, and was not under the control and superintendence of the defender (Galbreath), and had not been maintained by him or his authors. The Court, in respect of that verdict, altered the interlocutor of the Lord Ordinary, and refused the prayer of the original petition. That judgment was appealed to the House of Lords, who reversed it, and returned to that of the Lord Ordinary. Lord Campbell examined the different pleas maintained for the respondents in the appeal. He said—"The first is that by the law of Scotland the soil of all highways is in the Crown. Let us observe to what an extent this proposition goes. Carriage roads, horse roads, and footpaths are equally public roads, and whether the use of them has existed further back than can be traced, or they have been established by uninterrupted use for more than forty years immediately before the time when the controversy respecting them arises. It comes to

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this, then, that if a proprietor, for the accommodation of the public, suffers a public road for horses, carriages, or foot-passengers to be established over his land, the property of the space which the road traverses is gone from him and his heirs, from the centre to the sky, so that he loses all the herbage there may be upon the surface of it, with all the minerals under it, and he cannot connect the different parts of his intersected estate by a tunnel under it, or by a bridge over it. It is curious, in a feudal point of view, likewise, to consider where and how the fee is supposed to be transferred. But I am happy to think, my Lords, that there is no sufficient authority in the law of Scotland for a proposition so absurd and inconvenient. When the text writers cited upon this point are examined it will be found that they mean no more than that highways are *res publicæ*—that there is a public servitude over them—that they are called 'the king's highways' in Scotland as they are in England, because the public, represented by the sovereign, have a right to use them, and that any purpresture or nuisance upon them is a public offence, for which the offender may be prosecuted and punished, leaving the soil subject to the public servitude to remain in the private proprietor. The highway belongs to the king; but what is the definition of a highway? Not the soil over which the public have a right of passage. . . . This right of passage may well be said to belong to the king, although the soil over which it is exercised belongs to a private individual." Following up the same line of argument, Lord Brougham remarked—"When it is said, as it is in the books, and in some of the cases, that a highway is in the public or in trustees on behalf of the public, or in the Crown for the benefit of the public, what is it that really is so? *Ex vi termini*, we are not to take 'highway' to mean that, which it is often used to mean, by the ordinary confusion of language in common parlance, where, in this case, as in many others, you confound the thing with the use of the thing," &c.—4 Bell's App. p. 389. It is obvious from the opinions so expressed of these noble and learned Lords in deciding a Scotch appeal according to the law of Scotland that they applied their observations to all public roads; but they are peculiarly applicable to a footpath like the present, which we must assume has been acquired merely by the public passing over it for the prescriptive period. It appears to me, therefore, that the right which the public have to such a footpath is more of the nature of a servitude than of property. And I may add that the views expressed by Lord Campbell in Galbreath v. Armour were repeated and enforced by him in the subsequent case of The Marquis of Breadalbane v. M'Gregor, July 14, 1848, 7 Bell's App. p. 43, in which a right was claimed for the public to have stances on a drove road, for cattle using the road to rest and pasture upon. In the latter case, Lord Campbell said (p. 60)—"I observe it is stated that the pasture upon the drove road belongs to those who use the drove road. Now, that I take leave very much to doubt, or I might say to deny. The notion has been suggested, that wherever a road is established the soil of the road belongs to the public. That is a fallacy. There may be a road established by usage for forty years, but the soil of the road continues to belong to the coterminous owner. If there are minerals under the road the minerals are his; if trees grow upon the road the trees are his; if there is grass upon the road he may take the grass—subject always to the public servitude."

If the public, then, has a mere right to pass over the road, and if the *solum* or ground passed over belongs to the conterminous proprietor, it would be a strong thing to hold that the proprietor, or his tenant with his leave and in his right, is not entitled, for the protection and service of his estate, to put up gates

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which do not unnecessarily or in any material degree obstruct the public in the exercise of their right of passage. No authority was cited in support of any such proposition. On the contrary, there is ample authority, I think, in the opposite direction. Thus, in Rodgers v. Harvie, 7 S. 289, the interlocutor bears —"Finds that by the verdict of the jury it is established that for forty years and upwards . . there existed a public footpath from . . . Therefore finds and declares that the pursuers and their families are entitled to the use and privilege of the said footpath or foot-road, free from any encroachment or any interruption inconsistent with or injurious to such use and privilege;" . . . "ordains the defender to remove the obstructions mentioned in the summons, in so far as they close up or obstruct the said passage, . . without prejudice, however, to the defender enclosing his ground, . . provided he leave in the fences wickets or proper openings for allowing free passage." This makes it very clear that the Court considered that the party through whose lands the public footpath passed had the right to put up gates or wickets across it, so far as not to be destructive or injurious in a reasonable sense to the right of passage belonging to the public.

That the same principle was recognised in the case of Kirkpatrick v. Murray and the Aberdour case,[1] both of which were cited in the course of the argument, is also, I think, clear.

The general right of the owner, or farmer in his place, to erect gates, provided they do not interfere in a fair and reasonable sense of that expression with the public right of passage, is therefore, I take it, beyond dispute. But it is said here that no gates having existed for a period of seven years prior to those put up by the respondent the appellant was entitled to the benefit of a possessory judgment, and consequently the petitioner was not entitled to put up the gates till he had established his right to do so by a declarator in the Supreme Court. Assuming that he had a right to put up gates at all, and there being no dispute about the existence of a public footpath itself, I think it would be quite extravagant to hold that before exercising his right he required to resort to the Supreme Court for a warrant to do so. Indeed, the case of Wood v. Robertson, referred to by the Sheriff, is conclusive on this point; for, although that case related to a servitude road, the Sheriff had at the time it was decided no more authority to deal with a servitude than he had with a public road. It appears to me, therefore, that the putting up of gates being a matter incidental to the use of the footpath was peculiarly appropriate to the Sheriff, who, if he has jurisdiction in anything, has it in questions of possession. It was for him, therefore, to regulate the use and possession of the footpath, and that is all he did.

The only remaining point to be noticed is whether the gates put up were in themselves of an objectionable description. I think the appellant has failed to shew that they were. Besides, on this point, Mr Ritchie's report, to which no objection was taken by the appellant, must be held as conclusive.

I, therefore, for the reasons which now have been stated by me, concur with your Lordship in the opinion that the appeal in this case ought to be dismissed, and the Sheriff's interlocutor appealed against affirmed.

LORD GIFFORD.—The questions raised in this case are important and interesting, and they have been very ably argued. It can perhaps hardly be said that

[1] Hay v. Earl of Morton, Dec. 5, 1861, 24 D. 116, 34 Scot. Jur. 61.

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these questions are directly and conclusively settled by any of the authorities referred to, but on principle I have little difficulty in coming to the conclusion that the judgment of the Sheriff-principal is well founded, and that the appeal ought to be dismissed, subject to the right of the appellant to have the wickets or swing-gates across the footpath made as convenient as possible for the exercise of the admitted public right of footpath.

The first question raised was, Has the Sheriff jurisdiction as in a possessory question to authorise or confirm swing-gates or wickets across an admitted public right of footpath where such gates or wickets have not existed for the possessory period of the last seven years? Now, on this point, I am of opinion that the Sheriff has jurisdiction in such a question as this. He can regulate interim possession—he can say and determine how and in what manner the right of footpath is to be enjoyed in the meantime—his judgment being always possessory and *ad interim*, leaving either party, if they think that the interim possession fixed by the Sheriff is inconsistent with their legal and permanent rights, to have these rights finally determined and fixed by the Supreme Court. It is a mistake to say that in such possessory questions the Sheriff has the mere ministerial duty to look to, What was the state of possession and the manner of possession for the last seven years? and to continue that precise state of possession by an interim possessory judgment till the matter of right be fixed. No doubt this is often done when a competition of heritable rights arises, when the Sheriff, who cannot decide in the competition, continues the party in possession who has been so for the last seven years, and this is in such cases the possessory judgment. But this by no means exhausts the Sheriff's jurisdiction in possessory questions. In cases where no question of heritable right arises, where the heritable right is admitted and undisputed, but where the parties are at issue as to the mode in which they may use and enjoy their respective rights, the Sheriff has undoubted jurisdiction to regulate *ad interim* the mode of possession, and this, apart altogether from the usage during the last seven years. Thus, in questions of admitted common property, the Sheriff may fix *ad interim* how the co-proprietors are to possess or enjoy their admitted joint rights. In questions of common interest, as where houses are built in flats, with a common entrance or common stair, the Sheriff may fix questions of gates or doors or modes in which alterations are to be made or repairs effected. And so in many other questions of like nature, when there is no dispute about the heritable right, but only difference as to its consequences or results, the Sheriff may *ad interim* regulate possession or exercise of use, either party having the right to resort to the Supreme Court for a permanent rule. Thus the Sheriff is undoubtedly the proper judge in all questions as to the interim rights between landlords and tenants—in all questions of removing, ejection, maills and duties, intrusion, wrongous use of property, nuisance, and a variety of other actions which often arise where no question of heritable right at all is raised, but which all relate to the use or enjoyment of heritable subjects.

In the present case there is no doubt at all that the Sheriff had jurisdiction to entertain and dispose of the present petition, for it is simply a petition to interdict the appellant from injuring or removing the swing-gates across the line of public footpath in question, that is, to interdict the appellant from destroying these swing-gates at his own hand, and by violence or force. It cannot be disputed that the Sheriff had power and jurisdiction to restrain violence or prevent personal conflict or breach of the peace. But it does not deprive the Sheriff of

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this jurisdiction merely because the appellant, against whom interdict was sought, pleads that the petitioner had no right to put up or to maintain the swing-gates or wickets in question, and urges that no such gates or wickets have existed during the last seven years. A judgment refusing the interdict sought would be virtually a judgment finding that the petitioner had no right to put up the swing-gates or wickets, and that the appellant was entitled *brevi manu* to remove them, but in a question of jurisdiction such a judgment would be quite as much an exercise of jurisdiction as a judgment finding that the swing-gates must remain, or regulating their construction.

By a recent statute the jurisdiction of the Sheriff has been enlarged so as to enable him to try all questions relating to real or prædial servitudes. But even before that statute was passed the Sheriff was in use, and almost necessarily so, to regulate *ad interim* the possession and exercise of servitudes, whether of road, of pasturage, of aqueduct, or of any other description, and our books are filled with instances of such interim regulation. The case of Wood, 9th March 1809, F.C., and other cases quoted in the present discussion, are examples. Even in questions where the road is not a servitude road, but a public right of way, the Sheriff has undoubted jurisdiction to regulate interim possession. An instance occurs in another case cited in argument, Kirkpatrick v. Murray, 26th November 1856, where there was claimed a public right of way through Mr Murray's private park and policies of Cally, and where the Sheriff regulated interim possession by fixing that gates at either end pending the action of declarator of right of way should be unlocked so as to give the public *ad interim* right of access.

There are other similar cases, and it would be extremely inconvenient if the local Judge had not such jurisdiction, but if parties on mere questions of interim enjoyment or possession should be obliged to come to this Court. I am therefore of opinion that the Sheriff had jurisdiction to entertain and rightly entertained the question whether the swing or wicket-gates erected by the petitioner should or should not be maintained, and whether or not their construction should be altered or modified.

But the next and the more important question is, what may be called the merits of the action, and these are, whether the Sheriff has decided rightly in holding that the petitioner is entitled to maintain swing-gates across the line of the public footpath in question, and in fixing or approving of the character and construction of these gates. Now, here also I am of opinion that the Sheriff-principal has decided this point rightly, subject to the observation I have already made, that, if the respondent demands it, the construction of the swing-gates possibly might be somewhat improved or altered.

It seems to be quite fixed, and, indeed, was not seriously disputed by the counsel for the appellant, that in the case of a proper servitude right of footpath, that is, a right of footpath not in favour of the public, but in favour only of the proprietors and tenants of a particular property or estate,—a prædial servitude of footpath, as it is called,—the proprietor of the servient tenement, that is, the lands subject to the footpath, may put up such swing-gates, stiles, or turnstiles, as may be necessary for fencing his property, provided they do not materially interfere with the exercise or enjoyment of the right of way which the occupants of the dominant tenement can claim. This rests upon the equitable rule that a servitude must be rendered as little burdensome to the servient tenement as is consistent with its fair exercise.

It was contended, however, that this principle, which is in full force as to a

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servitude footpath, is inapplicable to a right of public footpath where the right of way is in the public, and is not confined to the mere inhabitants of a dominant estate, and the distinction between the two was urged with great ability. No precise authority was quoted establishing that open or unlocked gates were permissible in the one case and not in the other, the nearest authority being the *dicta* in the case of Wood v. Robertson, 9th March 1809. But there the Judges were only dealing with a servitude road on which they decided that swing-gates were permissible, and, while doubting whether such permission should be extended to public roads, the Court seem to have had in view not a mere public right of footpath, but a public right of road for carriages and vehicles of all kinds where the public were entitled to drive, day or night, free of all obstructions. I cannot hold, therefore, the *dicta* or doubts expressed in Wood v. Robertson as excluding the right of a proprietor to put swing-gates or stiles or wickets across a public right of footpath, and I am of opinion that the same principles of equity which give a proprietor a right to put such gates across a servitude footpath will apply, at least in many cases, and in the present case, to a public right of footpath. There are many public footpaths extending for miles across open or pastoral country. Fences are required on such estates for the mere purposes of pasturage, and to prevent cattle and sheep from straying. It would be very hard in such cases to compel the proprietor to fence the line of footpath on both sides throughout its entire length, it may be for many miles, and we are familiar with such footpaths, extending through a whole valley, and yet this would be the consequence of preventing him from putting, say, at the entrance and exit of such footpath, swing-gates or wickets, which, while they would prevent animals from straying, would be no inconvenience to foot-passengers using the footpath.

No doubt there is a broad and a well-known distinction between a servitude footpath and a public footpath, the use of the one being confined to the residents in or the visitors to a dominant tenement, the use of the other being open to the whole public wherever they reside or wherever they are going. But this difference does not affect the equitable principle which gives the proprietor the best use of his property subject to the right. In reality, a public right of footpath is really the same as a servitude right, excepting that the dominant tenement is the whole kingdom and not a special subject or estate, and no good reason seems to exist why the equitable rights of use which the law secures to the proprietor of a servient tenement should not be given to the proprietor of an estate burdened with a public footpath, provided only its use as a public footpath is not interfered with. It seems to follow from the judgment of the House of Lords in the case of Galbreath v. Armour, 11th July 1845, 4 Bell's App. Ca. 374, that the *solum* of the line of footpath is in the landlord of the ground, and not in the Crown; the public have nothing but a mere right of free passage over or through the lands which the respondent in the appeal occupies, and which belong to the Earl of Kinnoull. I am therefore of opinion in the present case that the petitioner (respondent in this appeal) is entitled, in order to the enjoyment of his land for pasture, to put up such swing-gates or wickets, as while they will prevent his cattle from straying, will not impede the public right of way.

It was urged for the appellant that the path in question was not only used for foot-passengers, but was occasionally traversed by horses or by riders on horseback. I am of opinion that this has not been sufficiently proved, or, at all events, not during the last seven years, and therefore I think that in this question

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of interim possession, and in this action we can do no more than settle interim possession, the alleged right of horse-road or *actus* has been rightly laid out of view.

I have only to add that if the appellant had thought it worth while to move for it, I should be inclined to give him, instead of a wicket or wickets, swing-gates fastened by a mere latch or catch (which may be self-acting), instead of the wickets which I understand presently exist. I sympathise with the remark urged by the appellant that a wicket, requiring to be turned by each single individual, and thus scarcely permitting the passage of more than one at a time, may be inconvenient when a whole congregation is at once dismissed, and the present footpath seems to be used by the congregation. A swing-gate, which admits of being held open or even temporarily fastened open seems not unreasonable in such circumstances, and when it had allowed passage it could be closed on a latch so as to serve the petitioner's legitimate purpose of preventing his cattle from straying. The gate could be so hung or so hinged as, if thought desirable, to swing shut of its own accord. This is really a matter of adjustment, if moved for, and I see the present respondent expresses readiness to do whatever is expedient in this respect.

On the whole, and subject to this remark, I think the judgment of the Sheriff-principal right.

The LORD JUSTICE-CLERK was absent.

THIS interlocutor was pronounced:—"Find in point of fact that the public footpath runs through a part of the farm of Peel, in the occupation of the respondent, and that the respondent, on more than one occasion before the present proceedings were instituted erected, with the consent of the proprietor, swing-gates across the footpath; (2) that these gates were broken down and removed, and that the appellant was concerned in and a party to the demolition and removal of these gates; (3) that these gates were necessary for the proper use of the respondent's farm, and were so constructed as not to be in any material degree injurious or obstructive to the public in the free use of the path; (4) that the gates now erected in place of the gates so removed or destroyed are in like manner necessary for the proper use of the respondent's farm, and not in any material degree injurious or obstructive to the public in the free use of the path; and (5) that the respondent sustained damage to the extent of £5 in consequence of the demolition as aforesaid of the above-mentioned gates: Find in point of law that the respondent was entitled to erect said gates across the footpath, and that the appellant was not entitled to remove or destroy the same: Therefore, in respect of the foregoing findings, affirm the interlocutor of the Sheriff appealed against: Dismiss the appeal, and decern: Find the respondent (the petitioner in the Sheriff Court) entitled to expenses in this Court," &c.

MURRAY, BEITH, & MURRAY, W.S.—JOHN GALLETLY, S.S.C.—Agents.

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Walker, *et al.* v. Presbytery of Arbroath, *et al.*

JAMES WALKER AND ANOTHER, Complainers.—*J. G. Smith—Balfour.*
THE PRESBYTERY OF ARBROATH AND OTHERS, Respondents.—*D.-F. Watson—Gloag.*

Church—Churchyard—Presbytery—Jurisdiction—Ecclesiastical Buildings Act, 1868, 31 *and* 32 *Vict. c.* 96, *secs.* 3, 14, *and* 20—*Compulsory Sale—Notice.*—On 18th April 1875 a notice was read from the pulpit of a parish church intimating that a petition had been presented to the Presbytery, "craving them to design and set apart the piece of ground immediately adjoining the churchyard on the north, or other suitable piece of ground, for an addition to the same, and that the Presbytery are to visit and inspect the churchyard on Thursday the 6th day of May next, at one o'clock afternoon, at which time the heritors and all others concerned or persons duly authorised to act for them, are requested to attend."

At the time specified the Presbytery, after inspecting the churchyard, proceeded to designate the piece of ground to the north, part of which belonged to W., a heritor, who was not present, but who had heard the above intimation made in church. On 11th May notice was sent to W. (but not to his tenant) that a meeting of Presbytery would be held on 17th May "to take further steps towards making an addition to the churchyard," and requesting him to attend.

At this meeting the Presbytery, upon the report of men of skill, fixed the value of W.'s ground, including the value of unexhausted manure, and ordained the tenant to remove at the term of Martinmas 1875. No notice of either judgment was sent to the heritor or to his tenant till 22d July 1875.

In a suspension and interdict brought by W. and his tenant, and insisted in by W., on the grounds (1) that the only notice he had got of the meeting of 6th May was a notice that the Presbytery would merely visit and inspect the churchyard, and that therefore the decree of designation then pronounced was illegal; (2) that he had been deprived of his statutory right of appeal to the Sheriff by not receiving notice of the judgment until after the time for appeal had expired,—*held* (1) that the designation of an addition to a churchyard, and the regulation of the procedure thereanent, being matters within the exclusive jurisdiction of the Presbytery, were not subject to review in the Court of Session; and (2) (*rev.* judgment of Lord Young, *diss.* Lord Ardmillan) that considering the fact that W. had been engaged in negotiations with the heritors as to the sale of his ground before the application to the Presbytery the notice from the pulpit was not so insufficient as to justify the Court in quashing the whole proceedings as illegal.

Churchyard—Decree of Designation—Decree of Removing by Church Court—Executorial Power—Compensation to Tenant—Lease.—In the same suspension and interdict insisted in by the tenant, on the grounds (1) that the designation, decrees, and valuation were invalid, because the Presbytery had ordained the tenant to remove, and (2) that the tenant's compensation had not been taken into view, *held* (1) that the decree was according to usual style, and competent, although the Presbytery had no executorial power to enforce the decerniture to remove; (2) that, assuming that the tenant's interest was not taken into view in the valuation which the Presbytery had made, it was still open to the tenant to maintain any claim that he had.

1ST DIVISION. Lord Young.

THIS note of suspension and interdict was presented by James Walker of Ravensby, in the parish of Barry and county of Forfar, and James Dargie, one of his tenants, against the Presbytery of Arbroath and heritors of the parish of Barry, for suspension of a decree of designation by the Presbytery of a piece of land on the estate of Ravensby as an addition to the churchyard of Barry, and for interdict against the respondents carrying the same into effect.

The note was presented in the following circumstances:—On 19th March 1874 the heritors of the parish of Barry resolved that an addition should be made to the churchyard, and on 1st October 1874 they came to be of opinion that a small field adjoining the churchyard to the north,

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and belonging to Mr Walker, was the most suitable for this purpose. An offer for the ground was made to Mr Walker, but on 11th November 1874 he declined it, at the same time stating the terms on which he would agree to the proposal of the heritors.

Subsequent negotiations with Mr Walker proved abortive, and on 6th April 1875 a petition was presented to the Presbytery, signed by fifteen of the heritors, setting forth the circumstances, and craving the Presbytery to visit and inspect the churchyard, and to designate and set apart so much of the said piece of ground adjoining the churchyard to the north, or other suitable piece of ground, as might be necessary as an addition to it.

The Presbytery, at their meeting on 6th April 1875, as their minutes bore,—"Resolved to visit and inspect the churchyard of Barry on Thursday, the 6th day of May next, at one o'clock P.M., with a view to fix upon a piece of ground suitable for designating as an addition to the churchyard, if they shall find the same to be necessary, and to designate the same; and directed and hereby direct the minister to intimate this petition, and the time fixed for the visit, from the pulpit and on the church door, and also by advertisement in the local papers once during each of the two successive weeks between the intimation from the pulpit and the day for which the visitation is called; further appointed and hereby appoint the minister to secure the attendance of a duly qualified and licensed land-valuator to aid them in the inspection and valuation of such portion of ground as may be considered suitable and necessary as an addition to the churchyard, with a view to apportion the expense of providing the same among the several heritors according to their just proportions; and adjourned and hereby adjourn further consideration of the petition till the said 6th day of May next."

On Sunday, 18th April 1875, the following intimation was made from the pulpit and on the church doors of the parish church of Barry:—"Notice.—Intimation is hereby given to the heritors of this parish and all concerned that a petition has been presented to the reverend the Presbytery of Arbroath, craving them to design and set apart the piece of ground immediately adjoining the churchyard on the north, or other suitable piece of ground, for an addition to the same, and that the Presbytery are to visit and inspect the churchyard on Thursday, the 6th day of May next, at one o'clock afternoon, at which time the heritors and all others concerned, or persons duly authorised to act for them, are requested to attend."

An advertisement was also inserted in the "Dundee Advertiser" of 23d and 30th April to the same effect.

Mr Walker was present in church on Sunday, 18th April 1875, when this intimation was made.

The minutes of the meeting of Presbytery of 6th May bore,—"The Presbytery then did, along with the heritors and the valuator, visit and inspect the churchyard and adjoining ground, and after deliberation and hearing parties petitioners, Find *ad interim* that the churchyard of Barry is not sufficient for the wants of the parish, and requires to be enlarged; further, that a portion of the two ridges of arable land lying immediately to the north of the churchyard, belonging respectively, the ridge contiguous to the churchyard, to the estate of Ravensby, possessed by James Walker, Esq., and the ridge further north to the estate of Pitskelly, possessed by the Right Honourable the Earl of Dalhousie, and bounded as follows,— . . . is a suitable and proper and convenient piece of ground to be designated and appropriated as an enlargement of the present churchyard. The Presbytery further designate and set apart the portion of ground above defined, and belonging to the several estates of

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Ravensby and Pitskelly, as an addition to the churchyard of Barry: . . . . Further, the Presbytery ordain the present tenants of said portions of land now designated and set apart for addition to the churchyard . . . : as aforesaid to remove therefrom at the term of Martinmas next: Further, the Presbytery remit to Mr James Proctor, licensed land-surveyor, to measure separately and ascertain the dimensions of the several portions of land now designated and set apart for the purposes aforesaid, distinguishing that portion belonging to the estate of Ravensby, set apart for addition to the churchyard, from the portion belonging to the estate of Pitskelly, set apart for the like purpose, . . . and to report the same certified to the Clerk of Court; and appoint the clerk to communicate the said certified measurements to Mr Collier, the valuator, and remit to the said valuator to ascertain and fix the value of said portions of ground respectively, and to report his award to a meeting of Presbytery to be held at Barry on Monday, the 17th day of May current, at one o'clock afternoon; and the Presbytery did and hereby do appoint a meeting to be held at the time and place aforesaid, and cite parties *apud acta* to appear for their interests, and adjourn further consideration of the petition till said meeting."

No special intimation was made to Mr Walker of the resolution come to by the Presbytery at their meeting of 6th May 1875, but on 11th May a notice was sent him that a meeting of Presbytery would be held on May 17th "to take further steps towards making an addition to the churchyard at Barry, which meeting you are requested to attend."

The Presbytery met on 17th May 1875, when appearance was made for the petitioners (the heritors).

Mr Walker was not present either at the meeting of 6th or of 17th May.

The minutes bore that the reports from Mr Proctor as to the measurement, and from Mr Collier as to the value of the portions of the ground taken from the estates of Ravensby and Pitskelly respectively, were read, and that "Mr Collier stated in his report that in arriving at these valuations he had taken into account the unexhausted manures in the ground, and as regards the Ravensby land the allowance required to be made for detour;" that the Presbytery, after findings as to the measurement and value, in terms of the reports, found that the value of the ground was a burden upon the whole heritors of the parish of Barry, and fell to be paid by them according to their just proportions; that the heritors were bound to enclose the addition made to the churchyard with a proper wall, &c., and generally to do whatever might be requisite to put the whole into a proper condition for the use of the parishioners as a churchyard, and remitted "to the heritors to take estimates of the expense; and authorised them to enter into contracts for the execution of the work, and to report the same to the Presbytery on Tuesday, the 7th day of September next, at their meeting in Arbroath, to enable them then to give final decerniture in the petition, and to allocate the whole expense upon the several heritors according to their just proportions, and adjourned farther consideration of the petition till the said 7th day of September next, at twelve o'clock noon, and cited parties petitioners to appear then and there for their interests."

No special intimation was made to Mr Walker of the resolutions come to by the Presbytery at their meeting of 17th May 1875. But on 22d July 1875 a letter was addressed to the complainer, James Dargie, by the clerk to the Presbytery, requiring him to remove from that portion of the ground designated as the addition to the churchyard which was occupied by him.

The note of suspension and interdict was presented on 4th September 1875, and the Lord Ordinary granted interim interdict.

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Accordingly, the meeting of Presbytery, appointed for 7th September 1875, was not held.

The complainers set forth as the grounds of their suspension and interdict—That no intimation whatever of the petition, or of its presentation, or of the meeting of Presbytery for its consideration, or of the adjournment of that meeting, was made to either of the complainers. Farther, the intimations ordered by the minute of Presbytery of 6th April 1875 were not made. An intimation was made from the pulpit that the Presbytery were to visit and inspect the churchyard on the 6th day of May, but no intimation was given of the object of the visit, and in the notice affixed to the church door (which notice bore no date) no intimation was given either of the object of the visit, further than that it was "to visit and inspect the churchyard," or of its date. Farther, the petition and the time fixed for the visit were not intimated in the local papers. The only newspaper published in Arbroath was "The Arbroath Guide," and no advertisement whatever on the subject was inserted in that paper. That neither of the complainers received any intimation of the object of the meeting of 6th May, or that it was the intention of the Presbytery at that meeting to designate as an addition to the churchyard the ground belonging to and occupied by them respectively. That no intimation whatever was made to them of the designation of the said piece of ground belonging to and occupied by them respectively at the meeting of 6th May 1875, nor of the object of the meeting appointed to be held on 17th May 1875. That they received no notice of any meeting with Mr Proctor or Mr Collier, and had no opportunity of being heard before the latter as to the price to be paid for the ground. That the complainer James Walker having received no notice of the foresaid findings or pretended findings and designation of part of his lands by the respondents, the Presbytery of Arbroath, and having been in ignorance of these findings or pretended findings and designation till after the receipt by the other complainer of the foresaid letter from the clerk to the Presbytery, dated 22d July 1875, was unable to submit the proceedings of the respondents, the Presbytery of Arbroath to the review of the Sheriff, in terms of the provisions of the Act 31 and 32 Vict. c. 96.* That the whole of the foresaid proceedings of the respondents, the Presbytery of Arbroath, were illegal, and the desig-

* The Act 31 and 32 Vict. cap. 96, sec. 3 enacts that "from and after the passing of this Act, if in the course of any proceedings before any Presbytery of the Church of Scotland relating to . . . the designing or excambing of sites for or additions to churchyards, and the suitable maintenance thereof (including the building or repairing of churchyard walls), any heritor or the minister of the parish shall be dissatisfied with any order, finding, judgment, interlocutor, or decree pronounced by such Presbytery, it shall be competent for such heritor or minister, within twenty days of the date of such order, finding, judgment, interlocutor, or decree, to stay such proceedings by appealing the whole cause, as hereinafter provided, and such appeal, on being duly intimated to the clerk of the said Presbytery, shall have the effect of staying the Presbytery from taking any further steps in connection with said proceedings; provided always that if no such appeal is taken and duly intimated within the period foresaid, every such order, finding, judgment, interlocutor, or decree not appealed from as aforesaid shall be final and not subject to review." Section 4 provides that "an appeal under this Act shall be taken by the appellant or his agent presenting a summary petition to the Sheriff of the county in which the parish concerned is situated, praying him to stay the proceedings before the Presbytery and to dispose of the same himself." Section 14 provides for an appeal from the Sheriff's judgment to that of the Lord Ordinary on Teinds, whose judgment, by sec. 20, is declared to be final.

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nation of a portion of the estate of the complainer James Walker in the occupation of the other complainer, without their consent, and without intimation to them that they might be heard for their interest, both as to the expediency of taking the ground, and as to the compensation to be paid to them in the event of the same being taken, were null and void. The complainer James Dargie held a lease of the ground which did not expire till the term of Martinmas 1886, but no provision was made for payment to him of any sum whatever in respect of unexhausted manure, or the loss of the occupation of the said subject during the years yet to run of the said lease, and it was, he averred, the intention of the respondents to take possession of the ground and to deprive him of the occupation thereof without making any compensation to him therefor, or giving notices or putting in force the provisions of the Lands Clauses Consolidation Act, 1845.

The complainers pleaded;—(1) The whole proceedings of the Presbytery in connection with the said pretended designation of the ground in question having been irregular, informal, and illegal, the designation is inept and not binding on the complainers. (2) The said pretended designation and valuation of the ground in question are inept and not binding on the complainer James Walker, in respect that they were made in his absence and without intimation; or at all events without any lawful or sufficient intimation to him.

The respondents pleaded;—(1) The judgments of the Presbytery referred to not having been appealed from are final, and implement thereof cannot competently be interdicted. (2) The proceedings of the heritors and the Presbytery above set forth having been regularly taken, the ground in question was thereby duly designated as a portion of the churchyard of Barry. (4) The petition of the heritors, and deliverances of the Presbytery thereon, having been duly intimated, the complainer Mr Walker was bound to appeal against the deliverances of the Presbytery, if he objected thereto.

The Lord Ordinary of consent passed the note and continued the interim interdict.

Thereafter, on 26th November 1875, the Lord Ordinary pronounced this interlocutor:—"Suspends the proceedings complained of, continues the interdict, and declares the same perpetual, and decerns: Finds the respondents liable in expenses," &c.*

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* "NOTE.—It is admitted that the complainers had no notice of the presentation of the petition of the heritors to the Presbytery on 6th April, of the meeting of Presbytery on that day, of the proceedings thereat, other than the subsequent intimation from the pulpit, and the advertisement referred to and quoted in Statement 4. I assume that this was good notice of the resolution of Presbytery 'to visit and inspect the churchyard' on 6th May, as a preliminary to designation, but it was, I think, no notice that the Presbytery would, at a meeting to be held immediately after the inspection, and on the same day, proceed to designation. This, however, they did in the absence of the complainers, and, as I must hold, without notice to them. The interest of the complainer Mr Walker was obvious, for not only was he proprietor of the ground which the Presbytery designated, but as an heritor he was by 31 and 32 Vict., chap. 96, sec. 3, entitled to appeal to the Sheriff against the judgment of the Presbytery within twenty days of its date. It does not appear that he had any notice of the judgment of 6th May, or of the subsequent judgment of 17th May, prior to the letter of 22d July, quoted in Statement 7. The proceedings of the Presbytery in ordering the removal from the ground, and in valuing it, may be subject to criticism and objection, but the want of notice to parties so nearly interested as the complainers, and particularly to the heritor who was thus deprived of his

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The Presbytery of Arbroath, and the Earl of Dalhousie as one of the heritors of the parish of Barry, reclaimed.

Counsel were first heard on the grounds stated in the second plea in law for the complainers, on which the Lord Ordinary had founded his judgment.

At advising on 18th February 1876,—

LORD PRESIDENT.—The object of this suspension is to stop certain proceedings which have been taken by the Presbytery of Arbroath for the purpose of making an addition to the churchyard of the parish of Barry, and the Lord Ordinary has suspended the proceedings and granted interdict against further proceedings in the matter. His judgment gives effect to one of several objections which have been stated by the complainers, namely, that a certain deliverance of the Presbytery designating this ground as part of the churchyard, or as an addition to the churchyard, was not preceded by any proper notice to the complainers, who are the proprietor and tenant of the ground so proposed to be added to the churchyard. Of course in dealing with this reclaiming note we have not considered nor have we heard parties upon any of the other objections which have been taken to these proceedings, and our judgment must be confined entirely to that which forms the ground of the Lord Ordinary's judgment. As regards that matter I cannot agree with the Lord Ordinary.

The Presbytery in dealing with this matter are not regulated by the provisions of any statute, but are possessed of a jurisdiction which, although originally derived from statute, is matter entirely of common law as regards the mode of its exercise. It depends entirely upon practice and custom how its proceedings are to be carried out. It is, no doubt, of importance to observe that a recent statute has been passed to amend procedure in regard to ecclesiastical buildings and glebes in Scotland, including the matter of churchyards, but that statute neither confers jurisdiction on the Presbytery, nor deprives them of jurisdiction, nor does it either extend or limit their jurisdiction. It seems to me merely to recognise the existing jurisdiction of the Presbytery, and to give a particular mode of appeal or review of their proceedings in place of that which was formerly competent. The 3d section of the statute provides,—"If in the course of any proceedings before any Presbytery of the Church of Scotland relating to . . . . the designing or excambing of sites for or additions to churchyards, and the suitable maintenance thereof (including the building or repairing of churchyard walls), any heritor or the minister of the parish shall be dissatisfied with any order, finding, judgment, interlocutor, or decree pronounced by such Presbytery, it shall be competent for such heritor or minister, within twenty days of the date of such order, finding, judgment, interlocutor, or decree, to stay such proceedings by appealing the whole cause, as hereinafter provided; and such appeal, on being duly intimated to the clerk of the said Presbytery, shall have the effect of staying the Presbytery from taking any further steps in connection with said proceedings: Provided always, that if no such appeal is taken and duly intimated within the period foresaid, every such order, finding, judgment, interlocutor, or decree not appealed from as aforesaid shall be final and not subject to review." The statute also contains provisions as to the mode in which the appeal is to be followed out, by presenting a summary petition to the Sheriff

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statutory right to appeal, is, in my opinion, sufficient to warrant the suspension now asked."

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of the county, and makes the deliverance of the Sheriff of the county upon the appeal petition final and conclusive, subject only to appeal to the Lord Ordinary on Teinds, and makes the judgment of the Lord Ordinary on Teinds not reviewable.

Now, it seems to me that that statute, in the first place, clearly recognises the competency of the Presbytery to deal with the matter here in dispute. It leaves the jurisdiction of the Presbytery just where it found it, but in place of there being any mode of reviewing the Presbytery's findings in this Court, as formerly, there is an appeal given to the Sheriff, and from him to the Lord Ordinary on Teinds, and that is exclusive of all other review. Although the Lord Ordinary on Teinds is a member of the Court of Session, he is singled out as a person possessing peculiar functions of his own for the purposes of this statute; and most certainly the Inner-House cannot exercise those functions for him, nor in any way, so far as I can see, review the proceeding of the Presbytery in a matter of this kind.

But, no doubt, although we are precluded from reviewing the proceedings of the Presbytery, either on matters of substance or matters of form, if it can be made out to our satisfaction that some serious violation of the ordinary rules of procedure common to all Courts of competent jurisdiction has been committed, whereby injustice or inequity has resulted, then we may be entitled to interpose for the purpose of setting the matter right, and making the inferior Court perform its functions according to the known rules and principles of law. But I think before we can so interfere we must be quite satisfied, not that the Presbytery have proceeded in a different mode from that in which the Sheriff or any other civil Court would have proceeded, provided they have followed their own rules and practice, but that they have proceeded in some way which is inconsistent with the ordinary rules of the administration of justice in all Courts, and have thereby committed some injustice. Now, I cannot see that there is anything of that kind before us as regards the objection which has been sustained by the Lord Ordinary; and it seems to me that his Lordship has too much left out of view, as I think the counsel for the complainer did also in the course of the argument, that we are not here to review the proceedings, but only if sufficient cause be shewn to quash them, and set them aside as being illegal. And in exercising such a jurisdiction, it creates a very considerable embarrassment and limits very much our right of interference that the inferior Court is not acting under the directions of any particular statute, and therefore is not tied down to the use of any particular form; so that unless it can be shewn that some practical injustice has been done by failure to follow out the obvious and proper course which every Court of ordinary jurisdiction must follow in its proceedings, I do not think there is any room for our interference.

Now, how stands the matter of fact? It is said that the Presbytery proceeded to designate this ground as an addition to the churchyard without due notice to the complainer, Mr Walker, and his tenant. In considering whether any notice was given to Mr Walker in this respect, or whether he really was without notice of these proceedings, I do not think we are at all confined in our inquiry to the precise terms of the notice which reached his ear as a member of the congregation in church upon the particular day when the notice was read out from the pulpit. On the contrary, we are quite entitled to see how far Mr Walker is in good faith in objecting to the terms of that notice, and how far his own previous knowledge of the proceedings with regard to the addition to the

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churchyard did not enable him fully to understand what was the intended import and effect of that notice. Now, it appears from the minutes of the heritors which have been laid before us that the addition of that piece of ground, the property of Mr Walker, to the churchyard, was the subject of negotiation between Mr Walker and the heritors for some time previous to the presentation of the petition upon which the deliverance complained of was pronounced. The heritors, at a meeting on the 1st of October 1874, resolved to offer to Mr Walker for one acre of the field immediately adjoining the present burying-ground to the north of the existing churchyard, a certain sum of money, and upon certain conditions, and the clerk of the heritors was desired to make a communication to Mr Walker upon the subject. We find from another meeting of the 19th of November 1874 that Mr Walker's answer was received, and Mr Walker's answer adjected certain other conditions which were not satisfactory to the heritors; and accordingly the meeting unanimously declined to entertain Mr Walker's offer upon the terms therein stated. Then there was still further negotiation upon the subject, and the minutes shew that personal communications took place between Mr Walker and some of the heritors, or some one deputed to represent them, and that in the end Mr Walker and the other heritors could not come to terms about the price of this ground and the conditions on which it was to be taken. That this piece of ground belonging to Mr Walker, immediately adjoining the churchyard upon the north, was the piece of ground that everybody looked to as forming the proper addition to the churchyard, there could be no manner of doubt. Now, it is in these circumstances, when the heritors find that they cannot settle this matter among themselves, that a petition is presented by fifteen of the heritors to the Presbytery of Arbroath. No doubt this is not a petition by the whole heritors, nor was it at all necessary that it should be so. It appears that there are forty heritors in the parish, and the petition was signed by only fifteen. I do not think that that makes any difference. But the prayer of the petition is that the Presbytery shall visit and inspect the churchyard, and with the assistance of such persons as may be considered qualified, find that it is no longer sufficient in extent for the wants of the parish, and design and set apart so much of the foresaid or other suitable piece of ground as may be necessary as an addition to it. Now, the foresaid piece of ground is just the piece of ground which had formed the subject of negotiation between the heritors and Mr Walker previously, viz., that field belonging to him immediately adjoining the churchyard on the north. This petition having come before the Presbytery on the 6th of April 1875, the Presbytery resolved to visit and inspect the churchyard on the 6th of May next, with a view to fix upon a piece of ground suitable for designating as an addition to the churchyard, if they shall find the same to be necessary, and to designate the same; and directed the minister to intimate this petition, and the time fixed for the visit, from the pulpit, and on the church doors, and also by advertisement in the local newspapers. Following upon this minute there comes the notice which is complained of as insufficient, and which the Lord Ordinary has held to be insufficient, as a notice to Mr Walker of the intention of the Presbytery to proceed to designate the ground as an addition to the churchyard. The notice is in these terms:—"Intimation is hereby given to the heritors of this parish and all concerned, that a petition has been presented to the Reverend the Presbytery of Arbroath, craving them to design and set apart the piece of ground immediately adjoining the churchyard on the north, or other suitable

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piece of ground, for an addition to the same, and that the Presbytery are to visit and inspect the churchyard on Thursday, the 6th day of May next, at one o'clock afternoon, at which time the heritors and all others concerned, or persons duly authorised to act for them, are requested to attend."

Now, it is maintained by the complainer that this is an insufficient notice, because it does not intimate that at that same meeting on the 6th of May the Presbytery will proceed to designate ground as an addition to the churchyard, but merely intimates an intention of the Presbytery to visit and inspect the churchyard. Now, if it were absolutely necessary that the Presbytery should divide the exercise of its functions into certain parts or stages,—if the Presbytery could not competently, at one and the same meeting, visit and inspect the churchyard, and also designate ground as an addition to it, I should think there was a good deal of force in that objection. But that has not been contended, nor could it be contended, because there is nothing, so far as I know, in the practice of the Church Courts to prevent the Presbytery from proceeding to exercise their functions to the whole extent in the course of one visit; and I do not see any reason why they should not do so under ordinary circumstances. Why should they not on their visit to the churchyard say,—"There cannot be the smallest doubt that the churchyard is too small—everybody is agreed about that—the whole heritors are agreed upon that subject, and there is one piece of ground here that above all is the proper piece of ground to add to the churchyard, and therefore we at once fix upon that and designate it as the proper addition." Now, if it be competent to do that at one meeting, and if it be formally intimated to the heritor who is interested that the Presbytery are to proceed to visit the churchyard for the purpose of giving effect to the petition, the prayer of which is set forth in the notice,—for the petition is described as craving the Presbytery to design and set apart the piece of ground immediately adjoining the churchyard on the north, or other suitable piece of ground—if it be competent for them to do that at one meeting, then I think it is a very strict construction indeed of such a notice as this, to say that they have thereby pledged themselves that they will not proceed to do that at one meeting, but will confine themselves at their first meeting to a visit and inspection.

Nor is there anything in the practice of Presbyteries at all to justify such an expectation. We have been referred to the forms and styles of writs in Church Courts,[1] which are well known, published, and acted upon every day; and in analogous cases, for which styles are provided in that book, we certainly find a great deal of authority for holding that an intimation of this kind, conceived in general terms, and making reference to the prayer of the application which is before the Presbytery, is quite sufficient notice to everybody concerned. It is quite clear that in a proceeding of this kind it is not necessary to have a formal citation of parties, and an execution of citation upon them. That cannot be maintained. Indeed, it is admitted that an intimation from the pulpit and upon the church doors is sufficient. And surely, if that be so, it depends entirely for its authority upon the practice of the Church Courts; and if the practice of the Church Courts be also to give intimation generally in such terms as are found in this notice, that equally must receive respect from this Court, when we are considering whether the Presbytery have committed any such flagrant violation of the ordinary rules of proceeding in judicial tribunals that their proceedings must

[1] Cook's Styles, p. 147.

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be set aside as altogether illegal. I am not able to say that this notice is in that sense an irregular and insufficient notice, or that the thing was here done behind the back of Mr Walker, while he really knew nothing about it, and that his land was taken (as it has been expressed) without his knowledge. I think there is very strong evidence in this case that Mr Walker knew perfectly well what was going on, and, at all events, whether there is such evidence otherwise or not, it appears to me that the terms of this notice were quite sufficient to make him answerable if he did not choose to come to meet the Presbytery in the churchyard, in terms of the intimation which he so received.

It is said that, in consequence of his not receiving sufficient notice, and not believing that the Presbytery were going to designate this ground on that particular day, he lost his opportunity of appealing to the Sheriff. But he got further notice after this deliverance had been pronounced, by a letter dated the 11th of May, in which he was told, that "on Monday, the 17th, the Presbytery will meet within the parish church of Barry, to take further steps towards making an addition to the churchyard, which meeting you are requested to attend;" and if he had even complied with that request, and attended that meeting either by himself or a representative, he would then have found what had been done on the 6th of May, and he would still have been in time to appeal to the Sheriff. But he does not choose to attend that meeting either, but lies by, apparently with the hope of finding some technical objection to the proceedings which have taken place in his absence.

I cannot give any countenance to an attempt of this kind to set aside the proceedings of a competent Court upon so vague and imperfect a ground as this seems to me to be; and therefore I am for recalling *in hoc statu* the interlocutor of the Lord Ordinary, and hearing what further objections there are to the proceedings of the Presbytery.

LORD DEAS.—The question is, whether Mr Walker can be held to have got notice of what was intended to be done, and was done, by the Presbytery at their meeting upon the ground in question upon the 6th of May. There is no room for doubt according to the practice in this country, as well as according to the fair construction of the statute of 1868, that the Presbytery had and have jurisdiction to do what they did, provided they did it in a regular and proper manner. The duty of providing additional ground, when it is required for a churchyard, lies in the first instance upon the heritors; but there is an undoubted power in the Presbytery, if the heritors do not fulfil that duty, to take steps to have it carried out. It is also quite clear that in this case there has been no breach of any provision of the statute of 1868, which makes certain regulations, with a power of transferring the jurisdiction from the Presbytery to the Sheriff.

I entirely agree with your Lordship that the proceedings of the Presbytery are to be regarded in a different and less strict and stringent light than the proceedings of an ordinary Court of law. There is no imperative rule with reference to citation or intimation. The rules applicable to summonses in this Court, where there must be citation by a messenger-at-arms or by a sheriff-officer, are altogether inapplicable to the proceedings of a Presbytery. The Presbytery do not require to employ messengers-at-arms or sheriff-officers. They proceed in their own way, and all that is required is that everything shall be done fairly,—that the matter in which any individual heritor is concerned shall be fairly brought to his knowledge. If that has been done, there is no room for question that the law has

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been fulfilled. Accordingly, the question here is whether that has been done. It is said in the record, art. 17, "The complainer, Mr Walker, believes and avers that all the notices and intimations were intentionally made vague in order that he might not know what was being done, and might consequently be deprived of his right of appeal to the Sheriff, and his other rights." What might have been the effect if that had been so, I do not know; but there is not a particle of evidence of that, and there is not the slightest presumption that it is true. On the contrary, there is the strongest possible room for believing that it is not true. It is unintelligible what motive a body like the Presbytery, entrusted with the duty of providing additional ground for the churchyard, could have had for making their intimations intentionally vague in order that the complainer might be deprived of his rights. It is not said that the members of Presbytery had any desire to be buried in this particular spot, or that they had any personal interest whatever in the matter. That averment, therefore, ought not to have been made. There was a long negotiation about the matter before these ultimate proceedings were adopted. There was a meeting of the committee of heritors, at which the complainer was present, on 19th March 1874, and the minute of meeting bears that those present were unanimously of opinion that steps must immediately be taken either for enlarging the present burying-ground, or acquiring ground elsewhere in the parish. A negotiation then took place between a sub-committee of the heritors and Mr Walker for acquiring this very bit of ground, and he did not impugn his previous resolution and opinion that it was necessary to have that ground or some other, and he made no objection to the heritors having that ground on certain terms and conditions. These terms and conditions were rejected as unreasonable. Thereafter, a number of heritors presented a petition to the Presbytery on 6th April 1875, pointing out that the piece of ground in question was the most suitable, and asking the Presbytery to visit and inspect the churchyard, &c. (as narrated at p. 499). There had been a previous meeting of the heritors on 18th March 1875, at which Mr Walker was not present, when an opinion of counsel was submitted, and the clerk was instructed to petition the Presbytery to designate the ground, and on that authority the petition of 6th April was presented. The main reason for noticing that previous meeting is, that the minute of meeting bears in the body of it that there were more than forty heritors in the parish, and consequently the more specific intimation which otherwise would have been requisite was not required. The Presbytery ordained advertisement and intimation to be made. Advertisements were accordingly inserted in the newspapers —[reads]. Intimation was likewise given from the pulpit. It is stated, and is not disputed, that Mr Walker was in church on 18th April when the intimation was made from the pulpit. I need not say that, being a heritor, Mr Walker had perfect access to all the minutes of meetings of the heritors, so that if he had any doubt about their contents he could easily have seen them.

Now, Mr Walker's whole case is founded upon this,—that while it had been distinctly stated at the beginning of the notice, both in the newspapers and in the intimation from the pulpit and on the church doors, that the object and intention was to design and set apart this ground, yet all that, it was understood, the Presbytery were to do, at their meeting on 6th May, was to visit and inspect the churchyard. The whole question thus comes to be whether Mr Walker was not bound to understand, and whether in point of fact he did not understand,

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that when it was stated the Presbytery were to visit and inspect the churchyard it was meant that they were to do so for the purpose of designating the additional ground, if the heritors who were summoned did not appear to object.

I do not say there is any bad faith on the part of Mr Walker, as he says there was on the part of the Presbytery, but it is very extraordinary if, after all the negotiations and all the notices, he did not understand that the meeting of 6th May was to be a meeting upon the ground at which the Presbytery might fairly be expected and intended to go on to designate the ground if nobody appeared to object. It is not very usual for a body like the Presbytery to travel backwards and forwards, at their own expense, in this sort of way,—to go simply to see the ground which they knew all about before, and about which the negotiations had taken place, and which all of them were familiar with as being the most convenient piece of ground for the purpose. The heritors had satisfied themselves about all that before, and it does not appear that the Presbytery could have had any doubt about it; and it is quite clear that in point of law and practice Mr Walker was reasonably bound to understand that this proceeding might take place upon that day, and was not intentionally nor even really kept in the dark about it. He could easily have made that clear to his own mind if he had any doubt about it; and on the whole matter I am of opinion that, according to all the law and practice applicable to proceedings of Presbyteries in matters of this kind, the notice to him was quite sufficient, and if that be so, there is an end of the question we are now considering.

LORD ARDMILLAN.—The leading facts from which this case has originated are very simple. It appears that an additional piece of ground was required for burial ground in the parish of Barry. The complainer, Mr Walker, is proprietor of the lands of Ravensby in the parish and in the vicinity of the present burial ground. It does not appear that he is the only proprietor of land so situated as to be available as an addition to the burial ground. The mode by which the land of an heritor can be lawfully taken for the purpose of adding it to burial grounds is by procedure in the Presbytery, in the course of which a judgment of designation, which means a presbyterial setting apart of the land required, is pronounced by the Presbytery. I have no doubt of the jurisdiction of the Presbytery. This judgment of designation is an important step directly affecting the interest of the heritor, and it is all the more important, that by the Act 31 and 32 Vict. cap. 96, sec. 3, it is provided, that, if any heritor be dissatisfied with any order, finding, judgment, or decree of the Presbytery in procedure for such designation, it is competent for the heritor to appeal to the Sheriff within twenty days from the date of the judgment. The complainer, Mr Walker, alleges that his land has been illegally designated, and illegally taken from him, and two questions are presented for determination in this Court—1st, Whether the complainer can be competently heard—whether he is entitled to challenge the proceedings now objected to, or is excluded from challenge because he did not appeal to the Sheriff; and 2d, whether, if the challenge is competent, the proceedings of the Presbytery have been legal, or have been so illegal and irregular as to call for the interposition of this Court to redress a wrong done to the complainer. The two questions have in argument been naturally and perhaps unavoidably mixed, but they are separately stated on record, and have been separately argued, and I think must be separately dealt with.

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The Lord Ordinary has held the challenge competent, and being of opinion that the complainer is right on the merits, has accordingly granted interdict as craved. I think that the Lord Ordinary's opinion is right upon both points.

Mr Walker has had his land taken from him without his consent and in his absence. That is the leading and primary fact in this case, the point from which the consideration of the argument must start. The next fact is, that Mr Walker had declined, as he was entitled to decline, to agree to an arrangement. He had declined to part with his lands on the terms proposed to him. He was not only not a consenting party, he was, and was known to be, an opposing party, and the procedure for designation was adopted in order to effect by presbyterial authority what had not been accomplished by arrangement. To me it appears that Mr Walker was just in the position to render it especially becoming and right for the heritors who desired designation of his land, and for the Presbytery whose interposition was craved, to deal carefully and fairly and candidly by him, and to afford him every legitimate opportunity of stating his views and protecting his interests. I think it will appear in the sequel that they did not do so. They have taken his land, certainly without his consent, and, as he alleges, without sufficient notice. The respondents say that the complainer is not entitled to plead the want of notice, because he did not appeal within the period of twenty days from the date of the judgment. They plead that this application is incompetent because he did not appeal. But, looking to the nature of his objection, which is want of notice, this plea of the respondents to exclude his stating it in this Court seems to me to be ill-founded in law, and manifestly so in equity. He says that he would have appealed if he had got notice. He says he got no notice either of the intention to designate on the 6th of May, when, in his absence, the judgment of designation was pronounced by the Presbytery, or of the fact that on 6th of May such judgment of designation had been pronounced. Not having got notice of the intention to crave or decern designation, he was not present when the judgment was pronounced, and not having got notice that the judgment had been pronounced, he did not appeal. Now, the respondents plead that, because he did not appeal, he cannot competently maintain the objection of want of notice. They actually propose to shut out his complaint as incompetent, on the ground that he did not appeal, although the want of notice prevented his appeal.

It is argued that, even if he had got no notice at all, he cannot be heard to complain of it, because he did not appeal. The want of notice prevented appeal. The want of appeal protects the judgment. This is a very singular plea on the part of the respondents. If it were well founded, the result would be, that the party who got no notice could get no redress, and that the respondents, by withholding notice, could create and secure the finality of their own judgment. I cannot understand this. If an heritor, getting no notice, or insufficient notice, has, for want of notice lost, first his land, and then his right to appeal, is he not to be permitted to seek, in this Court, redress against the double loss and the double wrong inflicted by those who ought to have dealt fairly by him, and given him due notice?

To sustain the plea of finality and incompetency of complaint as urged in the first plea in law stated for the respondents, and on that ground to refuse this note, and hold the complainer excluded from stating his case, would, I think, not be just.

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I therefore hold the complaint competent, and proceed to consider the complainer's case on its merits. Did the complainer get sufficient notice to support the taking of his land in his absence and without his consent?

In my opinion, the question here involved seriously affects the rights of property. I think it clear, that the land of a British subject, of whatever station, cannot be taken from him in his absence and without his consent, unless he has had such notice of the intention to take his land under judicial authority as to imply his consent from his absence or his silence. But the consent of an absent man, the owner of land to be taken from him by judgment, cannot be lightly inferred. The implication of consent must be clear. In the present case, I think that the implication is not clear, not sufficient, and not safe. The consent of Mr Walker to part with his land cannot be implied from his absence on the 6th of May unless he had distinct notice that, on that day, a judgment of designation was to be craved and pronounced, and this is the more especially important, because it was known that he was non-consenting, and that he had objections to state, and views to explain, on which he was entitled to be heard before judgment of designation was pronounced. I do not intend to occupy your time by again referring to the course of procedure in the Presbytery. We have it all before us, and it has been already explained. I am of opinion that the notice was altogether insufficient,—indeed, I hold that there was no notice at all of the intention to proceed to pronounce a judgment of designation on the 6th of May. There was notice of the existence, though not of the exact terms, of a petition by certain heritors craving the Presbytery to appoint a visit to the parish of Barry, thereafter to visit and inspect the churchyard, and after taking such assistance as might be required to find that the churchyard is no longer sufficient, and then after doing these things to design and set apart so much ground immediately adjoining the churchyard as the complainer's ground does, and to ordain the tenants to remove, and to ascertain the value of the ground and assess the heritors for the same. On the 6th of April 1875 the Presbytery, having considered the petition, resolved to visit and inspect the churchyard on the 6th of May next at one o'clock P.M., with a view to fix upon a piece of ground suitable for designating as an addition to the churchyard, if they shall find the same necessary, and to designate the same. They then proceeded to direct intimation of the petition, and the time fixed for the visit, from the pulpit, on the church door, and by advertisement. It is important to observe that what was directed to be intimated was the petition, the visit for inspection, and the time fixed for the visit, and no intimation was given of any intention to crave, or of any intention to pronounce, on the 6th of May, a judgment of designation of Mr Walker's land. It is not pretended that any notice was given of an intention to proceed on the 6th of May to the formal or final designation of the complainer's ground. Yet that designation was the only really important matter. On the 6th May 1875 the Presbytery, with certain heritors present, but in the absence of Mr Walker, proceeded to inspect, and then and there they pronounced judgment of designation. They inquired if the order for intimation of the petition and of the time of the visit had been implemented, and they were told that that had been done. They were not told, and they could not have been truly told, that any notice had been given of the intention then and there to pronounce judgment of designation. Mr Walker was not present, and was not cited to hear judgment, and it was known that he did not consent, yet in his absence, and with no other notice than that of the existence of the peti-

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tion, and of the intention to visit and inspect, the respondents proceeded to take his land. So far as I have been able to ascertain, this procedure was not according to the rules and practice of the Church Courts. I do not say that a separate letter of intimation to the complainer was necessary, that being required only in the case of a non-resident heritor. But the procedure is a sequence of separate steps. We have, first, the consideration of the petition, then the visit and inspection, the finding of insufficiency, and of the suitableness of the proposed addition, and then, most important of all, the judgment of designation, a step conclusive against the heritor if he does not appeal. Of that last and most important step no notice whatever was given. The minute bears that the Presbytery further designate and set apart the portion of ground above defined, &c.; and further, the Presbytery ordain the tenants of the land to remove at the next term of Martinmas.

In my humble opinion this judgment of designation by which they laid hold on the complainer's land without his consent, and notwitstanding his declared objection and known opposition which they had previously ascertained, was altogether irregular and illegal. In such a case the suggestion of the private knowledge of Mr Walker as a substitute for the proof of notice seems to me out of the question; but besides, the private knowledge is not proved, and the respondents demand a decision in their favour without proof. The conjecture or suspicion that he may have known can be no ground for judgment. It is said that Mr Walker should have been more alive to his interests, and the maxim *vigilantibus non dormientibus jura subveniunt* has been appealed to. But surely they who by their conduct have disarmed me and thrown me into a slumber cannot by this maxim maintain the wrong they did when I was asleep. To use the maxim for defence of such a wrong would be a perversion and an abuse of it. I look upon the right which a man has to his land as deserving and requiring the protection of a Court of justice against deprivation contrary to his will or without his consent. Where he has refused that consent, and where contract or arrangement is necessarily excluded, it is only on the very clearest and strongest grounds of law, and on the most regular and orderly procedure, that he can be deprived of his land. That must indeed be a powerful reason which stands at the door of a Court of justice and bids away a subject of this realm complaining of such a wrong. I can see no such reason here. I can see no ground on which we can, without proof, dismiss this complaint of Mr Walker, who alleges that he has been deprived of his land without his consent, in his absence, and without fair notice. The letter of 11th May was written after the designation, and does not state the fact of prior designation.

Nor is this all; within twenty days from the 6th of May Mr Walker had a right of appeal from the judgment of the Presbytery. The fact of the judgment created his interest to appeal; the terms of the judgment were the subject of appeal; the date of the judgment limited the time for appeal. But he got no notice of the fact that judgment of designation had been pronounced, and no notice of the terms of the judgment or of the date of it. Therefore he did not and could not, within the time permitted, take his appeal. He says he presented an appeal, but it was too late. And now, having taken his land in his absence, by means of failing to give notice of the intention to designate, and having cut him out of his appeal by failing to give the subsequent notice of the judgment of designation, the respondents meet his demand for redress in this Court by pleading that the complaint is incompetent, because he did not appeal.

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That plea seems to me to have no support in legal principle or authority, and to be signally at variance with justice.

It would be unbecoming in me to say that this is a clear case, because I am aware that I have the misfortune to differ from your Lordships. I have not formed my opinion hastily—I have reconsidered the view which I formed at the debate, and out of my great respect for your Lordships I have endeavoured to reach the conclusion which is satisfactory to you. But I am quite unable to do so. Important principle, legal and constitutional, appears to me to be involved in the questions before us. We are not indeed reviewing, nor can we review, the judgment of the Presbytery; but that judgment relates to part of a landed estate, and we are called on to exercise the high powers, I humbly think the clear powers, of this Court, by interposing to redress a wrong, and to quash as illegal and unjust a deliverance seriously affecting the land rights in Scotland of one of Her Majesty's subjects. To that effect and extent I think we have jurisdiction. It would be unfortunate if we had not.

If this case is decided against Mr Walker on the ground set forth in the first plea in law for the respondents, then his land is gone—taken from him without redress. If this case is decided in favour of Mr Walker, as I think it should, no wrong will have been inflicted, no injustice done, scarcely any inconvenience caused; the result would only be that the Presbytery must resume consideration of the matter, and proceed more regularly and more fairly next time.

I think the judgment of the Lord Ordinary right.

LORD MURE.—The question here raised for decision, in the view I take of it, is whether this Court has any jurisdiction to entertain the complaint which has been made to us in this note of suspension; because nothing can be more express than the provisions of the statute 31 and 32 Vict. c. 96, quoted in the record, to the effect that, in the ordinary case, there is no jurisdiction in this Court to entertain questions of this description. The jurisdiction by way of appeal is there given to the Sheriff in all matters relative to the fixing and designating of churchyards or glebes, or matters of that sort, before a Presbytery; and a Court of review having thus been provided by the statute, every other mode of review is expressly shut out. The jurisdiction of the Presbytery, moreover, to deal with these matters is distinctly recognised in the statute. In these circumstances the question which we have to consider is whether there is anything in the proceedings in this case which has been done in violation of the statute referred to, or of the ordinary rules of procedure in Presbyteries, which can warrant us in saying that the course adopted has been so utterly irregular and incompetent that we must step in as the Supreme Court, and quash the whole proceedings. Because I apprehend it to be perfectly settled law, that, where there are such clauses as those in the statute here in question, this Court cannot touch the proceedings of a Presbytery, unless there has been either some violation of the statutory procedure, or some such flagrant departure from the ordinary rules of procedure in Presbyteries, as will make it imperative upon us to hold that the proceedings must be quashed. Now, the only one of the grounds of objection on which this complaint is rested, with which we have here to deal, is the alleged want of due notice to the complainer of what was intended to be done upon the petition of the heritors. I understand that there are other objections to the procedure, although these were not argued before us. The Lord Ordinary has dealt with that one question; and the point for consideration is whether there is

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anything in the proceedings following upon the petition so irregular and illegal as to entitle us to interfere.

I do not mean to detain your Lordships by going over the details of the case. I concur with your Lordship in the chair, and with Lord Deas, in holding that nothing has been laid before us by way of objection to the proceedings which would warrant us in interfering. It may be unfortunate that the complainer did not take his appeal under the statute to the Sheriff; but he is only entitled to ask us to quash the proceedings and give him redress if there have been irregularities of the nature to which I have referred. Now, the plea in law which the complainer mainly rests upon is this—that the "pretended designation and valuation of the ground in question are inept and not binding on the complainer, in respect that they were made in his absence and without intimation, or, at all events, without any lawful or sufficient intimation to him."

In dealing with this question we cannot, in my opinion, shut out of view the fact that it is plain to demonstration that, for months before the proceedings were taken, the complainer was well aware that this particular piece of ground was required by the rest of the heritors with a view to add to the churchyard. Negotiations to that effect had been going on for a considerable portion of the year 1874. At one time the complainer had consented to the ground being taken on certain terms; but ultimately the parties could not agree about it, and the negotiations fell through. A meeting of heritors was accordingly held on the 18th of March 1875, which bears to have been duly called by intimation from the pulpit and advertisement in the newspapers, and which the complainer was therefore summoned to attend, for the consideration of the question, whether a petition should be presented to the Presbytery with a view to have the piece of ground in dispute set apart for the churchyard. The minute bears that the whole heritors were called to this meeting. The complainer, however, did not attend; and a petition having been resolved on, the one now in question was drawn up in the usual form and laid before the Presbytery. It was thereafter duly intimated from the pulpit; and it is admitted by the complainer that he was present and heard the intimation made. Now, in a parish which consists as this parish does of a large number of heritors, no other intimation is required, according to the usual practice and procedure of Presbyteries, than intimation from the pulpit, and on the church doors, advertisements in the newspapers, and the sending of letters to absent heritors, which, I understand from the books of practice, means non-resident heritors.

The notice on the church door was in these terms—"That a petition had been presented to the Presbytery of Arbroath craving them to set apart the piece of ground immediately adjoining the churchyard upon the north, or other suitable piece of ground, for an addition to the same; and that the Presbytery are to visit and inspect the churchyard on Thursday, the 6th of May next, at one o'clock afternoon, at which time the heritors and all concerned, or persons duly authorised to act for them, are requested to attend." There is here no limitation as regards what the Presbytery are to do on that day. It is an intimation that they are to visit and inspect the churchyard, evidently with a view to the designation and setting apart of the piece of ground in question; because it sets forth that the petition had been presented to them to set apart that particular piece of ground, and that the Presbytery are to visit and inspect the churchyard with a view to the setting apart of that ground. I see no limitation in that intimation to the effect that they were to confine themselves to visiting and inspecting on that

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particular day. It is to visit and inspect with a view to designate and set apart. That is the fair import of the intimation when read with reference to the petition. And similar notices are put into the public newspapers. In these circumstances, the complainer being quite aware of the object of the petition, and having heard that intimation made from the pulpit, coupled with a request that the heritors should attend, or send persons duly authorised to act for them, does not go to the meeting. The Presbytery make their inspection. There is apparently no opposition, and they proceed to designate the ground. But some further proceedings being necessary before any final steps could be taken in the matter, they appoint a valuator to report on the value of the ground, and another meeting is fixed for the 17th of May. On the 6th of May, therefore, the meeting is adjourned to the 17th, and parties are appointed to be called in the usual way to that meeting. The intention of the Presbytery to meet on the 17th of May is admitted by the complainer to have been intimated to him on the 11th in the following terms,—"The Reverend the Presbytery of Arbroath will meet at Barry on Monday, the 17th inst., within the parish church at Barry, at 1.30 P.M., to take further steps towards the making an addition to the churchyard at Barry, which meeting your are requested to attend." Now, I think it impossible to read this notice without seeing that this gentleman was put distinctly on his guard that, under a petition presented to the Presbytery in the usual form, the Presbytery were on the 17th of May to take further steps than those which had been taken on the 6th with a view to the addition to the churchyard. But he does not go to the meeting. Why, we do not see. Now, all this is done in accordance with the usual mode of giving notice by Presbyteries of proceedings before them, as I understand the style books. But it is said, under the second plea in law, that the proceeding being in absence and without any notice it is illegal. I cannot so view it. If critical objections of this description had been taken before the Court of appeal appointed by the statute I think it doubtful whether any of them could have been entertained. We are, however, here dealing with parties who have followed the usual form of proceedings by intimation from the pulpit, on the church doors, and by advertisement in the newspapers, and who, in this particular case, have been so careful as to send a special notice to the complainer of the meeting on the 17th of May. If he had gone to that meeting as requested he would have ascertained the exact position of matters, and could have taken his appeal against everything which had been done upon the 6th as well as on the 17th of May; so that it is simply in consequence of his wilful absence from the meeting on the 17th, to which he was duly and specially cited, that he has found himself in the difficulty in which he now says he has been placed.

I therefore concur in opinion with your Lordship and Lord Deas that we cannot interfere in this case on the grounds stated in the second plea in law.

THE COURT, on 18th February 1876, pronounced this interlocutor:—"Recall the said interlocutor *in hoc statu:* Repel the second plea in law for the complainers, and decern, and appoint parties to be heard on their remaining pleas, reserving in the meantime all questions of expenses."

The complainers then argued that the proceedings of the Presbytery were irregular, because they had ordained the tenant to remove, which

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they had no jurisdiction to do. Such a proceeding ought to have been brought in the Court of Session where the tenant would have appeared as a party.[1] Further, they had made no valuation of his interest, and awarded him no compensation.

The respondents argued;—The style of the order of the Presbytery was the same as the established style for the designation of glebes.[2] Admittedly the Presbytery had no executorial power, but they could obtain it at once by coming to the Court.[3] The tenant's interest was not left out of view in the valuation. But, at all events, it was still open to him to claim it. It was not the practice of Presbyteries to deal with subordinate interests such as those of tenants, bondholders, and superiors separately, but to leave it to the parties to arrange among themselves.

At advising,—

Lord President.—The complainer Mr Walker, and his tenant James Dargie, now contend that the proceedings of the Presbytery at two meetings on the 6th and 17th May 1875 were irregular. We have already held that the objection which Mr Walker took, that he had not sufficient notice of the intention of the Presbytery to designate the ground belonging to him for an addition to the churchyard, is ill-founded; and we have also already intimated our opinion, that seeing the proceedings of the Presbytery in a matter of this kind are final unless an appeal is taken to the Sheriff, we cannot interfere with those proceedings in the way of review, but only set them aside in the event of its being made out to our satisfaction that there is an excess of jurisdiction, or something equivalent to it. Now, keeping that in view, I am really quite unable to see any irregularity in the proceedings either at the one meeting or at the other. The deliverances of the Presbytery and the whole proceedings, as embodied in the minutes, appear to me to be in strict conformity to the order of practice of a Presbytery in such cases. They are in accordance with the style given in the ordinary styles of the Church Courts, not indeed that there is any special style applicable to this particular matter of designating ground for an addition to the churchyard, but there are styles for designating ground for other ecclesiastical property, such as a glebe or the site of a church, and these are styles applicable *mutatis mutandis* to a case of this kind; and when we find that the proceedings before us are quite in accordance with such styles, it is a serious matter for us to say that there is here an excess of jurisdiction, or such a departure from the ordinary and universally recognised rules of procedure in all Courts that we can interfere to set them aside. But apart from that altogether, it rather appears to me that the Presbytery have done nothing more than was absolutely necessary in order to work out their own jurisdiction. The ground being set apart for the purpose of forming an addition to the churchyard, it follows of necessity that both the owner and his tenant, if it is on lease, must be dispossessed, and it follows further that the ground must be taken possession of by the heritors of the parish and converted into a burying-ground; and these seem to me to be the only things that have been done by the Presbytery. No doubt one part of the first minute is an order upon the tenant to remove. Well, that seems to me to be quite right. It was said that this was an assumption of jurisdiction which was beyond the powers of the Presbytery, because they had no jurisdic-

[1] Stewart v. Magistrates of Greenock, March 2, 1779, 2 Pat. App. 486.
[2] Cook's Styles. [3] Ersk. Inst. i. 2, 2.

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tion to remove a tenant; but all that they have done is to appoint this man to remove. They cannot put that decree into execution, and in that sense it is not a decree at all. It can only be enforced by application to a Court of civil jurisdiction; and if any plea occurs to enable the tenant to resist the enforcement of the decree he can still maintain it, though I do not perceive that any such plea would be open to him.

Again, it is said that in valuing with a view to reimburse the owner for his loss, the tenant's compensation has not been duly attended to. Now, it certainly has not been left out of view, because in the second minute it clearly appears that the valuator embraced in his estimate of the value of the land the unexhausted manures on the ground, and that looks very like part of the tenant's compensation. But the plain answer to all that appears to me to be this, that as this proceeding has not yet come to an end before the Presbytery, it is quite open to the tenant still to ask the Presbytery to reconsider his claim for compensation. The matter is not ended by any means; there remains a good deal to be done, and there is nothing to prevent the Presbytery from reconsidering that matter if the tenant can satisfy them that there is some portion of his claim to compensation that has not been fully considered; and so, upon the whole matter, it appears to me that there is nothing to find fault with in these proceedings of the Presbytery.

LORD DEAS and LORD ARDMILLAN concurred.

LORD MURE.—The questions now raised present themselves to my mind very much in the same way as the larger question which we formerly disposed of. This Court has no jurisdiction to deal with cases of this description, unless it be shewn that there is some gross violation of statutory or common law rules. Otherwise this Court has no right to review in any respect the proceedings of a Presbytery. The points here raised are irregularity and excess of power in ordering the tenant to remove. Now, what the Presbytery here did was simply to ordain the tenant to remove. As pointed out by Lord Deas, they could not take an operative course to turn the tenant out as the civil Courts could do; but the order to remove is just the usual order pronounced, according to the styles of the Church Courts given in Dr Cook's book, in all questions of designating manses or glebes. If there was any impropriety or unfairness in that, it was a matter to be disposed of by the Sheriff on appeal. What, therefore, we are here asked to do is to review the judgment of the Presbytery in ordaining the tenant to remove; but that is a matter for appeal to the Sheriff.

As regards the compensation to the tenant, our interference would be still more questionable. The point raised is just whether the Presbytery, in valuing the landlord's interest in the ground, valued properly the interest of the tenant. But my view of that matter is that it is a question on the merits; and that we cannot form, or at all events act upon, any opinion we may have as to whether the Presbytery did right or wrong on that question, because we have no jurisdiction to deal with it.

THIS interlocutor was pronounced:—"Repel the reasons of suspension, refuse the interdict, and decern: Find the complainers liable in expenses," &c.

DRUMMOND & REID, W.S.—MACKENZIE & KERMACK, W.S.—Agents.

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ANDREW STEUART, Pursuer.—*J. G. Smith—R. V. Campbell.*
JOHN CHARLES EARL OF SEAFIELD, Defender.—*D.-F. Watson—Kinnear.*

*Public Burdens—Clause of Relief—School-Rates—*35 *and* 36 *Vict. c.* 62, *Education (Scotland) Act*, 1872, *secs.* 43 *and* 44.—In a disposition the granter bound himself to free and relieve the disponee of *inter alia* "all schoolmaster's salary and road-money payable for the lands and others hereby disponed, from henceforth and in all time coming."

Held (*diss.* Lord Deas) that the obligation to relieve of schoolmaster's salary did not apply to school-rates imposed under the Education (Scotland) Act, 1872.

Public Burden—Clause of Relief—Road-Money.—Held by Lord Young that the general assessment imposed under the Banffshire Roads Act, 1866, was covered by the obligation to relieve of "road-money."

1ST DIVISION. Lord Young. B.

ANDREW STEUART of Auchlunkart purchased in 1861 from the Earl of Seafield the lands of Russelhall and others at the price of £3505, and, in 1867, a portion of the lands of Belnabreich, at the price of £981, 12s.

The Earl granted dispositions of these lands in favour of Mr Steuart, "his heirs and assignees whomsoever," each containing the following clause:—"And I bind myself to free and relieve the said Andrew Steuart and his foresaids of all feu-duties, casualties, and public burdens payable for the said subjects prior to . . . . ; and also to free and relieve him and his foresaids, and the lands and others hereby disponed, of all cess or land-tax, minister's stipend, schoolmaster's salary, and road-money payable for the lands and others hereby so disponed, from henceforth and in all time coming: And I grant warrandice."

In 1866 the Banffshire Roads Act, 1866, was passed abolishing tolls in the county of Banff, and in that part of Elgin containing the lands of Russelhall and Belnabreich above mentioned, and introducing a general assessment for the maintenance of the roads and bridges in the district in lieu of the tolls, and of all statute-labour conversion-money and other road-money previously collected.

In 1872 the Education (Scotland) Act, 1872, came into operation.

The Earl of Seafield having refused to relieve Mr Steuart of the amount of assessment laid upon him under the Banffshire Roads Act, 1866, and of the amount of school-rate imposed under the Education Act, 1872, as not falling under the clause of relief in the dispositions, the pursuer brought this action to recover these assessments, and for declarator "that under and in virtue of the said obligations of relief the defender is bound to free and relieve the pursuer and the said lands and others henceforth in all time coming of all road-money or assessments under 'the Banffshire Roads Act, 1866,' falling upon the pursuer as proprietor or owner of the lands respectively conveyed to him by the said two dispositions; and further, of all school-rates under 'the Education (Scotland), Act, 1872,' falling upon the pursuer as such owner; or failing decree being obtained as to the whole of such school-rates, then of such proportion thereof as our said Lords may fix and determine."

The defender denied his liability in relief as concluded for.

The Lord Ordinary, on 14th July 1875, pronounced this interlocutor:—"Finds and declares that, under and in virtue of the obligations of relief libelled, the defender is bound to free and relieve the pursuer and the lands libelled of all road-money paid, or which may hereafter become payable, for the said lands, under the Banffshire Roads Act, 1866; and declares that money paid or payable under assessments duly imposed by virtue of the said Act, in respect of the ownership of said lands, shall be regarded as road-money within the meaning of said obligations of relief

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and of this decree: Decerns against the defender for payment of the several sums of road-money libelled as already paid by the pursuer under the said Act, with interest as concluded for: With respect to the other conclusions of the action—viz. those relating to school-rates under the Education (Scotland) Act, 1872—assoilzies the defender, and decerns: Finds no expenses due to either party." *

The pursuer reclaimed, and argued;—On a consideration of the series of statutes relating to parochial education in Scotland it was manifest that the Education Act of 1872 introduced no new system, but merely modified the old. Formerly the parochial schoolmaster received his remuneration from three sources—the school fees, which he was allowed to collect; the Government grant, when earned; and his fixed salary from the heritors holding lands of £100 valued rent. To these a fourth source might sometimes be added—namely, endowments. The obligation of the heritors was to contribute this portion of the schoolmaster's salary, and, in addition, to provide and maintain the school buildings and schoolmaster's house. The clause of relief from "schoolmaster's salary" contained in dispositions, such as those libelled, had always been interpreted to embrace relief from all obligations and liabilities of a heritor as to

* "OPINION.—With respect to the conclusions of the action relating to road-money, I am of opinion that money payable under assessments authorised by the Banffshire Roads Act, 1866, is road-money within the meaning of the obligations of relief in both deeds libelled. The road-money payable under the Act is probably of larger amount than the road-money payable before the Act by reason of the increased number or length of the roads to be maintained, and the abolition of tolls as a source of income; but it is the same tax, however, and, from whatever cause, the amount of it may be increased or diminished.

"With respect to the school-rate under the Education Act, 1872, I am of opinion that it is not 'schoolmaster's salary' within the meaning of the obligations of relief. By the law prior to the Act, 1872, a limited number of the heritors of each parish—viz. the valued rent heritors—were bound to provide a salary for a schoolmaster within a certain statutory maximum. The defender was a valued rent heritor, and his obligation to relieve the pursuer (his feuar) of schoolmaster's salary for his feu imported only that he would continue to pay the whole amount of the salary payable on the valued rent of his lands in the parish, without asking any contribution or relief in respect of the feu which he had given off. By the Act of 1872 the valued rent heritors are no longer required to provide a salary for a schoolmaster. The expense of the educational establishment instituted under that Act in each parish is defrayed out of a school fund, for which provision is made, and which in any particular parish may or may not, as it happens, be sufficient for the purpose without the aid of a school-rate. In the event (no doubt the usual event) of a deficiency in any year, a school-rate to an amount sufficient to supply it is authorised. Such a rate to supply a deficiency in the school fund of a parish has a very different incidence from the schoolmaster's salary, of which the defender undertook to relieve the pursuer, for it has the same incidence as the poors-rate, in assessing for which no distinction is made of valued rent heritors or account taken of valued rent. Nor is it a rate for schoolmaster's salary in any other sense than this, that it is to supply an ascertained deficiency in a catholic fund, out of which all charges connected with the execution of the Act, including the remuneration of teachers, are paid. The deficiency to be supplied may in any year be largely or even wholly attributable to a school board election, the expense of which is payable out of the school fund. The school-rate under the Act of 1872 is thus, as I regard it, quite distinguishable from the schoolmaster's salary payable by the valued rent heritors under the prior law, and I cannot extend to it the obligations of relief on which the pursuer founds. He is a ratepayer under a new system of national education, according to which also he is, as a ratepayer, an elector of the managing board of the district in which he is rated."

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schools in the parish, in respect of the lands disponed. The Act of 1872 introduced two material changes. The schoolmaster was no longer to receive his remuneration from different sources, but was to receive a slump salary from the school fund. The school fund was to consist of the school fees, the Government grant, the produce of endowments, and the rate levied on the householders in the parish to make up any deficiency in the fund. From the widening of the area of taxation the old valued rent heritors received a considerable benefit, but that was not to defeat the pursuer's claim of relief. When the matter was looked into more closely it was seen that the present school-rate was just the equivalent of the old assessment for the schoolmaster's salary, together with any assessment required for school buildings, &c. An apparent difference was introduced by the school board collecting the school fees and receiving the Government grant, instead of the schoolmaster receiving them directly as formerly. But it left matters the same in the end. The deficiency of the "school fund," for which the school rate was levied, was just the amount of the old schoolmaster's salary and the cost of maintenance of buildings. The only thing that created any new charge was the cost of the school board election; but that did not introduce such a change as to render it possible to hold that the Education Act, 1872, introduced an entirely new tax, which was not in contemplation of the parties in 1861 and 1867, when the deeds founded on were granted. The analogy of the Poor-Law Amendment Act, 1845, and the decisions pronounced under it, was conclusive in favour of the pursuer's argument.[1] Even if it could be held that a change had been introduced, and that the school-rate was not the equivalent of the schoolmaster's salary, still a portion of it at least was so. That portion could be easily determined by ascertaining how much was paid to the schoolmaster in name of salary, over and above the amount of school fees collected, of the Government grant, and of endowments, and dividing the rate laid on the pursuer in the proportion which that sum bore to the whole produce of the rate levied.

Argued for the defender;—The burden imposed on owners and occupiers of lands and heritages under the Act of 1872 was quite different from that imposed upon the valued rent heritors by the previous Acts. All these previous Acts were repealed. There was no longer any special provision made for schoolmaster's salary. What was provided was a catholic fund, upon which a great many different charges, some of them quite new, were laid. It was only to supply any deficiency of this catholic fund to meet these charges that a school-rate was to be levied. This was a very different thing from dividing the schoolmaster's salary among the valued rent heritors. The incidence of the new assessment was quite different. Its purposes were quite different. It could not be held to have been within the contemplation of parties, in entering into the contract of sale on which the disposition was granted, and it was not therefore covered by the clause of relief. Nor was it possible to give the pursuer the alternative relief which he asked. If practicable at all, which was very doubtful, that could not be done without an elaborate accounting, to be repeated every year, and at an expense quite beyond the value of the matter in dispute.[2]

[1] Lees v. Mackinlay, Nov. 11, 1857, 20 D. 6, 30 Scot. Jur. 10; Hunter v. Chalmers, July 16, 1858, 20 D. 1311, 30 Scot. Jur. 767; Reid v. Williamson, Feb. 16, 1843, 5 D. 645, 15 Scot. Jur. 308; Preston v. Magistrates of Edinburgh, Feb. 4, 1870, 8 Macph. 502, 42 Scot. Jur. 232.

[2] Sprot v. Governors of Heriot's Hospital, May 29, 1829, 7 S. 682, 1 Scot. Jur. 216; Scott v. Edmond, June 25, 1850, 12 D. 1077, 22 Scot. Jur. 473; Wilson v. Magistrates of Musselburgh, Feb. 22, 1868, 6 Macph. 483, 40 Scot. Jur. 250; Elliot v. Marquis of Lothian, Dec. 2, 1824, 3 S. 348.

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LORD PRESIDENT.—The object of this action is to have it declared that the lands mentioned in the summons are, in virtue of a clause of relief contained in the pursuer's titles, to be relieved by the defender of certain parochial and public burdens, one of them being the road-money, or assessments under the Banffshire Roads Act, 1866, and the other being school-rates under the Education Act of 1872.

The Lord Ordinary has found that the defender "is bound to relieve the pursuer and the lands libelled of all road-money paid, or which may hereafter become payable for the said lands, under the Banffshire Roads Act, 1866." But in regard to the education rate he has found the opposite; and with respect to the conclusions of the action relating to school-rates under the Education (Scotland) Act, 1872, has assoilzied the defender. The defender has acquiesced in the first part of the Lord Ordinary's judgment, but the pursuer has reclaimed against the second part. That, therefore, raises the only question which is now before us.

The clauses of relief which form the basis of the action are contained in two dispositions, which proceeded upon the sale of two parcels of land by Lord Seafield to Mr Steuart. These are not feu-dispositions or contracts, as the Lord Ordinary appears to have taken for granted, but dispositions in the ordinary form for a price paid; and certainly it is singular to find clauses of this kind in such deeds. The granter undertakes only a personal obligation of relief,—"I bind myself to free and relieve." The obligation of relief imposes no burden on any heritable subject, and the question, whether the obligation would be transmitted against a singular successor, is a question which the terms of the clauses necessarily suggest to the mind, and which, if raised, as it fortunately is not here, would present considerable difficulty. The terms of the dispositions and clauses of relief therein contained shew that there is something very special and peculiar in the case. At the same time, I do not think that this affects the construction of the clauses of relief themselves. I think we may consider them, as the Lord Ordinary has done, just as if they occurred in an ordinary feu-disposition.

The words of the clauses are—"I bind myself . . . . to free and relieve him (*i.e.*, the said Andrew Steuart) and his foresaids (*i.e.*, his heirs and assignees whomsoever), and the lands and others hereby disponed, of all cess or land tax, minister's stipend, schoolmaster's salary, and road-money payable for the lands and others hereby so disponed, from henceforth and in all time coming." The two dispositions themselves are dated in 1861 and 1867 respectively, and we must first consider the meaning of the term "schoolmaster's salary" at the date at which they were granted—that is, before the passing of the Education Act, 1872.

The state of the law prior to the passing of the Education Act, 1872, was, that the schoolmaster's salary was a burden on a very limited class of heritors, namely, those who held lands valued at not less than £100 of valued rent. That limited class sustained the whole burden of the schoolmaster's salary. They were also liable to provide and maintain the school buildings and schoolmaster's house. On the other hand, they enjoyed certain privileges in consideration of these burdens. They had the right of appointment of the schoolmaster, and they had the right of supervision of the school. But by the Act of 1872 the parochial schools were taken entirely out of the hands of this limited class of

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heritors, whose whole rights and privileges in the matter were abolished, and their whole liabilities extinguished. They are no longer liable to pay any part of the schoolmaster's salary on the ground that they are proprietors of lands valued at £100 of valued rent. There is no longer any such incidence of taxation. The burden of the schoolmaster's salary is not transferred as a separate burden to any class of proprietors at all. It is to be paid for the future out of the general school fund, as defined by sections 43 and 44 of the Act. The persons to be subjected to taxation are totally different. They are a much more extensive class than that which formerly bore the burden of the schoolmaster's salary. The school rate to be levied when required is to be laid on all owners and occupiers of lands and heritages in the parish. Instead of embracing only the few valued rent heritors, as we may term them, the incidence of the tax is now to fall upon all the inhabitants of the parish, or at least upon all the householders. It even goes further than that, for the definition of lands and heritages in the Valuation Act of 1854, which rules the matter, is of the most comprehensive kind. It includes "all lands, houses, shootings and deer forests (where such shootings and deer forests are actually let), fishings, woods, copse and underwood from which revenue is actually derived, ferries, piers, harbours, quays, wharfs, docks, canals, railways, mines, minerals, quarries, coal-works, water-works, lime-works, brick-works, iron-works, gas-works, factories, and all buildings and pertinents thereof, and all machinery fixed or attached to any lands or heritages." And not merely are these enumerated subjects liable to taxation, but every kind of beneficial interest in them is also a direct subject of taxation. It has even been carried this length, that a water company has been subjected to taxation in respect that its pipes ran under the soil of the parish. Nothing, therefore, could well be more extensive than the class of persons subjected to the tax.

Now, that itself is one very considerable difference between the old assessment, termed schoolmaster's salary, and the new one, termed education rate. But there are other points which shew a still greater distinction. The education rate is not laid on for the purpose of paying the schoolmaster's salary. The only authority which the school board have for requiring the parochial board to levy a school-rate for them is the 43d section of the Act, which says that "any deficiency" of the school fund to meet the burdens imposed on it by the Act "shall be raised by the school board, as provided for by this Act,"—*i.e.*, by the 44th section. But if the school fund is sufficient to meet those demands upon it, the school board has no right to require the parochial board to lay on an assessment. Now, the Government grant forms a constituent part of the school fund. So also do the school fees. There may be gifts and mortifications, the revenue of which will add to its amount. After taking all these elements of income into account, there may be no need for an assessment at all. It is, perhaps, hardly to be expected that this should be so at first, because the necessary outlay in buildings in most parishes has been large, but it may come to be the case in many parishes in after years. Now, it is only to supply the deficiency of the school fund, after taking all these elements of income into account, that there is any authority given to lay on an assessment.

Moreover, the school fund is applicable to a great many purposes. It is applicable to the maintenance of buildings. It is applicable to pay interest on debt. It is applicable to pay the expenses of the election of the school board and all the ordinary costs of management. In short, it is applicable to a great

many purposes never heard of under the old system. True, it may also be applied to furnish the schoolmaster's salary. But it does not necessarily follow that the schoolmaster's salary is paid out of the school-rate. If paid in the ordinary way, it is paid by appropriating a sum out of the school fund—that is, out of the aggregate fund. But, on the other hand, it may be laid as a special burden on one part of the school funds. There is nothing to prevent that. For instance, the whole school fees might be applied as an adequate remuneration to the schoolmaster. Could it then be said that the schoolmaster's salary was paid out of the produce of the rate, or that the rate was the same as the schoolmaster's salary before the passing of the Education Act, 1872? Therefore the nature of the new tax is totally different from that of the former one. Its incidence is also totally different. The purposes to which it is applicable are different. The schoolmaster's salary, instead of absorbing the whole of the assessment, may or may not be now paid, in whole or in part, out of the produce of the rate, just as the board may order.

On the other hand, the schoolmaster in the present day is in a totally different position from the parochial schoolmaster before 1872. Before the Act of 1872 came into operation the parochial schoolmaster was a public officer of importance. His office was a *munus publicum*. His duty was not confined to teaching. He had a great many other statutory functions,—for instance, under the Militia Act; under the Act of William IV., making him depositary of all documents appointed to be published by the standing orders of either Houses of Parliament; under the Railways and Lands Clauses Acts, making him depositary of plans, &c. All these were public functions belonging to a proper public official. But what are the duties of the schoolmaster under the present system? He has nothing whatever to do but teach. Section 76 of the Education Act makes that quite plain. All the duties of the parochial schoolmaster, such as those I have mentioned, "not relating to teaching," are transferred to the registrar of the parish. Further, he is no longer schoolmaster of the parish. There may be more than one, and they may be all of equal rank. We are no longer, therefore, dealing with a schoolmaster in the same position as the parochial schoolmaster held prior to 1872.

There is, therefore, on both these grounds, no longer any such tax upon land as schoolmaster's salary. The education rate is a totally different tax altogether.

In the course of the argument reference was made to a class of cases supposed to favour the pursuer's view. It was contended that the tax under the Act of 1872 was merely continuing in a different form the tax previously existing, in the same way as the present poor-rates, under the Act of 1845, is merely the continuance in a different form of the previous assessment. If the cases on the question of poor-rates were applicable to the present they would be conclusive, but I cannot admit the analogy. The ground of judgment on which it was held that the present poor-rate was the same tax as the assessment formerly imposed is better stated in the opinion of Lord Wood in the case of Hunter v. Chalmers (20 D. 1315) than anywhere else:—"I think that the claim of relief, which would otherwise have been competent is not destroyed or invalidated by the Act 8 and 9 Vict. c. 83. The burden of which relief is demanded is not a new burden introduced by that statute. It is a burden to which the owners of lands, as such, were subject, and which was exigible in respect of the laws existing at the time the original feu-contract was entered into, the Act, so far as regards the assessment for the support of the poor, only regulating the mode of assessment,

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and pointing out the different ways in which it may be imposed. In all of them the assessment is to be imposed to a greater or less extent on lands and heritages, or the owners or occupants thereof; and it is only for that portion of the assessment that relief is here asked. Had the assessment in question been one on means and substance the objection to the claim would have stood upon a different ground. But as that is not the case, and the burden not being one which, in respect of the Poor-Law Amendment Act, can be held to be a burden imposed by a supervening law, there is no room for maintaining that it could not be in the contemplation of the parties when the obligation of relief was granted, and therefore cannot, upon a fair reading of its meaning, be found to be included in it." Now, there it is observed that the tax levied under the Act of 1845 is a tax precisely of the same nature, imposed on heritable subjects, and applicable to the same objects as the former assessment. That case, therefore, stands in direct contrast to the present.

But the pursuer also contended that, even if not entitled to relief of the whole education rate, he was entitled to relief at least of so much of it as was applicable to the schoolmaster's salary. I cannot, however, entertain even that contention, for the reasons which I have already sufficiently explained. The school-rate is not necessarily applicable to the schoolmaster's salary at all. It may be one year, and it may not the next. The proportion of the rate applicable in one year to the schoolmaster's salary may, and generally will be, different from that applicable in any other year. If so, in order to entertain this claim, you must have an accounting every year to adjust the proportion of the education rate from which the pursuer is entitled to be relieved. Such inquiry is quite out of the question. Unless it is a burden which can fairly fall as a whole under the same category as the former assessment for schoolmaster's salary there can be no valid claim of relief.

Lord Deas.—We are quite familiar with clauses of relief of this kind in deeds between superior and vassal, and they have sometimes entailed considerable hardship on the superior. But that has never been allowed to interfere with the enforcement of the obligation. It is, however, new to find an obligation of this kind in an ordinary disposition by a seller to a purchaser, which last is the position of Mr Steuart under these deeds. He bought the lands partly in 1861 and partly in 1867. He paid a sum of between £3000 and £4000 for the first portion, and about £900 for the second portion. He says that these prices were in each case above the market value of the land in consideration of this obligation of relief. There may be some doubt about that, but the presumption, at any rate, is that he paid value for all he got. The Earl of Seafield is the granter of the deeds; and, although, when you come to the obligation of relief, it bears to be by the Earl without adding his heirs and successors, I can have no doubt that it is binding upon his representatives. When a man binds himself, he binds his heirs and successors. The obligation is in favour of the pursuer, his heirs, and assignees, in express words.

The obligation itself is perfectly clear. It is an obligation to free and relieve Mr Steuart, and his heirs and assignees, and the lands disponed, of, *inter alia*, schoolmaster's salary. But it is contented that there is no longer any schoolmaster's salary payable out of the lands. This is, I think, a difficult plea to maintain. There is a schoolmaster—and, I think, a parochial schoolmaster. He may not, indeed, be any longer a public officer in the sense in which parochial

schoolmasters were formerly public officers. But he is a schoolmaster entitled to a salary, and that salary is a burden to some extent at least upon the lands, although in the shape of an education rate.

It is very difficult to see how, under these circumstances, this clause of relief which must be held to have been paid for under an onerous contract, is to be rendered entirely valueless. Why is the grantee not to have implement of the clause by getting relief from the rate levied out of his lands, so far as applicable to schoolmaster's salary? There may be a difficulty in ascertaining what part of the salary is paid from the rate, or rather, what portion of the rate is applicable to the salary, but I do not see why that difficulty, which seems by no means insurmountable, should be allowed to defeat the clause of relief altogether. The fact that the schoolmaster is no longer a public officer can have nothing to do with the matter. I quite admit the practical difficulty of ascertaining the precise amount of which the pursuer falls to be relieved; but I cannot get over the fact that the schoolmaster's salary is paid, at least in part, out of a rate levied on the land.

LORD ARDMILLAN.—I concur with the Lord Ordinary in the view which he has taken of this case, both as regards the part of his decision which is favourable to the pursuer, and the part of his decision which is favourable to the defender. The only question seriously raised relates to the second part of the interlocutor, being that in regard to the obligation of Lord Seafield in the disposition granted by him to Mr Steuart in 1861, wherein his Lordship binds himself to free and relieve Mr Steuart and his lands of "schoolmaster's salary." A similar clause is in the disposition of other lands in 1867. I do not rely on the special and rather unusual peculiarity of the obligation of relief,—that it occurs in a disposition, and not in a feu-contract.

The Lord Ordinary has assoilzied the defender from the conclusions of the action in so far as relating to this particular obligation. At the date of the obligation the pursuer was an heritor on valued rent, bound to provide a salary for a schoolmaster up to a certain statutory amount. His obligation to pay the salary to the schoolmaster was direct, and was laid on him as heritor in respect of and in proportion to his valued rent. It was a rate or tax chargeable on the valued rent, and it was for the direct and definite purpose of remunerating the schoolmaster, and was payable to the schoolmaster. Since then the position and the obligation of the pursuer has undergone a most important change; changed also is the incidence of the tax on his land, and the nature of the tax itself, and the position and relations of the schoolmaster. The pursuer, as a heritor, no longer pays the schoolmaster's salary charged on the valued rent. There is no such charge, and no such payment. He pays his proportion, as a ratepayer in a new and wide class, of a general school-rate charged on the real rent, and administered and distributed and applied by a public board in promoting the purposes of primary education. It may, or it may not, happen that the rate or part of the rate he pays is applied to the remuneration of the schoolmaster. He does not pay directly any schoolmaster's salary. The obligation of relief has regard to the incidence of the rate or tax, rather than to its distribution—to the primary purposes of its enforcement, rather than to the ultimate purposes of its application. As a charge on the pursuer the school-rate under the Education Act is not a charge for schoolmaster's salary, nor is it a charge on the valued rent of his land; but, supplemental and auxiliary to other funds, it

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is a general school-rate for the district; it is charged on real property, and applied to many purposes. It is not reasonable to expect that a Court of law shall trace out the administration of school funds, gathered from many sources, and raised under statutory authority for many purposes, in order to see whether any or what part of it may have reached the schoolmaster in the shape of salary. It is quite uncertain how much of the school-rate may so reach the schoolmaster, because the school fund under the statute is not entirely composed of school-rates, but is drawn from other sources as well as from the rate, and indeed the school-rate is raised to supply a deficiency. It is quite possible that the schoolmaster may be otherwise remunerated, and that no part of the rate paid by the pursuer may be applied in paying the schoolmaster's salary, or rather the teacher's salary, for that is the word used in the statute. The incidence of the tax, and its character and quality when exacted, is far more important in this question than the distribution of the tax, and its character and quality when administered.

I am not prepared to say that the change from valued rent to real rent, if in other respects the charge had retained its former character, would of itself have been sufficient for decision of this question. But it is an element in the consideration of the question, and is not without some degree of weight. The assessment under the Poor-Law Act is, in my view, quite different from the school-rate. Your Lordship's explanations on this point are most important, and I entirely concur in them. I agree with the Lord Ordinary in holding that the nature of the rate is different, and that payment into a fund out of which all charges connected with the execution of the Act of Parliament are to be met —the remuneration of teachers being one of them—is not payment of schoolmaster's salary within the meaning of Lord Seafield's obligation of relief. There is truly no rate or tax exigible under the present law which can be correctly termed a rate or tax for the specific purpose of paying schoolmaster's salary. Since the application of part of the school-rate to that purpose is not a necessary nor a certain application of the rate, it cannot give a character to the rates, which form only part of the general fund. This school-rate, paid in respect of assessment on real rent, is one of several streams which flow into a general fund. The administration of that fund is in the hands of a public board, and it is applied to many purposes—to other purposes than the remuneration of teachers. We know not what part of the entire expenditure for various purposes is met by one of the several streams which form the fund, and to attempt, in every case where such a question is raised, to trace each stream, and to eliminate the application of each particular part of the fund, seems to me to be out of the question.

I think, accordingly, that we should adhere to the Lord Ordinary's interlocutor.

Lord Mure.—In the leading conclusion of this summons the pursuer asks for relief of the whole school-rates imposed upon the lands in question. He no doubt qualifies this by adding "or of such proportion thereof as the Court may determine." But the broad conclusion is the leading one, and it is, I think, untenable; because the school-rate is levied, not in order to pay the schoolmaster's salary, but to supply any deficiency there may be in the general school fund to meet the various calls which may be made upon it.

At the discussion, however, the pursuer took the lower ground, and restricted

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his claim to relief of that portion of the rate which was applicable to the schoolmaster's salary. This raises a more difficult question, because the terms of the clause of relief are broad and general; but after full consideration I have come to the same conclusion as the majority of your Lordships. Since the obligation to relieve was granted there has been a total change in the character and object of the rate. Formerly the schoolmaster's salary was a fixed sum, which was divided among the valued rent heritors. Each heritor's portion was collected from him by the schoolmaster, and the receipts granted proved the exact amount which each heritor had to pay. Now all that is changed. Under the present system, as I understand it, no rate is levied specially for schoolmaster's salary; and you cannot ascertain from the receipts what or whether any portion of the salary is paid in any one year out of the rate, without an inquiry which would involve an investigation into the whole accounts of the school board, to be repeated every year. You must ascertain what portion of the master's salary is paid out of the Government grant, what portion out of the school fees, and what portion out of gifts and mortifications, before you can ascertain what remains, if any, to be paid out of the rates levied to meet any deficiency in this school fund. The present tax could not therefore, in my opinion, have been within the contemplation of parties when they granted and accepted this obligation of relief. The observations of the Lord Ordinary at the end of his opinion are, I think, very pertinent; and the difficulty of sustaining the pursuer's contention lies just where his Lordship has put it.

THE COURT adhered.

MAITLAND & LYON, W.S.—MACKENZIE, INNES, & LOGAN, W.S.—Agents.

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2D DIVISION. Lord Rutherfurd Clark. I.

ROBERT WILSON, Pursuer.—*D.-F. Watson—Mair.*
THOMAS MANN, Defender.—*Balfour—R. V. Campbell.*

Process—Attendance of Counsel.—The hearing of this case was delayed in consequence of the senior counsel instructed for the pursuer being at the time of calling engaged in the First Division, and the junior counsel being engaged as sole counsel in a proof in the Outer-House. The Court at the same time made the following intimation :—" It is right that agents should understand that hereafter the Division Roll will be called in regular order, and the fact of counsel being engaged in a proof will not be taken as an excuse for not appearing in the Division."

WILLIAM OFFICER, S.S.C.—A. KIRK MACKIE, S.S.C.—Agents.

No. 86.

Mar. 2, 1876.

Wilson v. Mann.

ROBERT WILSON, Pursuer.—*D.-F. Watson—Mair.*
THOMAS MANN, Defender.—*Balfour—R. V. Campbell.*

Lease—Missive—Singular Successor.—A yearly tenant, who also acted as factor for his landlord, wrote in October 1871 to the landlord asking for leave to break up pasture on a portion of his farm and to perform certain operations which would occupy a period of years, and received a written acceptance of his proposal from the landlord, who died before Martinmas 1872. The tenant commenced the operations and continued to pay the same rent as before, which he entered as formerly in a cash-book which he had kept as factor for the landlord (and which had been docqueted by him on 1st September 1872) and subsequently for his trustees, and also in accounts rendered to the trustees, which were audited on their behalf in December 1874. In 1873 the tenant applied to the trustees to fix the exact termination of his lease. Their agents wrote him fixing

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the ish at Whitsunday 1880. The estate was advertised for sale, the lease terminating in 1880, and the rent being mentioned in the particulars of sale shewn to the purchaser. The tenant continued to pay the same rent after Whitsunday 1874, when the purchaser entered. In an action by the tenant against the purchaser for declarator that he was in right of a lease till Whitsunday 1880 at his old rent, *held* that the letters, cash-book, and accounts instructed a lease at the former rent and for the term alleged, which was good against a singular successor.

2D DIVISION. Lord Rutherfurd Clark. I.

THOMAS MANN, of Glentyan, in Renfrewshire, raised an action of removing against Robert Wilson, one of the tenants on that estate, on 8th September 1875, on the footing that he was only a tenant from year to year. Mr Wilson defended that action, and at the same time raised an action in the Court of Session to have it declared that he was "in virtue of letters signed by the late Captain James Stirling" (from whose trustees the pursuer had bought the property), "then proprietor of the estate of Glentyan, in or about the months of October and November 1871, and of a letter by Messrs Dundas and Wilson, clerks to the signet, factors and agents for the trustees of the said Captain James Stirling, then deceased, dated 23d December 1873," in right of a lease of the farm of Forehouse for the term of eight years from and after Whitsunday 1872 at the rent of £223 sterling per annum.

Wilson averred that on the death of his father in 1861 Captain Stirling had accepted him as tenant of the farm of Forehouse in room of his father, at the rent of £223, as a tenant from year to year, and that he also acted as factor for Captain Stirling until his death in 1872, and since then he had continued to act as factor for Captain Stirling's trustees until the sale of the estate to Mr Mann in 1874. He also stated that in 1871 a portion of the pasture of his farm of Forehouse, which was principally a grazing farm, called Bankhead, had become so coarse as to require to be broken up, and that he accordingly applied to Captain Stirling for leave to do so in a letter in the following terms:—"Forehouse, October 28, 1871—Captn. Jas. Stirling, R.N.—Dear Sir,—In consideration of the fact that Bankhead field, and the other grass fields leased by me from you, are not grazing as they did when more newly laid down, and believing that they require breaking up and renewal, I hereby submit to you for approval a plan for breaking up head end of Bankhead, or from trees above where old house stood, about 10 acres at first, and the rest of it, &c., afterwards, if you permit, as follows,—the larger part to be in oats, the rest green crop, first season; what is in oats to go through the regular cropping rotation, being laid down with a sufficient quantity of manure; what is in green crop first year to be oats next year, then green crop again, and laid down with sufficient manure; and when sown down to have proper grass and clover seeds, and of sufficient quantity, sown. Should this meet your approval, and you grant this request, it will much oblige your obedt. servt., ROBT. WILSON."

That to this letter Captain Stirling appended the following holograph addition:—

"Glentyan, 31st October 1871.

"To be laid down without furrows; cut once in hay, not allowed to seed; to have three tons of warm lime per acre, and a quarter of ton of salt pr. acre on the hay stubble. JAMES STIRLING, R.N."

That he, Wilson, appended in his own handwriting as follows:—

"I agree to the foregoing. ROBERT WILSON."

And that a day or two after the above was written Captain Stirling gave Wilson the following corroborative letter, written by Wilson to the dictation of Captain Stirling, who signed it, but it bore no date:—

"Mr Robert Wilson.—Sir,—I agree to your proposal for breaking up

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Bankhead field, &c., as specified in your note to me, with the addition which I have added at foot of same, viz., that it is to be laid down without furrows, to be cut only once in hay, and to have the quantity of lime and salt which I have mentioned applied to it. JAMES STIRLING, R.N."

It was further averred that this application was made by Wilson to Captain Stirling, and was assented to by him on the footing and understanding that Wilson was to remain tenant of the farm at least until the whole operations contemplated in the way of breaking up pasture ground and again laying it down in grass should be completed. That the period which Captain Stirling and he had in view as the shortest within which these operations could be completed was the term of Whitsunday 1880, and it was understood and agreed between them that he was to remain tenant of the farm of Forehouse until that term at the annual rent of £223. That Wilson accordingly, in terms of this agreement, at once proceeded to break up a portion of the farm, and he had since continued to cultivate a portion thereof, in terms of the agreement, and in conformity with the rotation assented to by Captain Stirling.

Wilson also stated that after Captain Stirling's death he continued to farm the land in accordance with this agreement, but when the estate was about to be sold, in order that he might know how much ground to break up in each year, he applied to the trustees, Mr Ralph Dundas, C.S., and a Mr Somervell, to fix the exact term at which his tenancy of the farm was to cease, and their agents, Messrs Dundas and Wilson, C.S., wrote him accordingly :—

"16 St Andrew Square, Edinburgh, 23d December 1873—Glentyan. "Robert Wilson, Esq., Forehouse Kilbarchan, Johnstone.—Dear Sir,—We have now heard from Mr Somervell regarding the termination of your occupation of Forehouse. He wishes it to be understood that the termination of your lease shall be at Whitsunday 1880, as to the whole subjects, that the lands shall be left in grass, and that the portion which you are allowed to break up shall be left in pasture of not less than a year old.—We are, dear sir, yours truly, DUNDAS & WILSON."

That the estate was sold by private bargain to Mr Mann, after an advertisement of particulars, which contained the following statements :—

"The lands are let from year to year, with the exception of Forehouse, the lease of which expires at Whitsunday 1880." Also—"Rental Particulars.—Forehouse—Let to Mr Robert Wilson for eight years from Whitsunday 1872, £223."

Wilson further averred that during Captain Stirling's lifetime, he, as his factor, had entered in a cash-book which he kept, the half-yearly rent of the farm of Forehouse as £111, 10s., and the cash-book containing these entries had been regularly docqueted as correct by Captain Stirling down to 3d September 1872, the docquet of that date being applicable to the year from 31st July 1871 to 31st July 1872; but the continuation of the cash-book after 31st July 1872, containing all the entries of Forehouse rent after 20th May 1872, was not authenticated or docqueted by Captain Stirling or his trustees in the cash-book, and was not submitted to the trustees, but Wilson rendered to them separate accounts from 31st July 1872 to July 1874, containing the like entries; which accounts were examined and found correct by accountants on behalf of the trustees, on 3d December 1874.

Wilson also stated that after Mr Mann had entered into possession of the estate at Whitsunday 1874 he had paid him rent at the rate of £223 per annum for two half years after his entry, and he produced receipts for these sums.

Mr Mann defended this action, and averred that Wilson was only a

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yearly tenant, and that the rent paid by him was much below the real value of the farm. He also stated that he had only received, and granted receipts for, the rent paid him by Wilson under protest. In any view, he averred that the arrangement founded on by Wilson related to the portion of the farm called Bankhead only, and that Wilson had not adhered to the rotation of crops stipulated for by Captain Stirling.

Pleaded for Wilson;—(2) The defender, at the time he purchased the estate of Glentyan, having been in the full knowledge that the farm of Forehouse was let to the pursuer to the term of Whitsunday 1880, he is now barred from objecting thereto, and he ought to be prohibited from disturbing or molesting the pursuer in the possession of the farm. (3) The defender having homologated the lease to the pursuer by taking payment of rents as above condescended on, he is now barred from interfering with the pursuer's possession of the farm.

Pleaded for Mann;—(2) The writs libelled on being informal and improbative and defective in the essentials of the alleged mutual contract of lease, the defender is entitled to absolvitor. (3) In a question with the defender, a singular successor, the alleged lease in all its stipulations, *hinc inde*, can only be established by writ, and the writs libelled on being insufficient and defective, the defender is entitled to absolvitor.

A joint minute was agreed to between the parties whereby it was admitted that the letters founded on by Wilson were genuine, and were written of the dates which they bore, and that the undated letter by Captain Stirling was delivered to Wilson on or about 31st October 1871. The entries in the cash-book and docquets by Captain Stirling, and the approval by the accountants of Wilson's accounts on 4th December 1874, were also admitted.

On 24th January 1876 the Lord Ordinary pronounced this interlocutor:—"Finds, declares, and decerns in terms of the conclusions of the libel: Finds the pursuer entitled to expenses; and remits," &c.*

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* "NOTE.—This case is attended with some difficulty.

"The argument of the defender is, that there are not sufficient writings to constitute a lease, or to prove the existence of such a contract, at least in a question with him as a singular successor, and in particular, he urges that the rent is not ascertained by any writing.

"The writings which passed between the pursuer and Captain Stirling in 1871 relate to Bankhead, which is a part of the farm of Forehouse. They shew that it was contemplated that the pursuer should possess the farm for a period of years. But the period is not fixed, nor is any reference made to the rent.

"On 23d December 1873 the agents of Captain Stirling's trustees wrote a letter, in which they say that the 'termination of your lease shall be at Whitsunday 1880.' This document recognises the existence of a lease, and specifies its duration, but it says nothing as to the rent. It seems, however, to the Lord Ordinary that it must be construed as meaning that the subjects were to be held at the rent which was then payable by the pursuer. What that rent was is fixed by the books kept by the pursuer as factor for Captain Stirling, and docqueted by Captain Stirling in August or September 1872. The pursuer continued to possess the farm after that time, and no change in the tenure is alleged. The Lord Ordinary thinks, therefore, that the rent payable is ascertained by the writ of the landlord.

"Although the pursuer was already in possession of the farm when the writing of December 1873 was granted, the Lord Ordinary thinks that his subsequent possession must be ascribed to that writing. This was the view of both parties. In their advertisements with a view to a sale of the estate of Glentyan, Captain Stirling's trustees stated that the farm of Forehouse was let under a lease expiring at Whitsunday 1880; and the pursuer proceeded with

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Mann reclaimed, and argued;—Whatever effect the letters and cash-book founded on might have as against the original granter they were of no avail against a singular successor. All the recent cases where informal and irregular writings had been sustained were cases between the tenant and the granter.[1] All that these missives could be said to do was to set up a former verbal lease, which could be of no force against a singular successor.[2] Captain Stirling's letter contained no reference as to either entry, ish, or rent, and was therefore not a binding lease, and the letter by the agents, though it fixed the termination of the lease, said nothing as to rent. It was not competent to find out the rent from the cash-book as the Lord Ordinary had done, as that was making a contract for the parties. Moreover, after Captain Stirling's death, the cash-book was never docqueted or examined, and ceased to be the writ of the landlord. The audit and approval of the separate accounts on behalf of the trustees did not take place till seven months after they had ceased to be proprietors of the farm, so that could not make the book from which they were taken the writ of the landlord. The omission of the rent in the agents' letter distinguished this case from those founded on by the Lord Ordinary.[3] Wilson had not cropped in conformity with the agreement he founded on, and so could not plead that *rei interventus* had followed on it.

Counsel for Wilson were not called upon to reply.

LORD JUSTICE-CLERK.—The first question is, whether there was at the date of the purchase a valid lease subsisting between the proprietor and the tenant. I am of opinion that this is too clear to be disputed, and that it is proved by the writ of the lessor that there was a binding and effectual lease for eight years from Whitsunday 1872 at a rent of £223. The proof of this contract rests on several written although informal documents. 1. The letter of 28th October

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the cultivation of the farm on the footing that he held it till that time. If the writing of December had not been granted, he might have given notice that he intended to remove at Whitsunday 1874.

"But it was maintained by the defender, that though a contract of lease might be sufficiently proved against Captain Stirling or his representatives, that contract was not binding on him as a singular successor. In the opinion of the Lord Ordinary, this argument should not prevail. He thinks that all the requisites of a lease have been sufficiently proved by the writings under which the pursuer was possessing at the date of the defender's entry, and that the contract is therefore available against the defender. The nearest case is that of Skene v. Spankie, 1 Bell on Leases, 313, and noticed in Baron Hume's Reports in Arbuthnot v. Campbell, p. 785. It is true that there the writing specially stated that the lease was to be at the present rent. But the Lord Ordinary does not think that a distinction can be drawn between the expression and the implication of such a stipulation, if the implication arises from the sound construction of the writing itself.

"It is clear enough, and indeed it was not disputed, that the defender purchased the estate on the representation that the farm of Forehouse was held under a lease, expiring at Whitsunday 1880."

[1] Walker v. Flint, Feb. 20, 1863, 1 Macph. 417, 35 Scot. Jur. 253; Emslie v. Duff, June 2, 1865, 3 Macph. 854, 37 Scot. Jur. 457; Bathie v. Lord Wharncliffe, Nov. 6, 1873, 11 Macph. 490, 45 Scot. Jur. 318.

[2] Sellar, &c. v. Aiton, Jan. 26, 1875, *ante*, vol. ii. 381; Bell's Prin. sec. 1190.

[3] Skene v. Spankie, May 20, 1790, 1 Bell on Leases, 313; Arbuthnot v. Campbell, Feb. 27, 1793, Hume, 785; Maxwell v. Grierson, Nov. 1812, Hume, 849; Hunter on Landlord and Tenant, i. 433; Ersk. ii. 6, 24.

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1871 necessarily implies a tenancy of at least five years, with a definite specified object, and thus it is clear that the acceptance of that offer implied an obligation to grant a lease for a term. 2. What that term was is proved by the letter of Dundas and Wilson, the landlord's agents, which truly constitutes the lease, for apparently the ish had not been previously adjusted. It is not so much proof of a previous verbal lease as the completion of the previous inchoate contract. This is conclusive against the landlord; and even if the rent had not been established *scripto*, the presumption would have been that the old rent was to be continued, and it is proved, under the landlord's own hand in the rental book, that this rent was £223. But the amount of the rent is clearly proved by the landlord's advertisement, in which the existence of the lease, the duration, and the rent are clearly announced to intending purchasers, and on this representation the defender made the purchase. I am therefore clear that there was a valid lease as between the former proprietor and the tenant. Is it then binding on the singular successor? I see no reason why it should not be so, for these informal writings together constitute a lease *scripto*. I should have come to the same conclusion although the documents had amounted to no more than the acknowledgment of an antecedent verbal contract. If the writing is sufficient to bind the landlord to grant a formal lease, that is sufficient, and it is immaterial to inquire how the antecedent obligation was constituted. But the agreement is not verbal. It is constituted *scripto* by the original letter and that of the landlord's agents, which together with the other writs contain all the requisites of a verbal lease. I agree without hesitation with the Lord Ordinary.

Lord Neaves.—I am of the same opinion, and may say generally that I am well satisfied with the Lord Ordinary's views as expressed in his note. The case is one of importance, and I should be sorry if the views urged for the reclaimer were held applicable in matters of this kind. In early times it was a disputed point whether a purchaser or a leaseholder was to be preferred. There were opposite maxims advocated by opposite schools. But the Legislature, influenced no doubt by the consideration of the importance of agricultural improvement in developing the resources of a country, removed the matter from the uncertainty of the common law and passed the Act of 1449, cap. 17. That Act gives protection against singular successors in the case of leases having an ish, a definite subject, and a substantial rent. At first the Judges used some strictness in construing that Act, and leases were held to be good only if they were constituted by regular and probative written documents. That has not been the law of Scotland, however, for a long time, and it would, I think, have been strange if an Act intended "for the safetie and favour of the puir people that labouris the ground" should only be available in such circumstances, and should not apply to those informal leases which were most likely to be entered into by illiterate tenants. It is sufficient as the law is now administered if there are documents to shew the consent of the parties to a continuing lease with a definite ish, rent, and subject. All such writings constitute a lease binding on singular successors.

In this case Captain Stirling, and his tenant, Wilson, made an arrangement under which there was to be a change in the possession by the tenant, and a certain change in the rotation of crops was made, as the tenant was no longer to be a yearly tenant but was to get a lease of longer duration. I think that upon that document the tenant could have come into Court, and have contended suc-

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cessfully that it implied a longer lease than from year to year and that he was entitled to get a formal lease the duration of which should be calculated on the nature of the work contemplated. I think the Court would have considered his case and have calculated the length of his tenancy, although it is unnecessary to decide that point here, as the duration of the lease was afterwards fixed and settled in the correspondence that passed with the landlord's agents. When such a document once existed as the proposal for an alteration on the possession it was competent for the landlord, or those acting for him, to supplement it and fix what was to be the duration of the lease. I think that Messrs Dundas and Wilson assigned a definite ish to the lease, when, looking to that document, they wrote saying the period for the ish now unfixed was to be 1880. But it is also said that there is no rent fixed in these documents. There are however other documents which do so. Wilson's book was kept by him as factor for his employer, and the rents were entered each half year, and the landlord signed the book for some years, up to 1872 in fact. The lease was commenced under the original missive, and the landlord could have access to the book in which the rent was entered each half year. We have thus the rent in a book which is the book of the landlord as well as of the tenant, and then there is the letter of Messrs Dundas and Wilson crowning the transaction by fixing the ish in 1880.

After this the lands were advertised for sale, and, although it is perhaps unnecessary for the decision of the case, still it is satisfactory that the fact of there being a lease at a certain rent and for a fixed period was set forth in the advertisement in the most explicit terms.

I cannot help thinking that all these documents and this advertisement put the purchaser in full knowledge of what he was buying. There was no concealment as to state of the lease or of the lands of Forehouse, as it plainly states that they were let for eight years to Robert Wilson. The purchaser bought on the footing that these lands were let on an eight years' lease, and presumably calculated the price he would give on that footing. After buying the lands on that calculation he now says he is not bound by the lease, and can get rid of it. That is certainly unjust to the tenant, and, I think, we are bound to protect him.

Technically there is no rent stipulated in the documents, but, I think, the factor's book satisfactorily shews the rent. The expression in Messrs Dundas and Wilson's letter, of "your lease," means and shews that the lease was granted at the rent he was then sitting at.

It has further been urged that Wilson did not act under the missive, but I do not think that is a relevant plea in the mouth of the defender, because any deviation must be held to have been condoned by his predecessor long ago.

LORD ORMIDALE.—I agree with both of your Lordships.

All that was necessary to constitute a lease, not only as between the tenant here and his original landlord, but also as between him and the present defender, is established by the writings before us.

It was conceded towards the conclusion of the argument, and indeed it could not, having regard to the authorities, be disputed, that a lease in all respects formal is not indispensable so as to bind a singular successor. All that is necessary is that the writing or writings constituting the lease should disclose the subject, the rent, and the duration of the contract. Here we have all of these

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essential elements; the subject of the lease is, I think, clearly established by writing, as well as the rent, and the duration. Without going back to the letter of 28th October 1871—although it is impossible even at that date not to see that there was a lease for an indefinite number of years—it is manifest that at any rate on 23d September 1873 a letter was written by Messrs Dundas and Wilson, who were just the landlords, or in the landlord's place, by which the lease was distinctly recognised. In that letter we have the subject expressly stated, viz., "your occupation of Forehouse," also the duration, viz., "Whitsunday 1880," and, I think, by very strong implication, if not in specific figures, even the rent. But the rent is proved otherwise in writing. It is proved by the factor's accounts, which, prior to 1872, bear to have been examined and docqueted by the landlord, Captain Stirling, and after his death these accounts continued to be kept by the factor for his trustees. These accounts must therefore be considered as good as the landlord's writ, and from them we find the amount of rent. It is true that the rental book does not appear to be docqueted by the trustees or by the defender, but I do not think that can affect the matter seeing that the accounts bear to have been examined and "found correct by accountants on behalf of the trustees." That negatives all idea of dishonesty or irregularity on the part of the factor. It appears to me, therefore, that there is enough in this case to set up the alleged lease and make it binding on the defender, without going into the effect of the advertisement and purchase, in regard to which, however, I concur in the observations made by your Lordships.

LORD GIFFORD.—I am of the same opinion.

(First) I think that there was a valid and effectual contract of lease concluded between Stirling's trustees, or Stirling himself, and the pursuer. After Messrs Dundas and Wilson's letter it would be impossible to say that the trustees were not bound. No doubt the rent was not mentioned in that letter, but there could be no doubt about the rent; it was £111, 10s. per half year at the date when the lease commenced, and that rent had been paid for four and a-half years. If the missive letter had contained the words "at your present rent," this would have removed every ambiguity, and the case of Arbuthnot v. Campbell would have been directly in point. The actual figures are not necessary, the words "present rent" are enough, and I do not see any difference between a case where these words are used and one where they are implied, the tenant being actually in possession and paying rent, and it not being necessary to say anything as to rent at all.

(Second) If the lease was binding on Stirling and his representatives I think it was also binding on the singular successor.

This purchaser has also barred himself from objecting to the lease if it was binding on his author, because in the warrandice clause "current tacks" are excepted,—that is, all current tacks binding on the landlord and disponer. The effect of this is that the purchaser is bound by all that would be binding on his author, as was decided in the case of Wight v. Hopetoun, Nov. 17, 1673, M. 15,199.

THE COURT adhered.

A. KIRK MACKIE, S.S.C.—WM. OFFICER, S.S.C.—Agents.

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DAVID STEPHEN, Pursuer.—*Guthrie Smith—J. A. Reid.*
THE COMMISSIONERS OF POLICE OF THURSO, Defenders.—
D.-F. Watson—Trayner—Keir.

Mar. 3, 1876.
Stephen v. Thurso Police Commissioners.

Reparation—Liability of Police Commissioners for Negligence of Contractor employed by them.—A person raised an action of damages against the police commissioners of a burgh for injuries sustained by him from having fallen over a heap of rubbish left upon the street after night-fall and not fenced or lighted. The defence was that the commissioners, under the powers conferred upon them by the Police Act, had contracted with a person for the cleaning of the streets and removal of refuse, and accordingly that, if there was negligence on the part of any one, it was the contractor who was liable, and not the commissioners. *Held*, upon the terms of the contract, that the commissioners retained a complete control over the execution of the operations contracted for, and were not relieved from the obligation incumbent on them to remove the rubbish or to put it in a state free of danger to the lieges.

Question, Whether, even if the contractor had been uncontrolled in the execution of the work, the commissioners could have so delegated their statutory duty as to free themselves from liability in case of its non-performance.

2D DIVISION. Ld. Craighill. I.

DAVID STEPHEN, watchmaker, Thurso, brought this action against James Brims and Charles Macdonald, joint-clerks to and as representing the Commissioners of Police of the burgh of Thurso, acting under the Police and Improvement (Scotland) Act, 1850, for payment of £500 as damages for bodily injury sustained by him by falling over a heap of rubbish in Rotterdam Street of Thurso after dark upon the evening of 27th November 1874.

The pursuer averred that, contrary to the duty imposed upon the commissioners by the statute, they had neither removed the rubbish before night-fall, nor fenced and lighted the same.

He pleaded;—The pursuer having at the time and place sustained the injuries and loss condescended on, and the said injuries and loss having been caused to him by and through the fault, culpable negligence, and failure on the part of the Police Commissioners of the burgh of Thurso, or of their servants or other persons or person for whom they were and are responsible, the said commissioners are bound to make reparation to the pursuer as concluded for.

The defenders stated;—(Stat. 1) "The defenders, as commissioners of police foresaid, contracted with Mr Andrew Swanson, carter, Thurso, for the removal by him of all dung, refuse, or other matter from the streets, lanes, pavements or footpaths in Thurso, and also, when required, from any premises there which the defenders or their inspector might point out. The said contract was binding upon the said Andrew Swanson for three years prior to Whitsunday last 1875." (Stat. 2) "The rubbish which the pursuer avers to have been the cause of injury and damage to him was removed by the said Andrew Swanson, or those employed and paid by him, under the foresaid contract with the defenders, from the premises of Mr J. W. Galloway, bank agent in Thurso. If there was any fault committed in allowing said rubbish to remain on the street unduly, or in its non-removal, it was the fault of Swanson, and not of the defenders."

And pleaded;—(1) The pursuer's statements are not relevant to support the conclusions of the summons. (2) The injuries condescended on, if sustained by the pursuer, not having been caused by the fault of the defenders, they are not liable in reparation, and should be assoilzied with expenses.*

* The clauses of the Police Act, 1850, founded on by the parties were:—
Sec. 49.—"That the commissioners, or any committee of their body especially

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A proof was allowed, which disclosed the following facts:—The contract between the police commissioners and Swanson, which was in writing, was executed in 1872, the period of its endurance being three years from Whitsunday 1872. The more important parts of the document bearing upon the present question are quoted in the opinion of the Lord Justice-Clerk (*infra*, p. 538).

About the end of the year 1873 Mr William Bruce was appointed inspector of nuisances for the burgh by the commissioners. Some time after his appointment a conversation took place, the effect of which is stated by Mr Bruce in his evidence,—"Some time after I was appointed inspector, the contractor and I were standing together at the top of Caithness Street, when Mr Brims came up and told the contractor it was better to leave the servants wholly in my power now. Swanson agreed to that. (Q.) That he would leave his men entirely in your power now? (A.) Yes." What precise change was in consequence made upon the previous relations between the inspector and Swanson did not clearly appear.

On 26th November 1874 a Mr Galloway wrote to Swanson desiring him to send scavengers to clean out his ash-pit. This was accordingly done next day, and the rubbish from the ash-pit put upon the street. The attention of Bruce, the inspector of nuisances, was called to the rubbish on the street, and, according to his evidence, he communicated with Swanson, who promised to have it removed that night. Bruce made no further inquiries after half-past three in the afternoon as to whether the rubbish had been removed. In fact it was not removed, and the pursuer coming home from his shop to his house about 7 P.M. stumbled over the heap of rubbish, and was severely injured.

The Lord Ordinary, on 24th November 1875, pronounced an interlocutor containing detailed findings in fact, in which he repelled the defences, and found the defenders liable in £50 of damages.*

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empowered, may contract with any person for carrying into execution any of the operations hereby authorised."

Sec. 139.—"That when any building materials, rubbish, or other things are laid, or any hole made in any of the streets, whether the same be done by order of the commissioners or not, the person causing such materials or other things to be so laid, or such hole to be made, shall at his own expense cause a sufficient light to be fixed in a proper place upon or near the same, and continue such light every night from sun-setting to sun-rising while such materials or hole remain, and such person shall, at his own expense, cause such materials or other things and such hole to be sufficiently fenced and enclosed until such materials or other things are removed, or the hole filled up or otherwise made secure."

Sec. 142 enacts that the commissioners shall cause the streets to be cleaned and dust and ashes to be removed from the houses.

Sec. 150.—"That the commissioners shall appoint and employ a sufficient number of scavengers, or contract with any company or other person to employ scavengers, for sweeping, cleansing, and watering the streets, and for removing all dust, ashes, rubbish, and filth therefrom, and from the houses and other premises therein, and for emptying privies and cesspools in the manner by this Act directed."

Sec. 218 empowers the commissioners to appoint an inspector of nuisances.

* "NOTE.— . . The real controversy is this—there having been fault, are the defenders liable for the consequences? They are commissioners of police. The cleaning and clearing of the streets was within their functions, and indeed was one of the most obvious duties they were called upon to discharge. But it does not follow from this that the fault in question can be imputed to them. They were entitled to contract for the performance of the work; and if a contractor undertook to do all that was required, to him, and not to the defenders, liability will attach. In fact, there was a contract for the cleaning of the streets,

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The defenders reclaimed.

Argued for the reclaimers;—The ground on which alone the Lord Ordinary had found them liable was unsound. A written contract could not be over-ridden by a loose conversation in the street such as that which was said to have taken place between Brims and Swanson. The liability of the defenders must be determined upon the basis of the written contract. The statute gave the commissioners the option of two ways of cleaning the streets. They might either employ scavengers themselves, or contract with another for this purpose. The defenders adopted the last course. The scavengers were the servants of the contractor, and not of the defenders. Where a person employed an independent contractor to do a lawful act he was not liable for the negligence of the contractor, or of the servants of the contractor.[1]

Argued for the pursuer;—(1) The terms of the contract shewed that Swanson was not an independent contractor. He was subject to the supervision and control of the commissioners. Where there was a retention of the right of control by the employer the employer was the person liable.[2] (2) The defenders being statutory commissioners could not delegate their statutory duties to the effect of relieving them from liability for the non-performance of such duties.[3]

At advising,—

LORD JUSTICE-CLERK.—This case raises a question of general interest. The action is at the instance of the pursuer against the Commissioners of Police for the burgh of Thurso, and the ground of action is that certain obstructions were left in the streets of Thurso, whereby the pursuer, walking in the dark, stumbled, and sustained severe injuries. The action is brought under the obligation imposed on the defenders by the Police and Improvement Act, 1850, and is laid upon their failure to remove the obstructions, or to fence and light the same, so as to prevent them being dangerous to the public.

It is not denied that the event happened, that this heap of rubbish was left on the streets, and that the pursuer was injured in the way he describes; nor is there any serious dispute as to the amount of the injury. The defence for the commissioners is that they had entered into a contract with a third party, Swanson, for the removal of rubbish from the streets, and that Swanson, being

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as well as for other work, current at the time of the accident; but, unfortunately for the defenders, the terms of that contract, for some reason not easily understood, were altered, and the effect of the alteration was, as the Lord Ordinary reads the evidence, to constitute the defenders the masters of the scavengers in so far as regarded the giving of orders, and the supervision of the work which was in hand. The contractor, in other words, was so far displaced. What he had previously done was committed to a servant of the commissioners, the inspector of nuisances, and the neglect, from which the pursuer suffered, is consequently not the neglect of the contractor, but that of the defenders, inasmuch as it was the neglect of their servant specially appointed by them to do what had previously been done by the contractor."

[1] Maclean v. Russell, Macnee, & Co., March 9, 1850, 12 D. 887, 22 Scot. Jur. 394; Murray v. Currie, Nov. 16, 1870, L. R. 6 C. P. 24; Taylor v. Greenhalgh, July 1, 1874, L. R. 9 Q. B. 487; Pendlebury v. Greenhalgh, Nov. 8, 1875, L. R. Q. B. Div. p. 36; Addison on Torts, 3d edn. pp. 395-6.

[2] Randleson v. Murray, April 21, 1838, 8 Ad. and El. 109; Burgess v. Gray, May 5, 1845, 1 C. B. 578.

[3] Hole v. Sittingbourne and Sheerness Railway Co., Jan. 14, 1861, 30 L. J. Ex. 81; Pickard v. Smith, May 29, 1861, 10 C. B. new ser. 470; Ellis v. Sheffield Gas Consumers' Company, Nov. 7, 1853, 23 L. J. (new ser.) Q. B. 42.

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an independent contractor, they are not liable for his negligence. The question is, whether this is a good defence.

In the ordinary case, when reparation is demanded from a principal for the consequences of acts done by those he employs, it is for the pursuer to prove such a relation between the person sued and the person who was the immediate cause of the accident as will make the act of the one the act of the other; and accordingly, if the person who caused the injury is an independent contractor, not under the control of the principal, the latter cannot be made liable, the relation of master and servant not subsisting between them. But there is a question involved in the present case to which I think it right to advert, although its solution is not necessary to the opinion I have formed. The case is wholly different where a distinct duty is imposed upon the person sued towards the person injured, and where that duty has not been performed. It is not disputed that it was the duty of the defenders under the statute to remove obstructions. It would seem, therefore, not to be necessary for the pursuer to prove the relation of master and servant between the defenders and Swanson, or any one else. It is enough for him, in the first instance, to say that the police commissioners were bound to remove this rubbish, that it was not removed, and that its non-removal caused the accident. There is a general power given by sec. 49 to "contract with any person for carrying into execution any of the operations hereby authorised," and in regard to cleaning there is a further provision in sec. 150 authorising them to "contract with any company or other person to employ scavengers for sweeping, cleansing, and watering the streets, and for removing all dirt, ashes, rubbish, and filth therefrom," &c. The question whether, when the whole work to be done under any of these branches is made the subject of a specific and independent contract, and where the contractor has power without further control or supervision to carry the work into execution,—whether such a contract will relieve the commissioners of liability, it is not necessary to decide in the view which I entertain. I am of opinion, in the first place, that this was not an independent contract, but, on the contrary, that the contractor was dependent on the commissioners, not only generally, but in regard to the whole details of the execution of the contract; further, that there was no obligation laid upon the contractor in the contract, so far as I can find, to fence and light obstructions in the street. Accordingly, the obligation to make them safe for the lieges still remained with the commissioners.

The terms of the contract are as follows:—It commences with a statement that the police commissioners having advertised for estimates for cleansing the town, and keeping the streets and lanes in repair, and lighting, &c., Swanson offered to execute these several works. The cleansing he undertook for £88, 10s., the fulzie being his property. He also made specific offers with regard to the other works. The contract then proceeds to narrate that the commissioners accepted these offers for a period of three years, and the contractor found caution, and bound himself and his cautioner "to perform the cleansing or cleaning of the whole streets and lanes within the burgh or barony of Thurso, ... including the cleaning out of the public privies, and to keep the same clean and in good order and condition, and to remove therefrom all refuse, dung, and fulzie, which refuse, dung, and fulzie shall belong to the said Andrew Swanson." That is the general enunciation of what the contractor binds himself to do, and afterwards comes the minute

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specification of what is to be done, from which it appears that the greater part of the work to be done is to be done as directed by the commissioners. For instance, it is provided "that all the side drains and surface strands running along the roads within the town . . . . shall also be swept as often as required by the inspector." It is also stipulated "that the commissioners shall be entitled, as occasion may arise, to require an additional cart or carts to be provided by the contractor for said purposes." Then comes a provision "that the contractor or one of his servants shall, when required by the inspector, be bound to clean and remove any nuisance, fulzie, or other matter on the streets, lanes, pavements, or footpaths, and shall also be bound to enter upon any premises when or where the commissioners or their inspector may point out any nuisance, and remove it upon receiving written orders to that effect from the clerk or inspector." Indeed, it is plain enough that without the leave of the commissioners the contractor had no power to enter private premises at all. The commissioners had the right under the statute, and the contract properly contained this provision that the contractor must have leave from the commissioners. In this particular case he had not that leave, because Mr Galloway applied directly to him and not to the inspector.

Then comes a clause of the greatest possible importance,—"The whole of the works and services specified shall be performed in the most sufficient and complete manner to the entire satisfaction of the said commissioners of police or any person they may appoint as surveyor or inspector, and that the contractor, except where otherwise provided for, shall be under the immediate order of the inspector, or, in his absence, of the clerk of the commissioners." That at once destroys the character of the contract as an independent contract. The control is kept in the commissioners in every case, "and in the event of the contractor at any time failing to carry out the works and services falling within the terms and scope of this specification, or being required to do so by the inspector or clerk as above provided, it shall be in the power of the commissioners to employ persons to do the work at his expense, and the contractor shall be bound to repay the expense so to be incurred by the commissioners."

I need not go further into the contract, because these passages shew plainly what kind of contract it was. I think the commissioners were quite right to retain the control and powers which they did. I do not say,—because it is not necessary to decide the point in this case,—whether or not the commissioners could so delegate their power as to cease to be responsible to the public. Here, however, they certainly retained the powers, and were therefore responsible to the public. That being so, on the general question of law I have no doubt.

The English authorities have established a distinction between a contract of service and an independent contract of work to be done. In the latter case the man who alone is responsible for the execution of the work is liable for his servants; but, on the other hand, when the man is merely another's hand, his employers are liable under the rule *qui facit per alium facit per se*. That is enough for the decision of this case.

But there is a second ground, which, looking at the facts of the case, is very strong. The contractor is not bound to light or fence heaps of rubbish; and there can be no doubt that the commissioners were bound to light or fence rubbish which they could not remove if the contractor was not bound to do so. The commissioners were also bound to remove this rubbish if the contractor failed to do so, and they could make the contractor repay them for expense so

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incurred. It is said that the contractor undertook to remove this rubbish, but from the evidence it appears that the inspector had reasonable ground to suspect that it would not be removed; and that would be sufficient to make the commissioners liable, even if the contract had been a more independent one than it is.

After the contract had been entered into we find the clerk to the commissioners taking a strong step, which throws light upon the view which the commissioners entertained of the power reserved by them. He told the contractor to give the whole charge to Mr Bruce, who had been appointed inspector of nuisances. Had there been an independent contract he could have had no power to do so; but, looking to the right of control reserved by the commissioners, I am not prepared to say that he went beyond his powers. But I do not think, as the Lord Ordinary does, that the action of the clerk constituted a new contract. It was only a strong exercise of the supreme control retained by the commissioners.

Therefore, on the whole facts of the case, I am of opinion that the commissioners are liable. As regards the general question of law, it is unnecessary to say anything farther. The law is well established. In the first place, a master is liable for the injurious act of his servant. In the second place, if the wrongdoer be a contractor who is subject to the control of his employer, the latter is responsible; and, in the third place, if the contractor be independent, and may do as he pleases as regards the execution of the work, he is to be viewed as the principal, and alone is liable.

Lord Neaves concurred.

Lord Ormidale.—That the defenders were entitled to enter into a contract for the cleaning of the streets of Thurso is clear, I think, from the 49th and 150th sections of the Police Act, 13 and 14 Vict. cap 33, under and in terms of which they derive their authority in reference to that matter. Neither can it be disputed in point of law that if the contractor could be held to have exercised an independent employment under the contract which was entered into with him, he, and not the defenders, would have been answerable to the pursuer in reparation for the injuries sustained by him. But, although the question has been found by me to be attended with difficulty, I have, after full consideration, come to be of opinion that the contractor Swanson cannot, under the contract, be held to have exercised an independent employment. It is, amongst other things, expressly stipulated in the contract that "the contractor, or one of his servants, shall, when required by the inspector, be bound to clean and remove any nuisance, fulzie, or other matter on the streets, lanes, pavements, or footpaths, and shall also be bound to enter upon any premises when or where the commissioners or their inspector may point out any nuisance, and remove it upon receiving written orders to that effect from the clerk or inspector;" and further, that he shall, except as regards some particular instances, "be under the immediate orders of the inspector, or in his absence, of the clerk of the commissioners." It appears to me that by these stipulations the contractor, in place of being left to the independent exercise of his own discretion and judgment in the execution of the work committed to him, was subjected in a very large degree to the control and direction of the defenders and their inspector. This being so, it is only reasonable, and in accordance with well established principles, that

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they, as the defenders called and concluded against in the present action, should, under the circumstance disclosed by the proof, be held liable in reparation to the pursuer.

Upon the ground I have now stated I have reached the same conclusion, although in a different way and for different reasons, as the Lord Ordinary. His Lordship seems to have thought that the contract, as originally entered into, if it had not been innovated on and altered, was such as to have placed the contractor in a position of independent employment; but I am unable to concur with the Lord Ordinary in that view. Neither can I agree with him in thinking that the contract was altered, or that it could have been altered in the way he assumed it was. On the contrary, it rather appears to me that the control and interference of the inspector, founded on as an alteration of the contract, was what the contract itself allowed; and that just shews that the contractor was not placed in such a position as entitles the Court to hold that he exercised an independent employment.

LORD GIFFORD.—I have felt this case to be one of considerable delicacy and difficulty, but I have ultimately come to be of opinion that the commissioners of police of Thurso, as such and to the effect of charging the funds under their control, are liable in damages to the pursuer. The amount of damages, as assessed by the Lord Ordinary, has not been objected to on either side. Both parties are satisfied with the mere assessment of damages, and the result is that I agree in the decree which the Lord Ordinary has pronounced, although I differ from the Lord Ordinary as to one of the main reasons on which his Lordship has proceeded. I cannot agree with the Lord Ordinary in his finding that the terms or provisions of the written agreement or contract between the defenders, the commissioners of police, and Andrew Swanson were varied or altered during its currency. On the contrary, I think that the provisions of that contract must be held to have been at the date of the cause of action in full force and observance, and that Mr Brims and Mr Bruce, even if they had wished to vary the provisions of the contract, had no power to do so, and did not do so in point of fact, and I cannot agree with the Lord Ordinary in resting the judgment upon such alleged variation.

Still, holding the written contract as in full force in all its provisions, and keeping in view the whole circumstances of the case, I am of opinion that in point of law the commissioners of police are liable to the pursuer for the negligence which left the heap of rubbish on the public street of Thurso unlighted on the night of 27th November 1874, whereby the pursuer received the injury for which he now claims reparation.

The delicacy and difficulty of the case arises from the necessity of distinguishing between the negligence of a servant employed by a master, and the negligence of a tradesman employed by a person to do some work on his property, or the negligence of the workmen of such a tradesman. A master is liable for damage occasioned by the act or by the negligence of his servant acting in his employment. In such a case the maxim applies *qui facit per alium facit per se.* On the other hand, a person who employs an independent tradesman or contractor to build or to repair or to take down his house, or to execute some specific work, is not liable for the fault or negligence of such tradesman or contractor, or of the workmen whom they may employ. The employer is not responsible either for the fault or for the negligence of the independent contractor unless he ex-

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pressly directed the wrongful or improper act. In such cases the rule holds. *culpa tenet suos auctores tantum.*

But there are many cases where it is exceedingly difficult to tell whether the party directly guilty of the fault or negligence is the servant of a master who will be responsible in the damage caused or merely the independent employee of an employer who will not be answerable for the employee's or contractor's fault and not liable in damages occasioned thereby. The present case is one in which there is great difficulty in determining whether the persons who were directly negligent, that is, the persons who were to blame for leaving the heap on the public street unlighted and unfenced, were in point of law to be held the servants of the commissioners, or were merely the workmen of an independent contractor, for whose negligence the commissioners are not answerable.

To solve this question it is necessary to take into view the terms of the written contract between the commissioners and Mr Swanson, and the mode in which it was to be carried out, and not only so, but to keep in view the position of the parties and the whole circumstances attending the deposit of the heap in question, and its being allowed to remain unlighted all night.

On carefully considering the very numerous cases which have occurred, chiefly in England, on this branch of the law, and of which we had in argument a very full citation, I think that the principle which governs the decision in such cases is that the person or superior, be he called either master or employer, who has reserved or who has assumed the direct and personal control over the subordinate, be he called servant or workman, who committed the fault or negligence, is liable for the damage thereby caused. In such case, "*respondeat superior;*" the superior is answerable for the negligence of his subordinate; and the test, I think, always is, had the superior personal control or power over the acting or mode of acting of the subordinate? I use the expression "personal control," because I think that this is always the turning point in such cases. Was there a control or direction of the person in opposition to a mere right to object to the quality or description of the work done? Where this element of personal control is found, then responsibility, either for malfeasance or nonfeasance, for fault or negligence, will attach, not only to the servant or workman (he is always liable), but to him who had the personal control over him who was his superior in the sense of the maxim. On the other hand, if an employer has no such personal control, but has merely the right to reject work that is ill done, or to stop work that is not being rightly done, but has no power over the person or time of the workman or artizan employed, then he will not be their superior in the sense of the maxim, and not answerable for their fault or negligence.

It is sometimes said that the question is whether the relation between the immediate wrongdoer and the defender is that of master and servant, or employer and contractor. But these words are a little ambiguous, and though they may indicate generally the rule of law the real question always is, I think, Who had the control and direction of the person who did the wrong? For example, it is of no consequence whether there is a written contract or not. The real question is, What is the nature of the contract? A man may have a written contract with his butler or coachman, but he will be liable for their negligence just as if he hired them verbally. And there may be no written contract with a builder who undertakes to build a house according to plans, and yet the owner of the house will not be liable for the fault or negligence of the builder or his workmen. Again, even where by the terms of the contract an employer

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has no personal control over the contractor's workmen, the employer may become liable for negligence if he personally interfere with the workmen and directs and adopts their acts. An instance of this occurred in the case of Burgess v. Gray (1845), 1 C. B. 578, and in other cases.

Now, applying the principle to the circumstances of the present case, I agree with all your Lordships that, by the terms of the written contract, the commissioners of police of Thurso did not so part with the entire control of the contractor and his workmen as to liberate them from responsibility for the particular act of negligence now in question. The direct parties negligent were the scavengers who removed the rubbish from Mr Galloway's premises to the public street and left it there. Now, the written contract expressly bears that the contractor, "except where otherwise provided for, shall be under the immediate order of the inspector, or, in his absence, of the clerk of the commissioners," and it is proved that in accordance with this the inspector and clerk were in the habit of giving, and in this instance did give directions and orders to the scavengers who, though paid by Swanson, the contractor, were always under the control of and obliged to obey the orders of the commissioners given through their inspector and clerk.

Indeed, I have some doubt with your Lordship whether the commissioners of police of Thurso could competently divest themselves of what was so much their proper and immediate duty as the keeping the streets of Thurso clean and free from obstruction. They have, no doubt, power by the statute to contract for work; but it is more than doubtful whether this would enable them to denude themselves of the duties and responsibilities which the statute imposes. It is unnecessary, however, to consider this, for I am quite clear that by this written contract the commissioners did not give up all control over the contractor and the scavengers, but, on the contrary, expressly reserved it.

Still farther, the special work done in this case—the removal of the rubbish from Mr Galloway's ash-pit and premises, must be held to have been done under the immediate orders of the commissioners and their inspector. By the terms of the contract it is only on getting written orders from the clerk or inspector that the contractor, Mr Swanson, or his servants, should be entitled or bound to enter upon private premises, such as Mr Galloway's undoubtedly were, and to remove rubbish or nuisance therefrom, and although a written order seems to have been dispensed with in this case, it was not the less under that clause of the contract that the operation of removing these ashes fell. It is proved that the inspector knew of the operation and gave directions concerning it.

On the general ground, therefore, that the present case is not the case of fault or negligence by an independent contractor or tradesman, over whom and over whose workmen the employer has no personal control, but the case of employers or masters hiring servants through a contractor, over whom they maintain entire control, I am of opinion that the commissioners are liable for the damages which have, I think, been very moderately assessed by the Lord Ordinary.

THIS interlocutor was pronounced:—"Recall the said interlocutor: Find that under the terms of the statute 13 and 14 Victoria, c. 33, the police commissioners were bound to remove, or cause to be removed, all refuse or obstructions on the public streets of the burgh: Find that on the day libelled a quantity of refuse was removed from the premises of the witness Galloway, and placed on the public street, and left there without any fencing or lighting

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The petitioner reclaimed, and argued, that by the Act of 1875, 38 and 39 Vict. c. 61, he was entitled to disentail without the consent of any heir other than the nearest heir, and that he ought not to be prejudiced by a change of circumstances occurring after the date of his consent.[1]

LORD PRESIDENT.—The position of this petitioner was such that if he had presented his application under 11 and 12 Vict. c. 36, he must have come under the provision in section 3, which requires that an heir "shall have obtained the consents of the three nearest heirs who at the said dates are for the time entitled to succeed to such estate in their order successively immediately after such heir in possession." Now, passing over in the meantime the Act of 16 and 17 Victoria, and looking to the provisions of the Act of last session, we find it is enacted by section 5—"Whereas it is expedient that section 3 of the Act of the 11th and 12th years of the reign of Her Majesty, chapter 36, should be amended: Be it enacted as follows:—(1) In any application to the Court of Session for authority to disentail an entailed estate in Scotland, holden by virtue of any tailzie dated prior to the 1st day of August 1848, the consent of any of the heirs of entail mentioned in the recited section entitled to succeed to such estate may competently be given after such application has been presented to the Court, and in the course of the same: (2) In the event of any of the foresaid heirs, except the nearest heir for the time, whether an heir-apparent or not, entitled to succeed, declining or refusing to give or being legally incapable of giving his consent, the Court may dispense with such consent in terms of the provisions following (that is to say)—(*a*) When any of the foresaid heirs entitled to succeed, except the nearest heir for the time, declines or refuses to give, or is legally incapable of giving his consent, the Court shall, on a motion to that effect by the petitioner in the application, and on a statement by him of the declinature or refusal or incapacity of such heir or heirs aforesaid, and after such intimation to the heir or heirs so declining or refusing, or to the guardians or other persons interested in the heir or heirs incapacitated as aforesaid, as the Court shall think necessary, ascertain the value in money of the expectancy or interest in the entailed estate with reference to such application of such heir or heirs declining or refusing, or incapacitated to give consent as aforesaid; (*b*) Upon such value in money being ascertained to the satisfaction of the Court, the Court shall direct the sum so ascertained to be paid into bank in name of the heir or heirs the value of whose expectancy or interest has been ascertained as aforesaid, or that proper security shall be given over the estate which is the subject of application for the amount so ascertained in favour of the heir or heirs aforesaid; (*c*) Upon such value in money being so paid or secured to the satisfaction of the Court, the Court shall dispense with the consent or consents of the heir or heirs the value of whose expectancy or interest has been ascertained as aforesaid, and shall thereupon proceed as if such consent or consents had been obtained: Provided always, that nothing herein contained shall render it competent to dispense with the consent of the nearest heir for the time entitled to

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just construction seems to be that the equivalent shall be taken to be a consent given at the date of the interlocutor dispensing with the consent. For it is only after such an interlocutor has been pronounced that the Court can proceed as if the consent had been obtained.

"The Lord Ordinary has therefore refused the petition."

[1] Carmichael, Dec. 22, 1853, 16 D. 296, 26 Scot. Jur. 142.

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succeed to any entailed estate sought to be disentailed." Now, the change which this introduced into the law, as under 11 and 12 Victoria, is simply that an heir of entail in possession proceeding to disentail instead of having to buy off the whole three next heirs is enabled as to the second and third heirs to take their interests compulsorily upon a valuation being obtained.

The petitioner presented his petition, stating to the Court the position in which he stood, and the position of the three next heirs of entail. He obtained the consent of the first heir of entail, and stated that the second and third declined to consent, although he afterwards obtained the consent of the second. It therefore was necessary to ascertain the value of the interest of the third heir. The proceedings for obtaining this value were in progress. A report had been prepared, but was not presented to the Lord Ordinary. At that time a new heir came into existence, a daughter being born to the heir in possession. The value in money of the interest of the third heir in existence had neither been paid into the bank nor secured, and it seems to me quite clear upon the statute that it is only when this has been done that the Court have it in their power to dispense with consents, and to proceed as if these had been obtained.

Now, it is clear that under 11 and 12 Victoria, if before one of the consents had been obtained, an heir was born, that would have put an end to the procedure, because the third heir would not have been one of the three heirs whose consent was required. The dispensation with consent under the Act of last session is just as essential as the consent was under the previous Act of 11 and 12 Victoria.

It was suggested that some aid might be got from section 19 of 16 and 17 Vict. c. 94, which provides—"The date of presenting any application under the said recited Act or under this Act shall be held to be the day on which the first interlocutor under such application has been or shall be pronounced, and no alteration of circumstances which has occurred or which shall occur subsequent both to the date of presenting such application and to the last date of the consents required to the same, whether by the birth of any intervening heir or by the death of any granter of such consent, or otherwise, except as hereinbefore specially provided, shall be deemed to have or shall have any effect upon the rights of the party who shall present or who has presented such application, or shall affect the procedure taken therein." But to my mind the difficulty is not removed by that section, because if the purchase and dispensation with consents is a necessary preliminary, and comes in place of the consents themselves, this section must be construed as requiring that the date of the petition and the date of the dispensation with consents must have passed before the clause in question can have any effect so far as to validate the petition.

I am prepared to adopt the interlocutor of the Lord Ordinary.

LORD DEAS.—The petitioner duly obtained the consent of the two first heirs of entail, Mr Kynoch junior and Mr Shand Turner. But the third, Mr Bentham Rae, being resident abroad, his consent was not obtained. It was therefore necessary that we should have the statutory equivalents. The statute fixes what is to be done in such a case. The Court is first to ascertain what is the value in money of the heir's expectancy. On that being done, which it could only be by interlocutor (not yet pronounced), the Court is then to direct that the money be paid into bank, or security found for it. On the money being so paid or security found, the third thing the Court is to do is to dispense with the consent, and then (but then only) the Court may proceed as if the consents

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had been obtained. But before any one of these three things had been done the petitioner's daughter was born, and her birth has given rise to the present question. I am clearly of opinion with the Lord Ordinary that we had not here the equivalents for the consent of Mr Bentham Rae before the birth of the petitioner's daughter, and therefore that the enactment relied on by the petitioner is not applicable. The consequence is that the Lord Ordinary is right in refusing the petition.

LORD ARDMILLAN.—Where consent is necessary, no consent can avail unless it has been granted, or unless a substitute for consent has been obtained through the medium of a statutory proceeding of the nature of *compulsitor* on valuation. The requirements of the statute for valuation of interest and dispensing with consent had not been complied with, and no sufficient consent had been obtained. At this point of time, and under these circumstances, the infant heir was born. I concur in your Lordships' opinion that we cannot grant this petition.

I have some doubt whether, if the procedure under the statute for valuing and discharging the interest had been completed before the child was born, we could have granted this petition, seeing that the child was *in utero*, and its birth expected immediately. But on this point I merely reserve my opinion.

LORD MURE concurred.

THE COURT adhered.

HAGART & BURN MURDOCH, W.S.—JOHN HOME, W.S.—Agents.

No. 89. Mar. 4, 1876. Miller v. Downie.

WILLIAM MILLER, Pursuer and Appellant.—*Asher—M'Kechnie.*
ROBERT DOWNIE, Defender and Respondent.—*Balfour—Moncreiff.*

Bankruptcy—Trust-Deed—Principal and Agent—Right in Security.—A granted a trust-deed for behoof of all acceding creditors in favour of B, and afterwards entered into an arrangement to pay a composition in four instalments, he being allowed to carry on his business, but subject to the supervision of B until the first instalment should be paid. The first two instalments were paid, but when A failed to pay the third B took possession of his shop and goods, and sold off everything for behoof of the creditors in the trust-deed. A had in the period after granting the trust-deed purchased and paid for some goods from C, but at the date when B took possession he was owing C the price of certain other goods, a portion of which were then in his shop. C, after obtaining decree against A for the price of the goods, sued B also for the price as really the principal in the transaction. *Held* that A not having been divested, and the trust-deed having been a mere security for payment of the composition, B was not in any sense a principal in the transaction, and that A alone was liable for the price of the goods.

2D DIVISION. Sheriff of Lanarkshire. I.

DAVID BROWN, baker, Cathcart Road, Glasgow, having got into difficulties, granted, on 13th November 1872, a trust-deed conveying all his estate to Robert Downie, accountant, Glasgow, for behoof of all his creditors acceding thereto, with full powers. On 23d November Brown agreed to pay a composition to his creditors in four instalments, the first of 3s. 6d. in the pound on 13th December 1872, the second of 1s. 6d. on 13th February 1873, the third of 2s. 6d. on 12th April 1873, and the fourth of 2s. 6d. on 13th June of that year. It was also arranged "that Mr Downie intromit with the estate funds until the first instalment of 3s. 6d. was paid."

In consequence of this arrangement Brown continued to carry on his business, and until 13th December 1872, when the first instalment fell

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due and was paid, he accounted daily to Downie for the drawings of his shop. The second instalment was also paid on 13th February 1873, but the third, which fell due on 12th April, was not paid. Downie thereupon, on 16th April, went to Brown's shop, and getting possession of everything in it, sold off the perishable goods at once, and subsequently disposed of the whole fittings, &c., by auction.

William Miller, a flour merchant, who had supplied Brown with flour after the date of the trust-deed, raised an action against him for the price of the flour in the Sheriff Court, and obtained decree.

Brown, however, having in the meantime been incarcerated by another creditor, and being in course of suing a *cessio*, Miller raised this action for the price of the flour against Downie, as Brown's trustee, averring that Brown had been employed and authorised by Downie to carry on the business for his behoof as trustee for the creditors acceding to the trust-deed, and that Downie had adopted and homologated all Brown's actings and dealings.

Downie defended the action.

Pleaded for Miller, *inter alia ;*—(1) The goods sued for having been sold by the pursuer to the defender through David Brown, the pursuer is entitled to decree. (2) The defender having homologated and adopted the actings of David Brown, and received and appropriated the goods bought by him and the proceeds thereof, is liable for the price of the same. (4) *Separatim*, the pursuer not being a participant under the trust-deed, is entitled to be ranked in full *primo loco* on all the assets taken possession of by the defender which did not belong to Brown at the date of the trust-deed, and if such assets are not now distinguishable he is entitled to payment in full.

Downie pleaded, *inter alia ;*—(4) The goods, the price of which is sued for, not having been sold or delivered to the defender, as trustee for Brown's creditors or as an individual, the defender is not liable for the price of the same. (5) The dealings and actings of Brown having been without the defender's knowledge or sanction, and not having been adopted or homologated by him, and the defender not having ordered, received, or used the goods sued for, or the proceeds thereof, the defender is entitled to decree of *absolvitor*, with expenses.

The Sheriff-substitute allowed a proof, from which it appeared that Brown had not applied to Downie for written orders when obtaining more flour for use in his business, as was usual in cases where the trustee and creditors carried on a business for their own behoof. Moreover, Brown stated that he had informed Miller that he had executed a trust-deed in favour of creditors. It was proved that Brown had paid Miller for certain quantities of flour supplied to him after the date of the trust-deed out of his own funds. It was also proved that after the payment of the first instalment Downie had in no way interfered with Brown until he took possession of his shop and stock on 16th April on his failure to pay the third instalment. It also appeared that at the date when Downie took possession of Brown's stock a considerable quantity of Miller's flour was in the shop unworked up, and this Downie sold along with the other goods for behoof of the creditors under the trust-deed, of which Miller was not one. There had been, however, at the date of the trust-deed, a considerable amount of flour in stock, which had since been worked up and sold by Brown in carrying on his business.

On 22d February 1875 the Sheriff-substitute (Erskine Murray) pronounced this interlocutor :—" Finds (1) that David Brown, baker, Cathcart Road, Glasgow, having got into difficulties, granted, on 13th November 1872, the trust-deed No. 7/1 of process, conveying all his estate to

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LORD MURE concurred.

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No. 89.
Mar. 4, 1876.
Miller v. Downie.

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Bankruptcy—Trust-Deed—Principal and Agent—Right in Security.—A granted a trust-deed for behoof of all acceding creditors in favour of B, and afterwards entered into an arrangement to pay a composition in four instalments, he being allowed to carry on his business, but subject to the supervision of B until the first instalment should be paid. The first two instalments were paid, but when A failed to pay the third B took possession of his shop and goods, and sold off everything for behoof of the creditors in the trust-deed. A had in the period after granting the trust-deed purchased and paid for some goods from C, but at the date when B took possession he was owing C the price of certain other goods, a portion of which were then in his shop. C, after obtaining decree against A for the price of the goods, sued B also for the price as really the principal in the transaction. *Held* that A not having been divested, and the trust-deed having been a mere security for payment of the composition, B was not in any sense a principal in the transaction, and that A alone was liable for the price of the goods.

2D DIVISION.
Sheriff of Lanarkshire.
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The Sheriff-substitute allowed a proof, from which it appeared that Brown had not applied to Downie for written orders when obtaining more flour for use in his business, as was usual in cases where the trustee and creditors carried on a business for their own behoof. Moreover, Brown stated that he had informed Miller that he had executed a trust-deed in favour of creditors. It was proved that Brown had paid Miller for certain quantities of flour supplied to him after the date of the trust-deed out of his own funds. It was also proved that after the payment of the first instalment Downie had in no way interfered with Brown until he took possession of his shop and stock on 16th April on his failure to pay the third instalment. It also appeared that at the date when Downie took possession of Brown's stock a considerable quantity of Miller's flour was in the shop unworked up, and this Downie sold along with the other goods for behoof of the creditors under the trust-deed, of which Miller was not one. There had been, however, at the date of the trust-deed, a considerable amount of flour in stock, which had since been worked up and sold by Brown in carrying on his business.

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defender, Robert Downie, accountant, Glasgow, for behoof of his creditors at the date thereof and acceding thereto, with full powers: Finds (2) that several meetings of creditors took place, at the third of which, on 23d November 1872, as appears by the minute thereof, 7/2, Brown agreed to pay a composition by four instalments, the first at 3s. 6d. per £ on 13th December 1872, and a second of 1s. 6d. on 13th February 1873, a third of 2s. 6d. on 12th April, and a fourth of 2s. 6d. on 13th June thereafter, which the meeting agreed to; and 'it was resolved that Mr Downie intromit with the estate funds until the first instalment of 3s. 6d. was paid:' Finds (3) that accordingly till the first instalment was paid Brown regularly accounted to defender daily for the drawings of the shop: Finds (4) that the second instalment was also paid, but Brown failed to pay the third: Finds (5) that between the time of the first and third instalments Brown himself managed the shop, kept the proceeds thereof, ordered flour, &c., paid (in full) for various quantities of flour got by him for the purposes of the shop from pursuer, William Miller, and others, and also ordered and received from the pursuer the goods mentioned in the account, which were not paid for: Finds (6) that at the time of his failing to pay the third instalment defender took possession of the balance of cash in Brown's hands and the stock in the shop, including some bags of pursuer's flour, turned Brown out, and proceeded to collect the accounts, and realise the estate, which action was approved of by the creditors at a meeting on the 18th April 1873, conform to minute 7/4: Finds (7) that pursuer raised an action against Brown and got decree for the amount of his account, but got nothing thereby; and Brown, after being in prison some time under a decree at the instance of another party, obtained decree of *cessio*, and the pursuer has now raised this action against the trustee: Finds on the whole case and in law that in the circumstances defender has made himself liable *qua* trustee for the creditors for the amount of pursuer's account: Therefore decerns against defender as libelled," &c.*

Downie appealed, and the Sheriff (Gillespie Dickson), on 18th June 1875, adhered to his Substitute's interlocutor.†

Miller appealed to the Court of Session against the finding of the Sheriff that Downie was only liable *qua* trustee.

Argued for him;—At the time when the composition contract was entered into there were not assets sufficient to pay the composition. To do that the business had to be carried on successfully. The real interest was therefore in the trustee for the creditors. The true relation of the parties was that of principal and agent. The circumstances required that this was either a case of partnership or one of principal and agent, and it was clear from the evidence that from the way in which Downie drew the proceeds of the business that it was really a case of principal and

* "NOTE.—If the trust-deed had not been enforced it was Brown rather than defender to whom pursuer had to look for payment, in consequence of the composition arrangement. But by defender's putting in force at the time of the third instalment the trust-deed, it must be held that Brown was merely managing the business for his creditors all along. Either it was theirs or it was not theirs. If it was theirs he was simply manager; if it was not theirs they had no right to take it back. To assume that it was still theirs assumed that Brown's subsequent liabilities were the liabilities of their own manager."

† "NOTE.—There is no doubt that the defender incurred liability as trustee for the debt in question. The pursuer contended that he is also liable therefor personally.

"Upon that question, if properly raised in this case, the Sheriff might have had considerable doubt. He reserves his opinion upon it, thinking that it is not so raised. . . ."

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agent. Downie was therefore liable, at all events in the first place, as an individual.[1]

Argued for Downie;—The flour was clearly the property of Brown; he had purchased it on the same footing as the other flour, for which he had paid out of his own funds. In any view this flour just came in place of what had been in stock at the time of the granting of the trust-deed. This was not a *rei vindicatio*, but a petitory action for the price of goods sold. All along Brown was acting for himself and not for the trustee and creditors. The fact of Downie entering into possession when he did shewed that he had had no true interest before.[2]

LORD JUSTICE-CLERK.—This claim does not rest on direct contract between pursuer and defender. It is conceded, and indeed clearly proved, that Miller knew no one in the transaction, and trusted to no one but Brown. He now, however, says that he has discovered since that Brown was really the agent of Downie—the trustee under a private trust conveyance for creditors—and claims against him as an undisclosed principal. He was not an undisclosed principal, for if Brown's evidence is to be trusted the pursuer was perfectly aware of Downie's title under the trust-deed, and therefore he did not regard Downie as principal at the time of this contract, and this of itself would go far in the solution of this case. But the ground of action is that the trustee was, in point of fact, the principal in this transaction, disclosed or undisclosed, and that the ostensible purchaser had no personal interest in the transaction, but was only an agent for the trustee. I am very clear in the general case that a trust-deed for security and payment of debt does not of itself divest the granter, or render the trustee and acceding creditors liable for the subsequent contracts made by the granter, unless they have by the nature of their proceedings acted as principals in the contracts themselves, or in the subjects to which these contracts relate. Their primary position is that of creditors only; and as long as they act in consistency with that character they will not be liable in any other. Even a creditor in legal possession under a specific security, while he will be liable for subsequent contractions, if these proceed on his mandate, express or implied, will not be liable simply in respect of his possession in security. But this case raises no such question. When these goods were ordered the trust-deed remained as a mere security for the payment of certain specific instalments of the composition; the debtor remained in undisturbed possession by the express consent of the creditors. He alone made the purchase for his own behoof, and the creditors could not have interfered either with the making or the fulfilment of the contract. It is a very clear case. The subsequent taking possession by the trustee, when the debtor failed to pay the third instalment, cannot possibly affect this question, whatever other rights might emerge out of it; but I am not prepared to say that the trustee had not a right to take the step which he did, and that solely in the character of a creditor holding a specific security, and without implying any other relation existing previously between him and the debtor.

LORD ORMIDALE.—I have come to the same conclusion, and agree with your Lordship that the Sheriff's judgment cannot stand.

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[1] Eaglesham and Co. v. Grant, July 15, 1875, *ante*, vol. ii. 960; Edmunds v. Bushell and Jones, Nov. 4, 1865, L. R. 1 Q. B. 97; 1 Bell's Com. (M'L.), 510 (note).

[2] Cox v. Hickman, Aug. 3, 1860, 8 Clark's H. of L. Ca. 268; Mollwo, March, and Co. v. The Court of Wards, July 6, 1872, L. R. 4 P. C. App. 419 (see pp. 435-8).

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The action is brought on the ground that as the trustee carried on the business through the agency of Brown, the bankrupt, he is liable for the debts incurred by Brown in so carrying on the business. That is the only ground of action libelled.

On the proof there is no sufficient evidence that Miller, when he sold flour to Brown, relied on the credit of the trustee at all. He himself gives very equivocal evidence on the point. I think it is clear, however, that he relied solely on Brown. He rendered no account to the trustee; he rendered it to Brown, and sued him for payment of it, and then, after getting his decree and finding it unavailing, he comes against the trustee. If he had made out that Brown was allowed to retain possession of his shop and bakery as the agent of the trustee and creditors, without doubt the trustee would have been liable. But, unfortunately for him, he has not made that out. On the contrary, it is clear, I think, that Brown was acting for himself, and that he alone is liable for the purchases he made. It was five weeks after the purchase and delivery of the last lot of flour that the trustee took possession of the shop and its contents. But the purchase had been previously made, and the flour delivered at a time when Brown was acting for himself. That being so, it is conclusive of the case. It is a mere question on the evidence, was Brown agent for the trustee and creditors or not? I can come to no other conclusion on the proof than that he was not.

The taking possession of the flour ultimately by the trustee raises a point on which I have some doubt. It was a sort of vitious intromission. The flour was not transferred to him, and could not have been by the trust-deed. But it was argued very ingeniously that the time for taking possession under the trust-deed was postponed, and that the flour ultimately taken delivery of by the trustee came into the place of what was in the shop at the date when the trust-deed was executed. But whatever doubt may attend this matter, I am satisfied that it cannot be dealt with under the present action as laid.

Lord Gifford.—I have formed the same opinion, and latterly with no difficulty whatever.

The action is for the price of flour sold and delivered by Miller to Brown. There is no direct contract between Miller and Downie,—they were never together in the matter. They never met. They never had any correspondence, and it is not pretended that Downie either directly or indirectly ordered the flour. He did not even know that it was being furnished by Miller, the pursuer. The only ground of the pursuer's claim against Downie is that although he had no contract with Downie he had one with Brown, who acted for Downie. It is urged that Brown had a mandate from Downie, and had power and authority to bind him.

This resolves the case into a question of fact, and it must be decided on the proof. The question is, whether or not it is established by the proof that Downie authorised Brown to buy flour, for the price of which he (Downie) would be responsible. I can see nothing in the evidence to shew that that was ever the position of parties, or that any such authority was ever given by Downie to Brown either directly or by implication. Brown became insolvent, and entered into a composition contract with his creditors, Downie having been appointed trustee. When a debtor enters into an arrangement to pay a composition to his creditors, and they agree to accept of the composition, the general rule is that the

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debtor gets back his estate, out of which, or by means of which, he is to pay the composition. The meaning is that the bankrupt is to be allowed to carry on or resume his business, paying therefrom the composition at the stipulated times. The creditors usually ask security for the composition, but they may do as they please in this respect. If Brown had paid all his instalments when they fell due I cannot see what liability the trustee and creditors would have been under to the subsequent creditors of Brown during the currency of the composition contract. The bankrupt resumed his business for his own behoof. The whole profit of it was his own, and neither the trustee nor the creditors had any responsibility therefor, unless they expressly interposed their credit. Now, there is not a particle of evidence that in the present case, and in regard to the flour sold and delivered by the pursuer to Mr Brown, either the creditors or the trustee, Mr Downie, interposed their credit, or, indeed, interfered in any way whatever. No doubt until the first instalment was paid Downie, as trustee for the creditors, called frequently at the shop and got the proceeds of the drawings of the business in order therewith to pay the composition, but there is nothing to suggest that he directed Brown in his purchases or gave him any orders of any kind. He only superintended and received the weekly drawings, but these were merely voluntary payments made to him by Brown towards payment of the first instalment of the composition, and even this course of dealing and these weekly payments came to an end when the first instalment of the composition was paid; nothing further occurred, and, in particular, Downie, the trustee, did nothing until Brown paid the second instalment due under his composition contract. It was during the interval between the paying of the first and the second instalments of the composition, and when Brown was in the full, absolute, and unlimited management of his own business, that this flour was purchased from the pursuer Miller. This was not the first purchase so made. There had been former purchases, and Brown had paid the price. Downie never heard of the transactions. Brown had the whole business, and he could do what he liked, provided he paid the instalments when they fell due. The pursuer himself admits that it was not on the credit of Downie that the flour was furnished, and that he looked for payment of the price, and rendered the account to Brown himself, so that if Downie has become liable therefor he has done so without the knowledge of the pursuer himself.

The only semblance of a difficulty in the case arises from what Downie did when he took possession under the trust-deed after Brown had failed to pay the third instalment. Now, it is possible that Downie, apart from Brown's consent, had no right to take possession of estate acquired by the bankrupt after the composition contract; but this is really immaterial in the present question. The flour undoubtedly was Brown's property, and if he did not object, no one else had any right to do so. The mere act of taking possession of the only two bags out of the whole quantity sold and delivered by the pursuer, cannot alter the state of matters between the parties, or make Downie liable for the whole debt due to the pursuer. Even as to the value of these two sacks, which is comparatively a very small sum, I do not think there are *termini habiles* for any claim against Downie. These two sacks had been absolutely out and out delivered to Brown, and Brown was entitled to apply them as he pleased.

I think the whole grounds of the present action are bad, and that the defender is entitled to absolvitor.

LORD NEAVES was absent.

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THE COURT pronounced this interlocutor:—"Sustain the appeal, and recall the interlocutors appealed from: Find that the flour in question was sold and delivered by the pursuer to David Brown, and that between the 15th and 27th of March 1873: Find that at the date of the said sale David Brown was carrying on business on his own account, and was in possession of the business and premises referred to in the record: Find that at the date above mentioned the said David Brown had granted a trust-deed for security and payment of his debts, and had made arrangement with his creditors by way of composition, two instalments of which had then been paid: Therefore sustain the fourth plea in law for the defender, and assoilzie him from the conclusions of the summons, and decern: Find the defender entitled to expenses in both Courts," &c.

DOVE & LOCKHART, S.S.C.—JOHN WRIGHT & JOHNSTON, Solicitors.—Agents.

No. 90.

SIR WILLIAM DUNBAR, Bart., (*Curator Bonis* to ——).—*Lee.*

Mar. 7, 1876. Dunbar.

Special Powers—Insanity—Aliment—Nobile Officium.—An application by the *curator bonis* of a person *incapax*, for authority to pay out of the surplus income of the ward's estate an alimentary allowance to the only brother and heir-at-law of the ward, who was in destitute circumstances, *refused*, on the ground that this was a matter in which the Court would not interfere with the discretion of the curator.

2D DIVISION. Lord Rutherfurd Clark. R.

THIS was an application by Sir William Dunbar, *curator bonis* of Mr —— for authority to pay out of the surplus income of the ward's estate a yearly alimentary allowance to the only brother of the ward, and the heir-at-law to his estates, so long as he was in circumstances to require it.

The circumstances set forth in the note for special powers were shortly as follows:—

The ward's estates yielded a clear rental, after deducting all burdens and expenses, of about £2000 a-year; and the expenditure on the ward's account was about £1500 a-year—leaving a surplus of about £500 a-year.

The ward's brother, who was twenty-six years of age, had, on attaining majority, received payment of the sum of £10,000 provided to him under his father's settlements. He entered into speculative transactions, the result of which was that he lost his whole patrimony, and in July 1875 he was adjudged bankrupt in the London Court of Bankruptcy. He was thus left entirely destitute. He was of weak constitution, and had not been brought up to any profession.

The curator further stated;—"The *curator bonis* is apprehensive that if the ward (who is fully aware of his brother's unfortunate position, and is most anxious to help him), were to be told that he was powerless to afford him any assistance out of his surplus income, it will, in all probability, operate very injuriously upon his health. He has a great affection for his brother; is keenly alive to his destitute condition; and knows that he himself has sufficient income to enable him to give assistance. Though not capable of managing his own affairs, the ward is possessed of considerable intelligence, and quite comprehends the position of matters. He has strong feelings, and rational wishes on this and many other subjects, and, indeed, is not insane in the ordinary sense of the word. But he is excitable, and with little or no power of self-control, and requires care and assistance. His sisters (who are his next of kin), quite concur in the proposed authority."

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The Accountant of Court issued the undernoted opinion.*

The Lord Ordinary reported the note to the Second Division.†

Counsel having been heard for the *curator bonis*, the Court took time to consider the judgment.

At advising, the opinion of the Court was delivered by

LORD JUSTICE-CLERK.—We cannot grant this application. The matters mentioned in the note are for the curator's consideration, and not for ours. Therefore, with whatever regret, we have no choice but to refuse the prayer of the petition.

THE COURT refused the note.

WILSON & DUNLOP, W.S.—Agents.

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* (After stating the facts, and that the ward's estate would probably be sufficient to afford the proposed allowance):—"The Court have frequently interponed their authority to advances by a judicial factor to sons and daughters of a lunatic, for their education, outfit in life, or aliment; and in some cases the Court have authorised a curator to continue to a brother or sister allowances which the lunatic had been in the practice of making to them, and which there was reason to believe it was intended to continue. Such authority was given in the cases of Duguid, Allardice's *curator bonis*, 1865 (n. r.), and in Carmichael, *curator bonis* to Hugh Scott, 1874 (n. r.).

"The Accountant, however, is not aware of any case in which the Court have authorised payment of an alimentary allowance to a brother, under circumstances similar or analogous to those involved in the present application, while there are several reported cases in which such authority has been refused. Reference may be made to the following:—Court, *curator bonis* to John Smith, Feb. 29, 1848, 10 D. 822; petition withdrawn, on opinion from the Court adverse to the application. Stewart, *curatrix bonis* to Stewart, Scot. Jur., Nov. 20, 1852, p. 30;[1] the Court refused the application. Robertson, *curator bonis* to Sinclair, Scot. Jur. 19th July 1853, p. 554; though the Accountant of Court reported favourably the Court refused the application.

"The special circumstances in the present case are, that the ward's brother received from his father an ample provision, all of which has been lost, either by misfortune or mismanagement; that he has not been educated for any profession through which he can now maintain himself, and that at the age of twenty-six he is entirely destitute. He is the heir-at-law of the lunatic ward, and the petitioner proposes, if he be authorised to make him an alimentary allowance, to take such obligation as shall secure repayment in the event of his succeeding to the estates now belonging to the ward, but such obligation can only be operative on the contingency of his surviving his brother."

† "This case is so peculiar that, in the opinion of the Lord Ordinary, it should be disposed of by the Court.

"If it had not been for the allegation that the refusal of the power would injure the ward, he would have refused it, for he thinks that, in ordinary circumstances, the Court cannot authorise a *curator bonis* to apply the estate under his charge in the support of the brother of his ward.

"But the curator alleges that the health of the ward would suffer if he were told that the surplus income of his estate could not be applied in the maintenance of his brother. Accordingly the application is made, not in the interest of the brother only, but in the interest of the ward. The Lord Ordinary was pressed to make inquiries into this allegation before reporting the case to the Court; but he has thought it to be the more proper course to report it as it stands, in order that the Court may direct such inquiry as it thinks proper to order, as well as the form of inquiry."

[1] 15 D. 37.

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JAMES BUCHANAN, Pursuer and Respondent.—*Balfour—Mackintosh.*
THOMAS BUCHANAN AND ANOTHER (Buchanan's Trustees), Defenders and Appellants.—*D.-F. Watson—J. C. Lorimer.*

Legitim—Donation.—A advanced the sum of £1000, being nearly the whole of his moveable estate, to one of his sons, who, at his father's request, wrote upon one sheet of paper three I O U's (the sums in which together amounted to £1000), one being in favour of each of A's other children, except a son whom he desired to exclude from all share in his succession. The paper containing the I O U's was then handed in turn to two of the creditors in the obligations (the third was deaf and dumb), and finally to the father, by whom it was retained till his death, which occurred nine months after the transaction. *Held*, in a claim for *legitim* by the excluded son against his father's trustees that, while the form of the transaction might be sufficient absolutely to divest the father of the sum of £1000, provided that such was the real intention of the parties, the whole circumstances, and, particularly, the retention of the obligatory documents by the father, shewed that the transaction was simulate, and that the fund formed part of the personal estate of the father at the time of his death.

2D DIVISION. Sheriff of Perthshire. I.

THIS action was raised in March 1874 in the Sheriff Court of Perthshire at Dunblane by James Buchanan, Callander, against his brothers, Thomas and Walter, as trustees of their father, the late Walter Buchanan, who died 12th May 1870. The conclusions of the summons were for count and reckoning for the purpose of ascertaining the amount of *legitim* due to the pursuer.

The defence was that the deceased had absolutely denuded himself of his personal estate during his life, and the question at issue was, whether a certain sum of £1000 was *in bonis* of the deceased at the time of his death.

From the proof it appeared that Walter Buchanan senior was in August 1869 possessed of about £1000 in money (of which £700 was lent to his son Thomas, and £300 deposited in bank), and also of house property to the value of about £40 a-year. He was then about seventy-three years of age, and, so far as it appeared, in good health. His only surviving children at that date were the pursuer, the two defenders, and two daughters, Isabella and Elizabeth, the latter being deaf and dumb. The evidence shewed that Mr Buchanan senior was desirous of excluding the pursuer from all share in his estate. On 5th August 1869 a meeting took place in Thomas's shop, at which Mr Buchanan senior, his sons Thomas and Walter, and his daughter Isabella, were present. On that occasion, according to the evidence of the defenders and their sister Isabella, he expressed his intention of dividing his personal estate among his children who had not already got their shares, and said that James (the pursuer) had already got his full share. Thomas then paid the sum due by him, and his father gave him a receipt therefor, which was produced in the present action. Nothing more appears to have been done upon that occasion, but about two days after a second meeting took place, of the same persons, also in Thomas's shop. What passed is thus described by the witnesses:—

Isabella Buchanan, examined for the defenders—"A day or two after that my father came again to the shop with £1000, which he said was all he had, and that he thought it would be better to give the £1000 to Thomas to keep and put out to interest on behalf of the rest of us. At the same time, Thomas, at my father's request, granted an I O U in favour of Elizabeth Buchanan for £400, and an I O U in favour of Isabella Buchanan for £300, and also an I O U in favour of my brother Walter for £300." *Cross.*—"When Thomas paid up the £700,

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he made the payment in money. My father told me that it was paid, and I supposed that it was paid in money. I did not see any money paid. My father spoke about it not being necessary to pay legacy-duty in consequence of the division he was making. I saw my father give £300 to Thomas on the day that the I O U's were written out. I cannot say that I then saw the notes of the £700 that my brother Thomas had got from my father. I knew when the I O U's were written out that I was to get a share, under my father's settlement, of the rents of his heritable property. I did not keep my I O U, but at once gave it back to my father to keep as he wished. My sister Elizabeth was not present when the I O U's were granted."

Thomas Buchanan,—"My father, at the time of division, asked me to write out the I O U's; and he told me what names and sums to put in them. I wrote them, and handed them to my father, and then he handed them to Isabell, who gave them back to my father, who handed them across the counter to Walter, who finally returned them to my father. They were then all on one sheet of paper. The I O U's were all on a single sheet of paper till after my father's death, when they were separated."

Walter Buchanan deponed that on 9th August 1869 (two days after this) his father gave him the paper containing the I O U's, and then took it back again, saying,—"Now, you can state after I am dead that I have given away all my money in my lifetime."

The paper containing the I O U's was placed by Walter Buchanan senior in a locked box, which he gave to his daughter Isabella a few days before his death, but without any instructions as to what was to be done with it. The key of the box he gave to his wife, who retained it till after his death, when the box was opened, and the paper in question found therein, along with the titles to his property and other documents.

It was stated in evidence that Thomas Buchanan paid interest on the £700 lent to him by his father until that sum was repaid, but there was no evidence as to whether or not any interest was paid by him to any one upon the £1000 handed to him by his father on or about 7th August 1869.

Mr Buchanan senior, as before-mentioned, died on 12th May 1870, survived by his five children before-mentioned, and his widow. The latter made no claim under her *jus relictæ*, and she died in 1872.

The Sheriff-substitute (Grahame) pronounced an interlocutor, of which the principal finding was as follows:—"That in August 1869, about nine months previous to his death, the said Walter Buchanan is proved to have paid over to the defender, Thomas Buchanan, the sum of £1000." He therefore found that the only sum available for *legitim* was a trifling sum, consisting of the value of the deceased's household furniture, and a proportion of the current half year's rent of his house property.

The Sheriff (Adam), on appeal, recalled the interlocutor of his Substitute, "and in place thereof, finds that, on the 7th August 1869, the said deceased Walter Buchanan paid to the defender, Thomas Buchanan, the sum of £1000, receiving from him in return three I O U's for the sums of £400, £300, and £300 respectively, in favour respectively of Elizabeth, Walter, and Isabella Buchanan: Finds that the said sum of £1000 was the property of the said deceased Walter Buchanan, and that no part of it was the property of the said Elizabeth, Walter, or Isabella Buchanan: Finds that the said I O U's were in possession of the said deceased Walter Buchanan at the time of his death, and that it is not proved that they were ever delivered to the said Elizabeth, Walter, or Isabella Buchanan respectively: Finds, therefore, that the said sum of £1000 formed part of the deceased's personal estate at the time of his death, and that the defenders, as his trustees, are bound to account for it, with

No. 91. interest at the rate of five per cent from the said 7th August 1869 to the date of the deceased's death."

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The amount of *legitim* due to the pursuer having been fixed by a subsequent interlocutor at £70, 17s. 5¼d., the defenders appealed to the Court of Session.

Argued for the appellants;—This case was entirely different from cases in which the person, who went through the form of giving away his property, afterwards dealt with it as his own by receiving interest or otherwise, and in which cases it was accordingly held that there was no real divestiture. In the present case Mr Buchanan senior survived the transaction in question nine months, and it was not proved that he ever claimed the money or exercised any control over it. His expressed intention was to give away his entire moveable estate to his children in his lifetime. No doubt the object he had in view was to defeat the pursuer's claim to *legitim*, but that was not an unlawful object. The only question, then, which remained, was whether the form of the transaction was effectual to carry out that intention. There was a distinct delivery of the documents of obligation to two of the persons in whose favour they were granted, and the absence of the third (Elizabeth) was explained by her being deaf and dumb. As soon as the documents of debt passed out of the hands of the granter, Thomas Buchanan, the obligations therein contained became effectual, and it must be presumed, in the absence of any evidence to the contrary, that the documents were handed to the father and retained by him as custodier for the creditors.[1]

The pursuer supported the judgment of the Sheriff, and argued that at most there was only a gift *mortis causa* of the £1000 in question, which could not affect the *legitim* fund.

At advising,—

Lord Justice-Clerk.—(After stating the facts)—There are two questions here, which are distinct—(1) whether the right conveyed *ex facie* of these obligatory writings was incomplete by reason of their not being delivered; and (2) whether, assuming that the forms of law have been sufficiently complied with, that which was done was intended to take effect during the lifetime of the father.

On the first of these questions, although it is narrow enough, I should hesitate to say that the obligation was ineffectual for want of formal completion. The ordinary rule of law is that an obligatory writing found in the hands of a third party is presumed to be held for the creditor, as it is beyond the control of the granter. A strong example of the rule, where it is very explicitly enunciated, will be found in the case of Turner, M. 11,582, in which a bond granted by a purchaser for the price of lands sold, taken in the name of the son of the seller, was found effectual against the father, having been delivered to a third party.

[1] Bell's Principles, secs. 1584-5; Hamilton v. Hamilton, Jan. 9, 1741, M. 11,576; Hill v. Hill, July 2, 1755, M. 11,580; Hog v. Lashley, July 1804, 4 Paton's App. 581; Millie v. Millie, June 7, 1803, F. C. and M. 8,215, aff. March 18, 1807, 5 Paton's App. 160; Balvaird v. Latimer, Dec. 5, 1816, F. C.; Keddie v. Christie, Nov. 24, 1848, 11 D. 145, 21 Scot. Jur. 26; British Linen Co. v. Martin, March 8, 1849, 11 D. 1004, 21 Scot. Jur. 360; Cruickshanks v. Cruickshanks, Dec. 10, 1853, 16 D. 168, 26 Scot. Jur. 92; Little v. Little, Feb. 18, 1856, 18 D. 701, 28 Scot. Jur. 295; Muir v. Ross's Executors, June 15, 1866, 4 Macph. 820, 38 Scot. Jur. 435; Watt's Trustees v. Mackenzie, July 1, 1869, 7 Macph. 930, 41 Scot. Jur. 626; Wright's Trustees v. Wright, March 15, 1870, 8 Macph. 708, 42 Scot. Jur. 363.

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No doubt an exception has been admitted in some cases in which a father has taken rights purchased with his own money in the name of his children, and has retained the written obligations in his own custody. The cases in the Dictionary are numerous, and far from being consistent, the cases of Hill, in 1756, M. 11,580, and of Holwell, in 1796, M. 11,583, being apparently in contradiction to the prior case of Hamilton, in 1741, M. 11,576, and the case of Turner, in 1782. Even in such cases, however, it must be shewn that the father was the real creditor, and that fact, along with the retention of the bond, raises a presumption against the form of the obligation and the ordinary rule, and that no immediate gift was intended. But whenever the father has communicated the right to his children, and has intentionally so written, spoken, or acted as to lead to the inference that he regarded the right as transferred, that will be sufficient to remove the presumption, and his retention will be in the character of trustee only.

The real question, therefore, is the second,—not what was done in form, but what was intended in substance. Was the form of delivery which was gone through with the children intended to operate an instant completion of the gift, or was it only intended to make an apparent and simulate completion of it? If the first was intended I think the form was sufficient,—but the mere form must yield to the actual purpose.

I have found difficulty on this question also, but, on the whole, I have come to the conclusion that this case belongs to the same category as those of Hog v. Lashley, and Millie v. Millie; and that the intention of all the persons engaged was to give an appearance of immediate right so as to exclude the *legitim* and the legacy-duty, while the actual command of the whole fund remained, and was meant to remain, with the father. I have come to this conclusion mainly and almost solely from the fact that these obligations were retained by the father, a proceeding for which no reason has been suggested, if an immediate and instant right was really contemplated. The avowed object was to disappoint the *legitim* and the legacy-duty, not to make over the money; and it being an attempt to reconcile objects which were incompatible, it must necessarily fail.

LORD ORMIDALE.—I have come to the same result, although, at first, I must own that the case appeared to me to be attended with considerable difficulty. I am now satisfied, however, upon the principles stated by your Lordship, that the case really depends on an issue of facts, in regard to which the Sheriff has determined rightly.

The action is brought at the instance of one of the sons of Walter Buchanan against two of the pursuer's brothers, as trustees of their father, in the shape of a count and reckoning, and the object of the action is to obtain a share of the personal estate of the father as *legitim*. I do not find in the record any defence stated that the pursuer is not entitled to *legitim* in consequence of being forisfamiliated, or on any other ground, apart from the allegation that no fund or estate, except a trifle, was left, out of which *legitim* is due. In regard to this allegation, the question on the proof is, whether the contents of the three I O U's really did or did not form part of the father's personal estate at his death, or had been previously disposed of by him. The whole matter of the making over and delivery before his death of these I O U's to some members of his family is, to say the least of it, attended with a good deal of suspicion. In the first place, I can hardly understand how the old man should have thought

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of divesting himself of his whole personal estate at the time he is said to have done so, leaving only for his support a pittance of £40 a-year from some heritable property he had. Then, when we come to the transaction itself, we find it to be one of a very singular description. The old man had received payment from his son Thomas of a debt of £700 two days before; he not only returns the £700 to Thomas, but gives him £300 in addition. This being done, he next takes from Thomas the three I O U's upon the same piece of paper, and delivers them, it is said, in that form to three of his children as their own. If that was really his object, and if the three favoured children were to get the full command of the money, why, it may be asked, did he not pay it at once to them as money instead of putting or leaving it in the hands of Thomas, taking from him three I O U's? Or, if Thomas was not ready to pay up all the money, why, in that view, it may be asked, did not the father at all events divide among the children the £300 which he had in hand? All this goes far to satisfy me that the transaction was a mere form or device for the purpose of defeating the pursuer's *legitim*, and also, it may be, preventing a claim being made as for succession-duty at the instance of the Inland Revenue officers. He may have been entitled to accomplish both of these objects, provided he really did divest absolutely himself in his lifetime. But, looking at the evidence as a jury, I have come to the conclusion that the transaction was a mere bit of acting; that the old man intended to retain control of the money himself, and that his children should not have it till after his death. He retained the I O U's himself, having immediately got them back from his children, and locked them up in a box, giving the key not to any of the children, the nominal creditors in them, but to his wife. Accordingly the box, and the I O U's, do not again appear till after his death. But a father is not entitled to defeat either *legitim* or succession-duty by any scheme or device having the appearance merely of disposing of his means and estate *inter vivos*, but in reality not doing so till after his death. A *mortis causa* disposal of a man's estate can never defeat claims either of *legitim* or succession-duty. It therefore, on these grounds, appears to me that the Sheriff has taken the right view of this case, and that his judgment ought to be affirmed.

LORD GIFFORD concurred.

The Lord Justice-Clerk intimated that Lord Neaves, who had heard the debate, concurred in the judgment.

THIS interlocutor was pronounced:—"Find that, at the date of the obligatory writings in question, the appellant, Thomas Buchanan, was indebted to the deceased Walter Buchanan in the sum of £700, and that on the same date the deceased advanced £300 to the said Thomas Buchanan: Find that the said obligatory writings were prepared and delivered by Thomas Buchanan at the request of the deceased: Find that the deceased never parted with the said documents during his life, and that it is not proved that the deceased ever effectually became bound to hold these obligations in trust for the appellants, or intended that the same should be paid or exacted during his own life: Therefore dismiss the appeal, affirm the judgment, and decern: Find the appellants liable in expenses," &c.

T. J. GORDON, W.S.—AULD & MACDONALD, W.S.—Agents.

JOHN GILLESPIE (Weir's Factor), Pursuer and Real Raiser.—*Melville.*
WILLIAM HEPBURN AND OTHERS, Claimants and Reclaimers.—*Balfour—Jameson.*
LIEUT.-GENERAL HUTCHINSON AND OTHERS (Hutchinson's Marriage-Contract Trustees), Claimants and Respondents.—*D.-F. Watson—Moncreiff.*

No. 92.
Mar. 8, 1876.
Gillespie v. Mercer, &c.

Succession—Testament—Conditio si sine liberis decesserit.—A truster bequeathed the liferent of her estate to her grandson A, with power to the trustees to make payments to him out of capital, and on his death the fee of the estate, or of so much as should remain, to A's issue, whom failing, to one of her nephews W, whom failing, to his two children *nominatim*, "and to the survivor of them, and failing both, to my own nearest heirs and assignees whomsoever." A died without issue. W and his children predeceased A, but W's children were survived by issue. *Held*, in a competition between W's grandchildren and the representatives of the next of kin of the truster, that the *conditio si sine liberis* did not apply.

2D DIVISION. Ld. Craighill. R.

ON 27th May 1811 Mrs Jean Hepburn or Weir, widow of John Weir, merchant, Edinburgh, executed a trust-disposition and settlement in favour of certain trustees.

At the date when the deed was signed Mrs Weir's nearest relatives were—(1) two sisters, Ann and Elizabeth Hepburn; (2) a grandson, Alexander Mercer; (3) three nephews, of whom one was William Hepburn of St Vincents; and (4) two children of William Hepburn, named respectively William and Harriet Hepburn. Mrs Weir died on 24th January 1813, survived by the above mentioned relatives.

The trust-deed provided, after the usual clause as to payment of debts, &c., in the second place, that the trustees should pay to each of the truster's sisters £100, "and failing any one of them the survivor is to have right to the other's legacy." It was provided, in the third place, that the annual produce and interest of the truster's property should be paid to her sisters "in liferent equally betwixt them during their lives, and to the survivor of them." The deed then proceeded as follows:—"In the fourth place, that after the death of the survivor of the said Ann and Elizabeth Hepburn the said trustees shall pay the yearly produce and interest of my said property, sums of money, and effects, to Alexander Mercer, only surviving child procreate of the marriage betwixt the deceased Captain John Mercer, and Elizabeth Weir, my daughter, with power, however, to the said trustees, if they shall think advisable, to assign and pay over to the said Alexander Mercer the whole or any part of my said property, sums, and effects. In the fifth place, that the said trustees, on the death of the said Alexander Mercer, shall pay over and convey my said property, sums, and effects (unless they shall have assigned and paid the same to himself in his own lifetime), or what part thereof which shall remain after any partial payment thereof to him, and that to the child or children lawfully to be procreated of his body, equally amongst them, if more than one, share and share alike, whom failing, to William Hepburn of St Vincents, my nephew, and failing him, to William and Harriet Hepburn, his children, equally betwixt them, and to the survivor of them, and failing both, to my own nearest heirs and assignees whomsoever."

The longest liver of the truster's sisters died in 1825, and from that date the produce of the estate was paid to Alexander Mercer till his death on 5th July 1869. He was predeceased by his wife and children, and left no descendants.

William Hepburn of St Vincents had had other children besides William

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and Harriet mentioned in the trust-deed, but they had died before the date of the trust-deed. William and Harriet, as well as their father, predeceased Alexander Mercer. William was survived by two children, William and Mary, and Harriet by one daughter Henrietta.

In an action of multiplepoinding raised in 1874 for distribution of the estate competing claims were lodged for—

1. William and Mary Hepburn, the children of William Hepburn junior, and Henrietta Hill or Reilly, the daughter of Harriet Hepburn, who claimed (1) the provisions in favour of their parents, on the plea that the *conditio si sine liberis* applied, and alternatively (2) &c.

2. The marriage contract trustees of Mrs Hutchinson and others claimed as representing certain of the truster's "nearest heirs."

On 19th October 1875 the Lord Ordinary pronounced this interlocutor:—"Finds that the residuary bequests in the trust-deed left by the truster, the late Mrs Jean Hepburn or Weir,—by which she appointed her trustees, in case of the failure of a child or children of the body of her grandson, Alexander Mercer, to pay over and convey, at his death, the trust-estate, or such part as should remain after any partial payment thereof, under the provisions of the will, 'to William Hepburn of St Vincents,' the truster's nephew, and failing him, to 'William and Harriet Hepburn, his children, equally betwixt them, and to the survivor of them, and failing both, to the truster's own nearest heirs and assignees whomsoever,'—is not qualified by the *conditio si sine liberis decesserit:* Therefore repels the first plea in law for the claimants, William Hepburn and others, and also repels the first and second alternatives of their claim: Ranks and prefers the claimants, Lieutenant-General William Nelson Hutchinson, and others, in terms of their claim; and likewise the claimants first mentioned, the aforesaid William Hepburn and others, in terms of the third alternative of their claim, and decerns: Finds the claimants, the said William Hepburn and others, liable in the expenses of the competition; allows an account," &c.*

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* "NOTE.—The question here at issue is the construction of the latter part of the residuary bequest in the trust-disposition left by Mrs Jean Hepburn or Weir, who died so long ago as 1813. Her settlement was made in 1811; and then, as well as at her death, there were alive, of her near relatives, two sisters, a grandson, three nephews, a niece, and a grandnephew and grandniece, the children of William Hepburn, one of the three nephews. Each of her two sisters was a legatee to the extent of £100 under the second purpose of the trust; and failing 'any one of them,' the survivor was to have right to the other's legacy, which was to be payable six months after the death of the truster. These sisters were also liferenters of the trust-estate under the third purpose of the trust. The longest liver of the two survived till 1825, and on her death a grandson of the truster, Alexander Mercer, became entitled to the liferent of the estate. He survived till 1869. When he died, the right to the fee became vested in the fiars. Upon this point the competing claimants are agreed.

"There are two sets of claimants. The one consists of or represents the next of kin of the truster as at the date when the residue vested. The other consists of or represents the children of William and Harriet Hepburn, son and daughter of the truster's nephew, William Hepburn; and the bequest of the residue, as set forth in the fifth purpose of the settlement, is the subject of the present litigation.

"The children of William and Harriet Hepburn claim the fund on the ground that they are to be held as instituted in place of their parents by virtue of the condition *si sine liberis decesserit.* The next of kin of the truster, on the other hand, contend that the case is not one in which the condition referred to can be

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William Hepburn and others reclaimed, and argued;—This was one of the cases where the *conditio si sine liberis* clearly applied. The whole of William Hepburn's children were called, so they were called as a class. The truster was *in loco parentis* to them. The gift was also one of the *universitas* of an estate. Moreover, it was much more likely that

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applied; and consequently, as William and Harriet Hepburn died before the period of vesting, that the residue now belongs to the next of kin. The Lord Ordinary thinks that the latter view is the sound one; and his reasons for this opinion can be briefly explained.

"A dispute as to the import of a will, it need hardly be said, is a dispute as to the intention of the testator. This is as true in a case, such as the present, where the question turns upon the existence of an implied condition, as it would be in a case where the controversy related to the interpretation of obscure, or, it may be, apparently contradictory provisions. Did the testator intend that the children of William and Harriet Hepburn should take the residue in room of their parents, if the latter died before the period of vesting? That, truly, is the issue now under trial. There are two ways, and only two ways, by which such an intention could be established. The first and most obvious, as assuredly it is the most satisfactory, is the testator's appointment. There is nothing of that kind here. On the contrary, the tenor of the clause is such as seems naturally to lead to the opposite conclusion. The father is to take, should he be alive at the death of Alexander Mercer, the truster's grandson. Should he fail, his children, William and Harriet, are to take. Should one of these two fail, the survivor is to take, and should both fail, the residue is to go to the next of kin of the truster. A bequest so framed seems almost inconsistent with the idea that there was in the contemplation of the testator any contingency by which the course of her succession, so clearly marked out, might be diverted.

"The other way by which the testator's intention may be shewn is the invoking of a presumption which in certain cases is afforded by the relation in which the testator stands towards the legatee. The law in these cases does not exactly make a will for the testator, but it supplements the will which has been made, by recourse to a presumption as to what would have been done had his will upon the point been expressed. The doctrine referred to has long been recognised, and is firmly established, but the cases to which it applies are limited, and their number ought certainly not to be increased. The present is a bequest to collaterals. A grandnephew and a grandniece are the legatees. Had they been called to the succession as a class the *conditio si sine liberis decesserit* might have been applied. This is proved by numerous decisions. These legatees, however, were called, not as a class, but individually by name; and for this reason the Lord Ordinary thinks that the doctrine in question has no application. The counsel for the unsuccessful claimants contended that, as William and Harriet Hepburn were, at the date of the will, the only surviving children of William Hepburn, they, though named, must be regarded as the whole members of a class, or, in other words, as a class. The Lord Ordinary doubts whether, in any circumstances, the suggestion here presented would be warrant for extending the operation of the condition; but be that as it may, it cannot, as he thinks, be viewed as such upon this occasion, because William Hepburn, the father, was alive at the date of the will, and, for anything that appears, his family might have been increased by the birth of other children.

"The cases referred to by the counsel for the claimants who have been successful, were Fleming, Mor. 8111, and Hamilton, 16 S. 478. Those referred to on the other side were, Wallace, Mor. Appx., *voce* 'Clause,' No. 6; Ross and others (Thomson's Trs.), 13 D. 1326; Scott and others (M'Gown's Trs.), 8 Macph. 356; M'Call and others, 10 Macph. 281; and Irvine, 11 Macph. 892. The Lord Ordinary thinks it right also to cite the case of Chancellor, 10 Macph. 995, as there are *dicta* in the report which seem to recognise the views of the law by which he has been influenced in pronouncing the foregoing interlocutor."

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she would prefer the children of her institute to her own heirs whatsoever.[1]

Argued for Mrs Hutchinson's trustees;—The truster was never *in loco parentis* to the children of her nephew William. Their father survived her. This was not a bequest in favour of a class. William might have had other children, and they would not have taken. There was here also a survivorship clause, which was against the presumption of the *conditio* applying.[2]

LORD ORMIDALE.—I need not enter into an examination of the general principles of law applicable to this case, as we had occasion to do so very recently in the case of Blair's Trustees.

In the present case there are some of the specialties or peculiarities which occurred in the case of Blair's Trustees, and which appear to me to be sufficient for its decision. We have, in the first place, a destination to William Hepburn of St Vincents, who was to take as conditional institute on the death of Alexander Mercer, the grandson of the testator, in the event of there being any residue, which there might not be, as the trustees had power to assign and pay over the whole estate to Alexander Mercer during his lifetime. It so happens that we have in this destination an undoubted case of selection. At the date when the deed was executed William Hepburn had two brothers living, and yet he is the brother alone selected and preferred by the testatrix; and it will be also remarked that she carries her predilection further in favour of his children *nominatim*. Now, in the case of Blair's Trustees I founded strongly on a similar circumstance, and so, I think, did your Lordship in the chair. It was the distinguishing feature in that case, as also in some of the earlier decisions; and it is a prominent feature of the present case. Children are not called as a class, but only two *nominatim*. William Hepburn might have had more children either by his then subsisting marriage or a subsequent one.

I go also upon what immediately follows, viz., the destination to these two children "equally betwixt them, and to the survivor of them, and failing both, to my own nearest heirs nnd assignees whomsoever."

The intention of the testatrix is the guiding rule, and I cannot read the deed here without being satisfied that it was not her intention to leave her property to any one who was not named by her.

LORD GIFFORD.—I am of the same opinion, but I have arrived at it with some hesitation. My leaning has always been towards the views formerly expressed by Lord Benholme, and towards the extension of the rule under which, when a bequest or provision is made in favour of near relatives of the testator, there is an implied provision that if the legatee predecease the testator leaving children, these children shall take the legacy or provision as conditional institutes to their parents. I think that this will in general be more in accordance with a testator's intentions than that such legacy should simply lapse. But the current of recent decisions has been rather adverse to the extension of this implied institution of children, and in deference to these judgments I concur in the decision now pro-

[1] M'Call v. Dennistoun and others, Dec. 22, 1871, 10 Macph. 281, 44 Scot. Jur. 160; Wallaces v. Wallaces, Jan. 28, 1807, M. App. *voce* Clause, 6; Thomson's Trustees v. Robb, July 10, 1851, 13 D. 1326.

[2] Hamilton, Feb. 8, 1838, 16 S. 478, 10 Scot. Jur. 263; M'Gown's Trustees v. Robertsons, Dec. 17, 1869, 8 Macph. 356, 42 Scot Jur. 161; Blair's Executors, &c. v. Taylor, &c., Jan. 18, 1876, *supra*, p. 362.

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posed. In the recent case of Blair's Trustees I was for holding that there was an implied condition that if the legatees called predeceased, their children should take, but I was in the minority, and I hold myself now bound by the judgment in that case, and that decision goes in an opposite direction, having the effect of narrowing the application of the rule.

You must look to the terms of the testator's deed, to the whole expressions made use of, and to the whole circumstance, taking them all into view, before you can say that the *conditio si sine liberis* was intended by the testator to apply. The question is always what was the intention of the testator. In the present case, when we look at the circumstances, the grounds and reasons for implying the substitution or conditional institution of children are weaker than occurred in many cases where the Court have refused to apply the *conditio si sine liberis*. The testator here selects a nephew, and provides that, if he fails, two of his children called *nominatim* are to take up the succession. No doubt they were the only children of the institute in life at the time, but there might have been more, and I think this must be held to have been in the testator's view. She does not go on to add the words used by her immediately before, "to the child or children to be procreated of his body." I do not think the Court can be called upon to insert for the the testator words which the testator might so easily have used if her intention had been what these words express. That would be making a will for the testator which she has not made for herself. The Court are not vaguely to guess at what the testator might probably have intended, but simply to gather the intention from the words used.

The LORD JUSTICE-CLERK concurred.

LORD NEAVES was absent.

THE COURT adhered.

GILLESPIE & PATERSON, W.S.—MACKENZIE, INNES, & LOGAN, W.S.—A. P. PURVES, W.S.—Agents.

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JOHN DOUGLAS, Pursuer and Nominal Raiser.
ALEXANDER M'CUTCHEON (Carson's Trustee), Real Raiser and Claimant.—*D.-F. Watson—M'Laren.*
ROBERT M'WILLIAM, Claimant.—*Burnet—Low.*

Right in Security—Assignation.—The creditor in a bond and disposition in security granted an assignation, *inter alia*, of the heritable subjects disponed in the bond, but did not expressly assign the bond itself or the debt; the assignation, however, bore to be "in real security of" the sum in the bond. The assignation contained an assignation of writs conform to inventory, in which inventory the bond was included. The bond was not delivered to the assignee, but a copy was. Three years after the date of the assignation the estates of the creditor were sequestrated, and his trustee completed his title to the bond by recording a notarial instrument two years after the assignee had been infeft in the subjects. In a competition between the assignee and the trustee, *held* (*rev.* judgment of Lord Curriehill) that the assignation was valid and effectual to convey the debt as well as the security.

Statute 37 and 38 Vict., cap. 94, sec. 25—Sasine—Recording.—The 25th section of the "Conveyancing and Land Transfer (Scotland) Act," 1874, abolished the distinction between burgage and feu-holding, and provided also that owners of lands held burgage might grant feus, and that "the titles of all such feus granted before the commencement of this Act shall be unchallengeable on

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the grounds that such feus are of land held by burgage tenure, or that such titles have been recorded in the Burgh Register of Sasines."

Where the holder of a security over certain heritable subjects, originally burgage but feued out by the magistrates, had, prior to the Act, recorded his infeftment in the Burgh Register, and his title was therefore objected to, *opinion* (*per* Lord Curriehill) that the provisions of the above section applied, and that the title was a good one.

2D DIVISION. Ld. Curriehill. I.

BY bond and disposition in security, dated 11th July 1853, James Brown, mason, Wigtown, in consideration of £100 advanced to him by Mr Carson, writer there, disponed and made over to and in favour of Mr Carson in security certain heritable subjects in Wigtown. Carson was infeft on the security, and on 22d June 1870, by disposition and assignation, in consideration of £700 advanced to him by Robert M'William, S.S.C., Edinburgh, "he sold, alienated, assigned, disponed, conveyed, and made over" to Mr M'William various heritable subjects, including, *inter alia*, "sixth, all and whole that piece of ground, &c. (being the subjects disponed to him in Brown's bond) . . and that in real security, to the said Robert M'William, of the sum of £100 sterling, interest and penalty, borrowed by James Brown . . . from me, the said William Carson, conform to bond and disposition in security, dated 11th July 1853, and recorded," &c. The assignation also contained an assignation of all right, title, or interest which Carson had in the whole subjects disponed, and a clause of warrandice, and an assignation of writs, which were stated to be delivered "according to inventory, so far as in my possession." Brown's bond to Carson was No. 10 of the inventory, but it did not appear to have ever been delivered to M'William, who only got a copy of it. M'William expede an instrument of sasine on the assignation, and recorded it in the Register of Sasines for the burgh of Wigtown on 11th March 1872. Carson died on 23d November 1871, and his estates were sequestrated on 17th March 1873, and Alexander M'Cutcheon, banker, Newton-Stewart, was appointed trustee thereon. M'Cutcheon discovered Brown's bond in Carson's repositories, and proceeded to make up a title to it in his own person, as trustee, on 17th December 1874, by expeding a notarial instrument in accordance with the "Titles to Land Consolidation Act," 1868, which he recorded in the General Register of Sasines applicable to the county of Wigtown.

Brown subsequently executed a general disposition of his whole estates in favour of trustees, and a Mr Douglas purchased the subject from the trustees. An action of multiplepoinding was raised in Douglas's name, and M'Cutcheon and M'William both claimed the amount in the bond.

It appeared that the subjects disponed by Brown, though properly burgage subjects, had been held by Brown in feu from the magistrates of Wigtown, and Brown's infeftment was recorded only in the Particular Register of Sasines for the shire of Wigtown. The bond in favour of Carson was, however, recorded both in the burgh and county Register of Sasines, but M'William, as above stated, did not record his assignation in any Register of Sasines, but expede an instrument of sasine *more burgi* in the whole subjects, which he recorded in the Burgh Register of Sasines.

M'Cutcheon pleaded;—(1) The claimant, by the act and warrant of confirmation in his favour, is vested in the real security constituting the fund *in medio*. (2) The deed founded on by the claimant M'William being disconform to the statutes regulating the transmission of heritable securities, and being ineffectual at common law or by statute to transfer such securities, did not divest the bankrupt of his right and interest in the fund *in medio*. (3) Assuming that the deed in favour of M'William was effectual to transfer to him a personal right to the fund *in medio*, such

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personal right is ineffectual as a preference in competition with the present claimant's infeftment. (4) The infeftment of the claimant M'William, being dated prior to the passing of the "Conveyancing (Scotland) Act, 1874," is null, (and liable to be set aside by exception under the Bankruptcy Act, 1856), in respect that while the subjects disponed in security are held feu, the infeftment is not registered in the General Register of Sasines, but is registered in the Burgh Register of Sasines of Wigtown.

M'William pleaded;—(1) The late Mr Carson having disponed and assigned to the claimant the subjects in question, and his whole right, title, and interest therein, and having granted warrandice, and assigned the writs, including the bond in his favour, and the claimant having been infeft thereon, he thereby became vested with all Mr Carson's rights. (2) The trustee in bankruptcy being only vested with the bankrupt estate *tantum et tale* as it existed in the person of the bankrupt, he has no good claim to the fund *in medio*.

On 3d November 1873 the Lord Ordinary pronounced this interlocutor:—"Finds that the sum of £100, and interest thereon, contained in the bond and disposition in security mentioned in the summons, and the lands thereby conveyed in security thereof by James Brown, the granter of said bond, to the late William Carson, also mentioned in the summons, and forming the fund *in medio* in this action, were not effectually transferred to or vested in the claimant Robert M'William by the bond and assignation, of which No. 8 of process is an extract, granted by the said William Carson to the claimant Robert M'William, dated 22d June 1870, or by the instrument of sasine thereon, No. 11 of process, expede by the said Robert M'William, and recorded in the Register of Sasines: Finds that the said debt and security are now vested in and belong to the claimant Alexander M'Cutcheon, as trustee on the sequestrated estate of the said William Carson, in virtue of the act and warrant of confirmation, and of the notarial instrument expede by him, No. 33 of process: Therefore repels the claim of the said Robert M'William: Sustains the claim of the said Alexander M'Cutcheon, and ranks and prefers him upon the fund *in medio* in terms of said claim, and decerns: Finds the said Robert M'William liable in expenses to the said Alexander M'Cutcheon: Appoints an account thereof," &c.*

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* NOTE.—(After narrating the facts)—"The sole grounds on which the trustee in the sequestration objects to the claim of Mr M'William, and himself claims the debt and security in question as part of the bankrupt estates, are—(1) that the disposition and assignation is, in consequence of defects in form, not a valid and effectual transference of the debt and security from Carson to M'William; (2) that even assuming the disposition and assignation to have been in proper form, M'William has never been validly infeft in the security, and is now excluded from claiming the debt in consequence of the trustee having completed a feudal title thereto in his own person.

"1. The first question is the most important. It is, whether Brown's security was validly transferred by Carson to M'William by the disposition and assignation already mentioned? That deed includes, as has been mentioned, several heritable subjects and other securities. It proceeds thus:—'I, William Carson, &c., in consideration of the sum £700 sterling paid and advanced for me by Robert M'William, S.S.C.' &c., 'have sold and disponed, and hereby sell, alienate, dispone, assign, convey, and make over to the said Robert M'William, his heirs and assignees whomsoever, heritably and irredeemably.' . . . . . .

"'Sixth, All and Whole that piece of ground consisting of four lots, with dwelling-houses built thereon, being part of the lands of Outer Acre'—[Here follows description]—'all lying in the burgh and parish of Wigtown and sheriffdom thereof, but always with and under the conditions, provisions and stipula-

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M'William reclaimed, and argued;—The assignation founded on, though not in accordance with the schedule annexed to the statute of 1868, was

tions mentioned in a contract of feu, dated the 21st day of March 1853, entered into between the magistrates and council of the burgh of Wigtown, on the one part, and the said John Adamson, on the other part, and that in real security to the said Robert M'William of the sum of £100 sterling, interest and penalty, borrowed by James Brown, mason and house builder in Wigtown, proprietor of said subjects, from me, the said William Carson, conform to bond and disposition in security, dated 11th July 1853, and recorded in the Register of Sasines for the burgh of Wigtown 19th November 1855.' These words, it is maintained on the part of Carson's trustee, do not in form or in substance constitute a valid or effectual assignation to Mr M'William of the security in question. I think the trustee's contention is sound. The debt is not assigned,—the bond itself is not assigned,—and nothing in short purports to be conveyed but the subjects over which the debt is secured. There can be no doubt that the debt as well as the security was intended to be assigned; and as in a question with Carson himself or his representatives (in the absence of insolvency), M'William could have insisted upon Carson granting a valid and formal assignation of the debt, and failing that, he could have adjudged the same in implement. But I do not think that the debt itself, which is not *in terminis* assigned, and to which the subjects are merely accessory as security, can be held to have been by implication assigned to Mr M'William in such a manner as to enable him to complete a title thereto, by simply recording the disposition and assignation, or even by expeding and recording an instrument of sasine, or other notarial instrument, thereon.

"In the first place, the assignation, neither in form nor in substance, follows the schedule (G.G.) in the 'Titles to Land Consolidation Act, 1868,' which, substantially re-enacting the corresponding provision of the Heritable Securities Act of 1845, allowed securities which had once been constituted by infeftment to be transferred in the short form set forth in the schedule; it being declared that on such assignation being recorded in the appropriate Register of Sasines the security 'shall be transferred to the assignee as effectually as if such security had been disponed and assigned, and the disposition and assignation or conveyance had been followed by sasine duly recorded according to the law and practice prior to the 1st day of October 1845, at the date of recording such assignation or conveyance.' But it will be seen at a glance that the disposition and assignation in question does not conform to the schedule, in respect—(1) that it does not assign or bear to assign the bond and disposition in security itself; and (2) that even when the bond is referred to it does not specify the names of either the granter or the grantee, all of which are particulars required by the schedule, and the failure to insert which is, in my opinion, a fatal omission. It is only on condition of following the new statutory forms that parties are allowed to dispense with the forms in use under the older law and practice.

"On the other hand, it is impossible to maintain that the security has been validly assigned in the form required by the law and practice prior to 1845. That practice required a disposition and assignation expressly assigning—(1) the sum due and interest; (2) the bond and disposition in security itself; and (3) the lands in real security to the assignee of the sums, principal and interest, &c., and containing an obligation to infeft, a procuratory of resignation, and a precept of sasine; and to complete the transference an instrument of sasine had to be expede and recorded in favour of the assignee. But there is not in the present deed any substantial adherence to the old form; and I am therefore of opinion that the security in question was not assigned by Carson to M'William in such a manner as to enable the latter to complete a feudal title thereto as assignee under any of the forms known to or recognised by the law and practice prior to 1845, or sanctioned by the statute of that year and by subsequent legislation.

"But apart from these considerations, I think that Mr M'William's case must fail on more general grounds. The debt must be regarded as the principal, and

effectual to convey the debt and security to the assignee. It was not compulsory to follow the forms prescribed by the statute. The bond was

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the lands as merely accessory as security. It is indeed true that where a debt has been rendered heritable by being secured over land, it cannot be effectually transferred so as to entitle the assignee to prevail in a competition with a subsequent adjudication or assignation completed by sasine, unless the heritable subjects, as well as the debt, are conveyed to the first assignee with a proper warrant for sasine followed timeously by infeftment.—Anstruther v. Black, Mor. 829. But this case gives no support to the view that the conveyance of the lands held by the cedent in security of a debt due to him by the owner of the lands will transfer the debt. On the contrary, the import of the decisions appears to me to be, that where a debt is heritably secured and the creditor is duly infeft, the debt itself and the subjects over which it is secured are held to be so inseparably connected that in order effectually to assign the debt both it and the lands must be expressly conveyed by a deed adapted to convey heritable property.

"It is said, however, by Mr M'William that, in virtue of the clause of 'assignation of writs' contained in the disposition and assignation, the debt itself, and the bond and disposition constituting it, have, as well as the lands, been validly assigned to him. The clause is in the following terms:—'And I assign the writs, and have delivered the same according to inventory, so far as in my possession;' and in the inventory, which is a separate document, the bond and disposition in security in question is set forth as being article 10 thereof. But it is also a fact in the case that the bond was not delivered to Mr M'William, but remained in Mr Carson's possession until his death; that it has never been in the possession of Mr M'William; and that it is now in the possession of the trustee. Besides all this, it cannot be said that the insertion of a writ in an inventory, which is a separate document from the disposition and assignation, is equivalent to a specification and assignation of the debt and grounds of debt, either according to the old established form of conveyancing, or the short form introduced and sanctioned by the recent statutes. It appears to me, therefore, that the original defect in the dispositive clause of the deed is not remedied by the clause assigning the writs.

"But it is further maintained by Mr M'William that *esto* there has been a failure here to comply with the rules of conveyancing, and that he was not in a position, without farther procedure, to make up a valid feudal title in his own person to the debt and security, still, as the security only vests in the trustee in the sequestration *tantum et tale* as it stood in the person of the bankrupt, and as the bankrupt was bound to give a good title to M'William, therefore the trustee can take the subject only under the like obligation. I am of opinion that this contention of the claimant cannot be sustained. It is true that in some cases where the bankrupt's right to an heritable subject, or an interest in heritable property, was at the date of the sequestration a mere personal right, a security granted prior to the sequestration over that right, in the belief that the bankrupt's feudal title was complete, will not necessarily be defeated merely because the granter's own right is afterwards found to have been a personal right. The security will be sustained, provided actual or constructive intimation of the assignation has been made; and in such cases registration of the deed or of sasine thereon in the Register of Sasines, though unavailing as the completion of a feudal title, has been held equivalent to intimation.—See the cases of Paul v. Turnbull, 13 Sh., p. 818; Edmond v. The Magistrates of Aberdeen, 18 D., p. 47. But the present case is in no way analogous to either of those referred to, for here Carson, the cedent, was himself feudally infeft in the heritable security; the only proper and competent mode of divesting himself thereof was by a formal assignation in one or other of the well known forms, and completed by infeftment; and if he failed so to transfer, the assignee, who is himself a law-agent, and who seems to have himself prepared the deed, must bear the consequences of taking a defective assignation. This is just the ordinary case of a security being blundered by careless conveyancing, and thereby losing in a

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included in the inventory of writs assigned in the assignation, and so was assigned along with the subjects. The assignee had, in any view, a right to have compelled Carson to give up the bond, and M'Cutcheon, as Carson's trustee, could not be in a better position than the bankrupt, as he only took the estate *tantum et tale* as it stood in the bankrupt.

Argued for M'Cutcheon;—As the assignation followed neither the new form nor the old, it was invalid and ineffectual to convey the debt and security. No mention was made of the debt, so it could not be held to have been assigned. A mere assignation of a security was of no avail

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sequestration the preference to which its priority in date might otherwise have entitled it. In short, the question simply is, was Brown's security, or was it not, a part of the estate of Carson at the date of the sequestration? In my opinion it remained so, because the disposition and assignation in favour of M'William was inhabile to denude Carson. This being the case, the trustee, who has expede a feudal title to the security by notarial instrument following on his act and warrant of confirmation, has now fully vested himself with the debt for behoof of the general creditors, and the claimant M'William cannot successfully compete with him for the amount.

"2. If I am right in the view now indicated, it is unnecessary to dispose of the other question raised in the record, which is, whether, assuming the assignation of the security not to be inept from defect of form, the infeftment which Mr M'William expede is inept in consequence of being recorded in the Burgh Register of Sasines, instead of in the General County Register of Sasines, being the appropriate register for writs affecting subjects which, like those in question, are held in feu? If this objection be well founded, Mr M'William cannot now, by any new procedure, make his right preferable to the real right completed by the trustee. Prior to the passing of the Conveyancing Act of 1874 this objection would have been formidable. But I think it is obviated by the 25th section of that statute, which abolishes the distinction between the tenures of feu and burgage, and provides, *inter alia*, that the 'proprietors of estates in land which were held burgage shall be entitled to grant feus of the same, in the same manner and to the like effect as if such estates in land had been held by feudal tenure; and the titles of all such feus granted before the commencement of this Act shall be unchallengeable, on the grounds that such feus were of land held by burgage tenure, or that such titles have been recorded in the Burgh Register of Sasines.'

"The facts upon which the present question depends are as follows:—(1) The parties agreed in stating at the bar that the subjects, which are situated within the burgh of Wigtown, are part of the burghal territory granted to the burgh by the royal charter in their favour; (2) That these subjects, though properly burgage subjects, were granted in feu by the magistrates to Brown or his predecessor, and that the infeftment in favour of Brown was recorded in the Particular Register of Sasines for the shire of Wigtown; (3) That the bond and disposition in security granted by Brown to Carson was recorded by Carson both in the Burgh Register and the County Register of Sasines; and (4) That the claimant, Mr M'William, did not record his disposition and assignation in any Register of Sasines, but expede an instrument of sasine *more burgi* in the whole subjects conveyed to him by that deed, including the subjects in Brown's security, and recorded that instrument in the Burgh Register of Sasines. It appears to me that such a case is one of those provided for by the recent statute. The assignation is a title,—no doubt a security title, but still a title,—to a feu granted before 1st October 1874, of land which was originally held burgage, but which has been feued out. Such a title is by the Act declared to be unchallengeable, although recorded in the Burgh Register of Sasines.

"As my opinion, however, is adverse to Mr M'William on the main branch of the case, it follows that his claim must be repelled, and the claim for Mr M'Cutcheon, the trustee in the sequestration, sustained, with expenses."

without an assignation to the debt also.[1] The doctrine of *tantum et tale* did not apply to such a case as this.

No argument was addressed to the Court upon the second question referred to by the Lord Ordinary.

LORD JUSTICE-CLERK.—The only question which it is necessary for us to decide is whether the disposition and assignation in favour of M'William is effectual as an assignation of the debt, in security of which the granter held the lands which are conveyed.

There is no question that in point of feudal form the lands are validly conveyed; and the question whether the debt was at the same time assigned is a mere question of the intention with which the words of this deed were used by the granter. If the granter did not mean to assign the debt, it may be that the conveyance of the heritable subject would be nugatory; but if he did mean to assign it, the expressions in the conveyance are abundantly sufficient to give effect to that intention.

That the granter meant to assign the debt admits, I apprehend, of no doubt. The conveyance is granted in security of a debt of £700, and the property in question is disponed in security of that sum to the extent of £100, which sum of £100 the deed proceeds to narrate had been borrowed from the granter by the owner of the subjects, which were held by him in security thereof. The only meaning of this is that the transferee is to hold the security to the same effect and for payment of the same amount as the granter could have done; and this is neither more nor less than the effect which an assignation would operate.

But the conveyance does not stop there, for it proceeds to make over all right, title, and interest which the granter had in the premises. This, I apprehend, covered, in words and in effect, not only the granter's interest in the heritable subjects, which indeed would be sufficient, but his interest in the debt also; and then he assigns the writs, the inventory of which includes the bond and disposition in security, which contains not only the conveyance but the personal obligation for the debt. This ought to have been delivered with the disposition, and if it had been I do not see how the trustee ever could have maintained his claim.

The Lord Ordinary has taken great pains with the case; but his view seems too strict. Any words which express a present intention to transfer are sufficient as an assignation, apart altogether from forms of style or the schedules of the recent statute. This is a very inartistic and careless piece of conveyancing, but on this point I entertain no doubt of its being effectual.

LORD ORMIDALE.—I am of the same opinion and on the same grounds. There can be no doubt that there was a disposition of the subjects themselves; but such a disposition without a transference of the debt would place matters in a very anomalous position. The security could be worth nothing to Carson if the debt merely remained with him, while the subjects forming the security were disponed to M'William without the debt.

It may be said that the deed, so far as the £100 is concerned, is a nullity altogether, on account of the informal and confused manner in which it is framed.

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[1] Anstruther v. Black, July 27, 1626, M. 829.

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But I cannot hold that. The latter part of the deed bears, not only by the strongest implication, but, I think, by express words, that both the debt and the bond were conveyed to M'William. The conveyance might not be valid in terms of the recent Act, because it is not in the statutory form requisite under that Act; but according to the old methods of conveyancing, which may still be used, no statutory form was enjoined or indispensable. Now, although in either view the conveyance here is very peculiar in its terms and style,—certainly anything but commendable,—it is, I think, sufficiently clear in regard to its meaning and effect to enable the Court to give judgment in favour of the reclaimer, Mr M'William.

Lord Gifford.—I am entirely of the same opinion, and I cannot say that after a little consideration I have found any difficulty in the case. It is quite true that this conveyance in favour of Mr M'William is a very ill-expressed and ill-drawn deed.

The question, however, is what is the real meaning and effect of the deed as it stands? What is the legal right which it confers upon the disponee? If its meaning is plain, and if it contains all statutory requisites, it must receive effect, notwithstanding all fault or inaccuracies of expression. Now, I think it is quite clear that the deed conveys to Mr M'William all the right which Carson, the disponer, had himself to the subjects in question. Clearly Carson intended to put M'William in his place, and this is sufficiently expressed. Carson himself had merely a security right, so he says in the deed, "in real security to the said Robert M'William," his disponee, who was his creditor for £700. Then he specifies the debt of £100 borrowed by Brown, the proprietor of the subjects; and it seems to me that this is quite sufficient to give to M'William for his security every right which Carson had over the subjects conveyed to him by Brown. Carson held the subjects in security of £100, and stood validly infeft therein. He dispones and conveys them to M'William "in security." I cannot read this otherwise than as an assignation of Carson's security right. But it is said that Carson should have expressly assigned the debt due to him by Brown, and, no doubt, this would have been more formal and regular, but I think that the conveyance of the debt is implied necessarily in conveying the subject of the security. If this were not so, the conveyance would mean nothing, and effect would be denied to the words used. But there is no rule of law which drives the Court to so inequitable a result. A creditor who hands over for value a pledge which he holds from a third party necessarily empowers the assignee to make the pledge effectual, and especially when the pledge is a heritable subject which makes the debt a heritable debt. But even in strict interpretation of the words I think the debt is conveyed. The subjects are disponed to M'William "in security" of the £100 due by Brown—that is, in security to M'William that he, M'William, shall receive this £100. The words can have no other meaning, and I think we must read them so as to be grammatical. No *verba sollemnia* are required in a conveyance like this. If the meaning of the deed is plain any kind of expression will do, and the solemn words of conveyance are complete.

It is impossible to read the sentence as it stands without seeing what it means. The writs are assigned, and the bond is included in the inventory of writs. In short, Carson, being largely indebted to M'William, conveys to him the security which he, Carson, held from Brown, and he specially assigns to him Brown's bond. That bond then belonged not to Carson but to M'William. Carson

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could not have kept it back from M'William, so his trustee cannot. The meaning of the deed is so plain that it does not need even implication strong to carry Brown's debt. It would be to deny the deed any meaning to allow the trustee to take what M'William had completed a title to long before. I think M'William being undoubtedly vested with the feudal title to the subjects, —and this was admitted in argument,—he is the only person who is entitled to discharge the incumbrance thereon, that is, to receive payment of and discharge Brown's bond.

LORD NEAVES was absent.

THE COURT pronounced the following interlocutor:—"Alter the said interlocutor, sustain the claim of the said Robert M'William, and rank and prefer him accordingly on the fund *in medio*: Find the reclaimer entitled to expenses incurred by him in the competition," &c.

RONALD, RITCHIE, & ELLIS, W.S.—ROBERT M'WILLIAM, S.S.C.—Agents.

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Mar. 9, 1876.

Smyth v. Smyth.

JOHN SMYTH, Pursuer.—*Darling.*
PATRICK SMYTH, Defender.—*Scott—Lang.*

Writ—Attesting Witnesses—37 and 38 Vict., c. 94, sec. 39.—The Conveyancing and Land Transfer (Scotland) Act, 1874, sec. 39, enacts that "no deed, instrument, or writing subscribed by the granter or maker thereof, and bearing to be attested by two witnesses subscribing, and whether relating to land or not, shall be deemed invalid or denied effect according to its legal import because of any informality of execution, but the burden of proving that such deed, instrument, or writing so attested was subscribed by the granter or maker thereof, and by the witnesses by whom such deed, instrument, or writing bears to be attested, shall lie upon the party using or upholding the same."

Held that the clause did not apply to a case where the signatures of witnesses bearing to attest the subscription of the granter of a deed were adhibited before the subscription of the granter, and where the witnesses neither saw the granter sign nor heard him acknowledge his subscription.

2D DIVISION. Ld. Curriehill. I.

THIS action of reduction was raised by John Smyth, Glasgow, against Patrick Smyth, Glasgow, to reduce "a pretended assignation bearing to be dated 1st June 1874, and to be granted by the deceased Francis Smyth in favour of the defender of a debt of £20."

The pursuer averred;—"The said pretended assignation is deficient in the statutory solemnities of execution, in respect that the alleged witnesses neither saw the alleged granter sign nor heard him acknowledge his signature;" and pleaded, that the assignation was consequently null, and ought to be reduced.

The defender founded on sec. 39 of the Act 37 and 38 Vict., c. 94.*

A proof was allowed.

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* Sec. 39.—"No deed, instrument, or writing, subscribed by the granter or maker thereof, and bearing to be attested by two witnesses subscribing, and whether relating to land or not, shall be deemed invalid or denied effect, according to its legal import, because of any informality of execution; but the burden of proving that such deed, instrument, or writing so attested was subscribed by the granter or maker thereof, and by the witnesses by whom such deed, instrument, or writing bears to be attested, shall lie upon the party using or upholding the same, and such proof may be led in any action or proceeding in which such deed, instrument, or writing is founded on or objected to, or in a special application to the Court of Session, or to the Sheriff within whose jurisdic-

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Bernard Gallagher, whose name appeared on the deed as an attesting witness, in his examination as a witness for John Smyth, stated,—"I see the signature of the witnesses to this deed. I see the name Bernard Gallagher. It is my signature. I remember the circumstances connected with the signing of the deed. It was signed in the house of Patrick Smyth, in Sandyfaulds Street in Glasgow, on the evening of Monday, June 1st 1874. In consequence of a message which I received through my wife I went down to Patrick Smyth's house that night, and when I went the document No. 7 of process was handed to me by Patrick Smyth. At that time there was no signature to the paper, but it bore two pencil marks indicating where the witnesses were to sign their names. . . . The pencilled markings were rubbed out by Patrick Smyth. When the paper was handed to me I read it over. Smyth's house consisted of a room and a kitchen. All this happened in the kitchen. The deceased was in the inner room, and when I had read the paper I took it in my hand and went into the inner room. As far as my judgment goes deceased was then in a dying state. He died on Thursday, the 4th of June 1874. I asked Francis Smyth, 'Is it your wish that I should sign this?'—shewing him the paper. He turned round and gave me a nod, which I took to be in the affirmative. He did not say anything. Nothing more passed.

"*By the Court.*—When I went into the room with that paper it was not read over by me or anybody else in the hearing of Francis Smyth. I just held it up. He did not read it himself. I understood he knew the nature of the paper.

"*Examination continued.*—I then left the room and went into the kitchen, and signed my name in presence of Robert Gallagher and his wife, Patrick Smyth and his wife, Patrick Smyth's aunt, and my own wife. These were all the persons in the kitchen at the time. I then handed the paper to my brother and told him to sign his name. I saw him sign his name immediately after I had done so. When I signed my name to the paper the name 'Francis Smyth' was not upon it, and I did not either then or afterwards hear him acknowledge his signature. I did not see Francis Smyth sign his name to the document."

Robert Gallagher gave similar evidence, with this difference, that he did not go into the room, nor did he see Francis Smyth that night at all.

Patrick Smyth, and his wife and her aunt, all deponed to the fact that Francis Smyth duly signed the deed in their presence after it had been signed by the Gallaghers, but not before the Gallaghers.

The Lord Ordinary, on 22d October 1875, pronounced this interlocutor:—"Finds in point of fact—(1) that the assignation, No. 7 of process, sought to be reduced, bears to be subscribed by the deceased Francis Smyth, as granter, and to be attested by Bernard Gallagher and Robert Gallagher, as instrumentary witnesses; (2) that the said assignation was subscribed by the said Bernard Gallagher and Robert Gallagher; (3) that it was so subscribed by them outwith the presence of the said Francis Smyth; (4) that at the time of their said subscription the assignation had not been subscribed by the said Francis Smyth, the alleged granter; (5) that the said Bernard and Robert Gallagher did not see the said Francis Smyth subscribe the said assignation; and (6) that the said Francis Smyth did not at the time of the said Bernard and Robert Gallagher subscribing the said assignation, or at any other time, acknowledge his subscription:

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tion the defender in any such application resides, to have it declared that such deed, instrument, or writing, was subscribed by such granter or maker, and witnesses."

Finds in point of law that the said assignation is null and void: Therefore repels the defences, and reduces, decerns, and declares in terms of the conclusions of the summons: Finds the defender liable to the pursuer in expenses: Appoints an account," &c.*

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* "NOTE.—The pursuer, John Smyth, seeks to reduce and set aside an assignation bearing to be dated 1st June 1874, and to be granted by his deceased brother, Francis Smyth, in favour of Patrick Smyth (the defender), another brother, and to assign to Patrick a debt of £20, alleged to be due by the pursuer to the said Francis Smyth.

"The assignation is *ex facie* probative. It bears to be signed by Bernard and Robert Gallagher as instrumentary witnesses, and the writer and witnesses are all properly designed. The pursuer, however, alleges that these witnesses neither saw the alleged granter sign the deed, nor heard him acknowledge his subscription. The proof which has been led establishes the facts to be as alleged by the pursuer. It is clearly proved that the deed was prepared by a law-agent on the instructions of the defender, Patrick Smyth; that, at the request of the defender, his brothers-in-law, Bernard and Robert Gallagher, came to his house in Sandyfaulds Street, Glasgow, in which the deceased Francis Smyth then resided with the defender, and that they there signed the assignation as witnesses outwith the presence of the said Francis Smyth; and that the deed had not then been subscribed by Francis Smyth. It is also clearly proved that these persons did not see Francis sign the deed, and that they neither at the time of their so subscribing as witnesses nor at any other time heard him acknowledge his subscription. In this state of facts the assignation, unless it can be aided by the provisions of the recent Conveyancing Act, is plainly null and void under the various earlier statutes relating to the execution and testing of deeds, as these have been interpreted by numerous decisions.—See particularly Young v. Ritchie, 2d February 1761, M. 17,047; Allan v. M'Kean, 21st December 1803, Hume, 914; and Earl of Fife's Trustees v. Duff, 22d December 1825, 4 Sh. 340.

"The defender, however, maintains that the law which had thus been settled has been entirely altered by the 39th section of the recent Conveyancing Act, 1874, quoted *supra*, p. 573.

"The defender admits that, by the proof which the pursuer has led, the *onus* of establishing the validity of the deed is shifted from the pursuer to himself; but he maintains that if he can prove that the deed was in point of fact subscribed by the person bearing to be the granter, and by the persons bearing to be the attesting witnesses—whether the subscription of the granter was made or acknowleged in their presence or not—he must prevail under the provisions of the recent Act above quoted. And in the course of the proof he examined himself, his wife, and his wife's aunt, in order to prove that the deceased Francis Smyth did in point of fact sign the deed after the so-called witnesses had signed it; but they failed, and indeed did not attempt to prove, the subscription was either made or acknowledged in the presence of the Gallaghers.

"I am of opinion that the construction which the defender seeks to put upon the Act of 1874 is wholly untenable. I do not think that the Legislature intended to dispense, or have by the statute in question dispensed, with the presence of witnesses as a solemnity at the execution of deeds, or that they have repealed the clause of the Act 1681, c. 5, which declared that none but the subscribing witnesses should be probative of the execution of writs, and, *inter alia*, of 'assignations.' It is indeed most obvious that unless the persons who bear to attest a deed see the granter subscribe, or hear him acknowledge his subscription, they are not 'witnesses.' Their presence is required to enable them to attest the fact that the granter subscribed the deed, and they cannot legally attest as a fact an act which they did not see the alleged actor perform, or hear him acknowledge. Whatever may have been the intention of the Legislature in enacting the 39th clause of the recent statute, it appears to me to be clear that that enactment has not subverted the former law and practice, which required

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Patrick Smyth reclaimed.

Argued for him;—Under the provisions of the 39th section of the Conveyancing Act of 1874,[1] it was sufficient for the party founding on a deed to prove that the signature of the granter was a real signature, and had been actually adhibited to the deed by the granter. That had been proved here. All the signatures to the deed were authentic, and had been appended to it *in bona fide*. It was true that no one relying on a deed tainted with fraud could take benefit by that deed; but here there was the *bona fide* real signature, and no attempt at fraud.

Counsel for John Smyth was not called upon.

LORD JUSTICE-CLERK.—I have no doubt as to the correctness of the Lord Ordinary's judgment.

It would be a different matter if the Act of Parliament had allowed proof that the granter of a deed had really signed it. But it has not done so; it has only provided that where there is an informality in the execution of a deed bearing to be attested, the person upholding the same may prove that it was duly signed by the granter and witnesses.

The clause in the Act founded on deals only with deeds bearing to be attested by two witnesses to the signature of the granter. In that case the *onus* is laid on the party using the deed to prove that it was duly executed. But, clearly, that party must prove that the persons bearing to have signed as witnesses did so sign. Here it has been clearly proved that the pretended witnesses were not witnesses at all; that they witnessed nothing, and could attest nothing.

LORD ORMIDALE.—I concur. It is proved very distinctly that the deed was signed by the granter after the two persons who bear to be witnesses to his signature had subscribed it; and it is also proved that they neither saw him sign nor heard him acknowlege his signature. The Act of Parliament was not intended to validate such a deed. It may be true that the signatures of the parties said to be the witnesses are genuine, but they testified to nothing. In short, they were, in no correct sense, witnesses at all to the execution of the deed.

LORD GIFFORD concurred.

LORD NEAVES was absent.

THE COURT adhered.

M'CAUL & ARMSTRONG, S.S.C.—GEORGE BEGG, S.S.C.—Agents.

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the subscription of the granter of a deed to be attested by subscribing witnesses, who either saw the granter sign the deed or heard him acknowledge his subscription. And as it is clearly proved that the persons, Bernard and Robert Gallagher, who bear to be attesting witnesses of the execution of the assignation sought to be reduced, were not in point of fact 'witnesses' in any sense of the word to the alleged subscription of the granter, it follows that the assignation must be reduced as null and void."

[1] Note, *supra*, p. 573.

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Mar. 10, 1876.
Sdeuard v. Gardner.

JAMES SDEUARD, Liquidator of the Western Isles Steam Packet Company (Limited), Petitioner.—*Mackintosh—Lang.*
ARCHIBALD GARDNER AND SON, Respondents.—*R. V. Campbell.*

Statute 25 *and* 26 *Vict. c.* 89 (*Companies Act*, 1862), *secs.* 129 *and* 51—*Voluntary Winding Up—Liquidation—Notice—Special Resolution.*—The 129th section of the Companies Act of 1862 enacts that a company may be wound up voluntarily "whenever the company has passed a special resolution requiring the company to be wound up voluntarily." Section 51 enacts that a special resolution can only be passed at a general meeting, of which "notice specifying the intention to propose such resolution" has been given. A notice was given of a meeting of a company "for the purpose of considering the present position of the company, and to consider and resolve whether, under existing circumstances, the company should be wound up, and, if so resolved upon, to decide in what manner this should be done." At the meeting a resolution was carried to wind up the company voluntarily. *Held* that the notice was sufficient.

Statute 25 *and* 26 *Vict. c.* 89 (*Companies Act*, 1862)—*Voluntary Winding Up—Creditors—Powers of the Court to stay Actions, Suits, &c. at instance of Creditors against a Company in Liquidation.*—The 138th section of the Companies Act, 1862, enacts that in voluntary windings up the liquidator may apply to the Court "to determine any question arising in the matter of such winding up, or to exercise, as respects the enforcing of calls, or in respect of any other matter, all or any of the powers which the Court might exercise if the company were being wound up by the Court." *Held* that this section did not give the Court power to stay proceedings by creditors against a company which was being wound up voluntarily.

1st DIVISION. B.

JAMES SDEUARD, secretary of the Western Isles Steam Packet Company (Limited), on 25th January 1875 sent the following notice to the shareholders of the company:—"An extraordinary general meeting of the shareholders of this company will be held within the company's offices here on Thursday, the 4th day of February proximo, at twelve o'clock noon, for the purpose of considering the present position of the company, and to consider and resolve whether, under existing circumstances, the company should be wound up, and, if so resolved upon, to decide in what manner this should be done."

An extraordinary general meeting was accordingly held on 4th February, at which a resolution was unanimously carried to wind up the company voluntarily under the Acts 1862 and 1867, and Mr Sdeuard was appointed liquidator. A notice of these resolutions was inserted in the "Edinburgh Gazette" of 9th February, and notice of an extraordinary general meeting to be held on 19th February was sent to the shareholders, at which meeting the resolutions were unanimously confirmed.

Mr Sdeuard thereupon entered upon his duties as liquidator, and proceeded to realise the assets of the company.

Messrs Archibald Gardner and Son having obtained a decree in the Sheriff Court of Lanarkshire against the company, used arrestments on 14th and 18th December 1875 in the hands of debtors of the company. Mr Sdeuard presented a petition, founding on secs. 138 and 163 of the Companies Act, 1862, praying the Court "to declare the said arrestments used by the said respondents to be void to all intents, or to order the said respondents to withdraw the said arrestments, and to desist and cease from using arrestments or any other diligence to the prejudice of the general body of creditors of the company, and to acquiesce in and accept the same dividends as the said general body of creditors."

Messrs Gardner lodged answers to the petition, in which they stated;—"The respondents, looking to the defective terms of the minutes pro-

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duced, do not admit that the company has validly gone into voluntary liquidation, nor that the petitioner is validly appointed. But apart from this objection, the respondents submit that the Companies Acts afford no authority for interfering with the ordinary diligence of creditors in deference merely to a voluntary liquidation of the company. They contend that interference with actions is only possible when the rights of creditors are protected by a winding up ordered by the Court, or subject to the supervision of the Court."

The petitioner argued;—(1) The notice was perfectly sufficient to shew what was to be proposed. No special form was prescribed by the statute,* and all that was required was sufficient notice to prevent surprise. The notice presented an alternative course,—either voluntary or judicial winding up. (2) The Court had power in the winding up of a company voluntarily under sec. 138 to exercise all or any of the powers which the Court might exercise if the company were being wound up by the Court, and, therefore, had power under sec. 87 to restrain the action or diligence of creditors of the company.[1] †

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* Sec. 51 enacts,—"A resolution passed by a company under this Act shall be deemed to be special whenever a resolution has been passed by a majority of not less than three-fourths of such members of the company for the time being entitled, according to the regulations of the company, to vote, as may be present, in person or by proxy (in cases where by the regulations of the company proxies are allowed), at any general meeting of which notice specifying the intention to propose such resolution has been duly given, and such resolution has been confirmed by a majority of such members for the time being entitled, according to the regulations of the company, to vote, as may be present, in person or by proxy, at a subsequent general meeting, of which notice has been duly given, and held at an interval of not less than fourteen days, nor more than one month from the date of the meeting at which such resolution was first passed: At any meeting mentioned in this section, unless a poll is demanded by at least five members, a declaration of the chairman that the resolution has been carried shall be deemed conclusive evidence of the fact, without proof of the number or proportion of the votes recorded in favour of or against the same: Notice of any meeting shall, for the purposes of this section, be deemed to be duly given and the meeting to be duly held whenever such notice is given and meeting held in manner prescribed by the regulations of the company: In computing the majority under this section, when a poll is demanded, reference shall be had to the number of votes to which each member is entitled by the regulations of the company."

Sec. 129.—"A company under this Act may be wound up voluntarily . . . (2) whenever the company has passed a special resolution requiring the company to be wound up voluntarily."

[1] *In re* Sablonière Hotel Co., Nov. 15, 1866, L. R., 3 Equity, p. 74; *in re* Keynsham Co., July 16 and 24, 1863, 3 Beavan, p. 123; The Peninsular Banking Co., Feb. 15, 1866, 35 Beavan, 280; The East Kent Shipping Co., July 8, 1868, 18 Law Times (new series), 748; Bank of Hindustan, &c., Nov. 21, 1867, L. R., 5 Equity, 69; The Poole Firebrick and Blue Clay Co., Dec. 18, 1873, L. R., 17 Equity, 268; Life Association of England (Limited), July 25, 1864, 34 L. J. (Chancery), 64.

† Sec. 85.—"The Court may, at any time after the presentation of a petition for winding up a company under this Act, and before making an order for winding up the company, upon the application of the company, or of any creditor or contributory of the company, restrain further proceedings in any action, suit, or proceeding against the company, upon such terms as the Court thinks fit; the Court may also at any time after the presentation of such petition, and before the first appointment of liquidators, appoint provisionally an official liquidator of the estate and effects of the company."

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The respondents argued ;—(1) The company was not validly in liquidation, as the notice was not sufficiently specific. It did not give intimation

Sec. 87.—"When an order has been made for winding up a company under this Act, no suit, action, or other proceeding shall be proceeded with or commenced against the company except with the leave of the Court, and subject to such terms as the Court may impose."

Sec. 115.—"The Court may, after it has made an order for winding up the company, summon before it any officer of the company or person known or suspected to have in his possession any of the estate or effects of the company, or supposed to be indebted to the company, or any person whom the Court may deem capable of giving information concerning the trade, dealings, estate, or effects of the company; and the Court may require any such officer or person to produce any books, papers, deeds, writings, or other documents in his custody or power relating to the company; and if any person so summoned, after being tendered a reasonable sum for his expenses, refuses to come before the Court at the time appointed, having no lawful impediment (made known to the Court at the time of its sitting, and allowed by it), the Court may cause such person to be apprehended, and brought before the Court for examination; nevertheless, in cases where any person claims any lien on papers, deeds, or writings or documents produced by him, such production shall be without prejudice to such lien, and the Court shall have jurisdiction in the winding up to determine all questions relating to such lien."

Sec. 117.—"The Court may examine upon oath, either by word of mouth or upon written interrogatories, any person appearing or brought before them in manner aforesaid concerning the affairs, dealings, estate or effects of the company, and may reduce into writing the answers of every such person, and require him to subscribe the same."

Sec. 118.—"The Court may, at any time before or after it has made an order for winding up a company, upon proof being given that there is probable cause for believing that any contributory to such company is about to quit the United Kingdom, or otherwise abscond, or to remove or conceal any of his goods or chattels, for the purpose of evading payment of calls, or for avoiding examination in respect of the affairs of the company, cause such contributory to be arrested, and his books, papers, monies, securities for monies, goods, and chattels to be seized, and him and them to be safely kept until such time as the Court may order."

Sec. 121.—"Where an order, interlocutor, or decree has been made in Scotland for winding up a company by the Court, it shall be competent to the Court in Scotland during session, and to the Lord Ordinary on the Bills during vacation, on production by the liquidators of a list certified by them of the names of the contributories liable in payment of any calls which they may wish to enforce, and of the amount due by each contributory respectively, and of the date when the same became due, to pronounce forthwith a decree against such contributories for payment of the sums so certified to be due by each of them respectively, with interest from the said date till payment, at the rate of £5 per centum per annum, in the same way and to the same effect as if they had severally consented to registration for execution, on a charge of six days, of a legal obligation to pay such calls and interest; and such decree may be extracted immediately, and no suspension thereof shall be competent, except on caution or consignation, unless with special leave of the Court or Lord Ordinary."

Sec. 133.—"The following consequences shall ensue upon the voluntary winding up of a company. . . . . (7) The liquidators may, without the sanction of the Court, exercise all powers by this Act given to the official liquidator."

Sec. 138.—"Where a company is being wound up voluntarily the liquidators or any contributory of the company may apply to the Court in England, Ireland, or Scotland, or to the Lord Ordinary on the Bills in Scotland in time of vacation, to determine any question arising in the matter of such winding up, or to exercise, as respects the enforcing of calls, or in respect of any other matter, all or any of the powers which the Court might exercise if the company

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of a resolution to be proposed that the company should be wound up voluntarily.[1] (2) The English Equity Courts had held that it was competent to stay actions in voluntary windings up, but the common law Courts took a different view, which was the correct view.[2]

At advising,—

LORD PRESIDENT.—The questions before us have arisen in the voluntary winding up of the Western Isles Steam Packet Company (Limited), and they are of considerable importance. But I confess that I do not think that they are attended with much difficulty. This voluntary winding up professes to have been conducted under section 129, sub-section 2, of the Companies Act of 1862, which enacts that a company may be wound up voluntarily "whenever the company has passed a special resolution requiring the company to be wound up voluntarily." It is objected by the respondents that the resolution of the com-

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were being wound up by the Court; and the Court or Lord Ordinary in the case aforesaid, if satisfied that the determination of such question, or the required exercise of power, will be just and beneficial, may accede, wholly or partially, to such application, on such terms and subject to such conditions as the Court thinks fit, or it may make such other order, interlocutor, or decree on such application as the Court thinks just."

Sec. 148.—"A petition, praying wholly or in part that a voluntary winding up should continue, but subject to the supervision of the Court, and which winding up is hereinafter referred to as a winding up subject to the supervision of the Court, shall, for the purpose of giving jurisdiction to the Court over suits and actions, be deemed to be a petition for winding up the company by the Court."

Sec. 151.—"Where an order is made for a winding up, subject to the supervision of the Court, the liquidators appointed to conduct such winding up may, subject to any restrictions imposed by the Court, exercise all their powers without the sanction or intervention of the Court, in the same manner as if the company were being wound up altogether voluntarily; but, save as aforesaid, any order made by the Court for a winding up subject to the supervision of the Court shall for all purposes, including the staying of actions, suits, and other proceedings, be deemed to be an order of the Court for winding up the company by the Court, and shall confer full authority on the Court to make calls, or to enforce calls made by the liquidators, and to exercise all other powers which it might have exercised if an order had been made for winding up the company altogether by the Court; and in the construction of the provisions whereby the Court is empowered to direct any act or thing to be done to or in favour of the official liquidators, the expression official liquidators shall be deemed to mean the liquidators conducting the winding up subject to the supervision of the Court."

Sec. 163.—"Where any company is being wound up by the Court or subject to the supervision of the Court, any attachment, sequestration, distress, or execution put in force against the estate or effects of the company after the commencement of the winding up shall be void to all intents."

[1] Silkstone Colliery Co., Nov. 19, 1875, L. R. 1 Chan. 38; Dixon v. Greenock Distillery Co., July 13, 1867, 5 Macph. 1033, 39 Scot. Jur. 575.

[2] Brighton Arcade Co. v. Dowling, Jan. 31, 1868, L. R. 175; Black and Co.'s case, Dec. 11, 1872, L. R., 8 Chancery, 254; *in re* The Great Shipping Co., Dec. 3, 1864, 10 English Jurist (new series), Chancery, 3; London Cotton Co., March 13, 1866, 12 English Jurist (new series), 313; *in re* Hull Forge Company, *ex parte* Mitchell, Feb. 21, 1867, 36 L. J. (Chancery), 337; *in re* International Life Assurance Co., Gibbs v. West's case, June 13, 1870, L. R., 10 Equity, 312; *in re* People's Garden Co., Nov. 13, 1875, L. R., 1 Equity, p. 44; Jamieson v. Waterhouse, March 13, 1868, 6 Macph. 591, 40 Scot. Jur. 306, in the House of Lords, May 22, 1870, 8 Macph. (H.L.) 88, 42 Scot. Jur. 466; *in re* Barstow and Co., July 11, 1867, L. R., 4 Equity, 681; Mitchell, July 16, 1863, 1 Macph. 1116, 35 Scot. Jur. 636.

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pany is not special, as defined by section 51 of the same Act, and they contend that the company is not therefore validly in liquidation at all, and therefore object to the appointment of the liquidator, and to his title to present the present application. Sec. 51 enacts,—"A resolution passed by a company under this Act shall be deemed to be special whenever a resolution has been passed by a majority of not less than three-fourths of such members of the company for the time being entitled, according to the regulations of the company, to vote, as may be present, in person or by proxy (in cases where by the regulations of the company proxies are allowed), at any general meeting of which notice specifying the intention to propose such resolution has been duly given, and such resolution has been confirmed by a majority of such members for the time being entitled, according to the regulations of the company, to vote, as may be present, in person or by proxy, at a subsequent general meeting, of which notice has been duly given, and held at an interval of not less than fourteen days, nor more than one month from the date of the meeting at which such resolution was first passed." Now, there are several requirements to constitute a special resolution. There must be two meetings, and a notice calling the first meeting must specify an intention to propose a resolution for voluntarily winding up the Company. At the first meeting a resolution must be passed by three-fourths of the members present or voting by proxy. Then there must be an interval of at least fourteen days, and not more than one month, and due notice must be given of the subsequent meeting, and at that meeting the resolution must be confirmed by a majority. I think it has been conceded that all these requirements have been complied with, except as regards the notice calling the first meeting. This notice, which is dated 25th January 1875, is in these terms:—"An extraordinary general meeting of the shareholders of this company will be held within the company's offices here on Thursday, the 4th day of February proximo, at twelve o'clock noon, for the purpose of considering the present position of the company, and to consider and resolve whether, under existing circumstances, the company should be wound up, and, if so resolved upon, to decide in what manner this should be done." No doubt this is not a literal compliance with section 51, because it does not specify an intention to propose a resolution for voluntarily winding up the company. But the question is, whether there is not a substantial compliance with the statute—whether it would not indicate to any one receiving it the intention that a proposal of voluntary winding up was to be considered. I do not think it would detract from the validity of the notice of a resolution if it intimated that some other resolution was also to be proposed. Suppose the notice stated that one member would propose that the company should be wound up voluntarily, and another would propose that it should be wound up under orders of the Court, that would be a perfectly good notice, because there would be a notice of a resolution to wind up voluntarily, and the addition of a notice of another resolution would not detract from it. The question, then, comes to be, whether the notice does not state the same thing in substance. The first question stated is, whether the company is to be wound up. The second question is, in what way this is to be done. Now, I think that there are only two ways of winding up. The one is voluntarily, the other under the orders of the Court. No doubt it may be done voluntarily under supervision of the Court; but that cannot be done unless it be first resolved to wind up voluntarily. At the first meeting the question was between voluntary winding up and winding up under orders of the Court. I think, therefore, that the notice was

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a good one. No shareholder who read it could doubt what the question to be considered would be, besides the primary question whether there should be a winding up at all. I do not think it was intended that the notice should be strictly construed. If sufficient information be given to satisfy the policy of the statute that is sufficient. I think, therefore, that the objection to the resolution to wind up voluntarily is unfounded. The company is, therefore, in liquidation, and the liquidator has a good title to present the petition.

Whether he has a good title to prevail is another matter, and gives rise to the second question. The petitioner prays the Court to "declare the said arrestments used by the said respondents to be void to all intents, or to order the said respondents to withdraw the said arrestments, and to desist and cease from using arrestments or any other diligence to the prejudice of the general body of creditors of the company, and to acquiesce in and accept the same dividends as the said general body of creditors." Now, this petition is founded on section 138, taken in connection with section 163, of the Act of 1862. Section 138 provides —"Where a company is being wound up voluntarily the liquidators or any contributory of the company may apply to the Court in England, Ireland, or Scotland, or to the Lord Ordinary on the Bills in Scotland in time of vacation, to determine any question arising in the matter of such winding up, or to exercise, as respects the enforcing of calls, or in respect of any other matter, all or any of the powers which the Court might exercise if the company were being wound up by the Court; and the Court or Lord Ordinary in the case aforesaid, if satisfied that the determination of such question, or the required exercise of power, will be just and beneficial, may accede, wholly or partially, to such application, on such terms and subject to such conditions as the Court thinks fit, or it may make such other order, interlocutor, or decree on such application as the Court thinks just." The power of the Court under this section is to determine any question in the matter of such winding up. I do not think that these words cover the case before us, as I do not understand that any question in the winding up has arisen. What has happened is, that a creditor has taken measures to enforce his debt, and is proceeding as if the winding up did not exist. We are asked to interfere in virtue of the words, "to exercise, as respects the enforcing of calls, or in respect of any other matter, all or any of the powers which the Court might exercise if the company were being wound up by the Court." This raises the very important question as to what are the powers contemplated. The 163d section appears to have no application,—"Where any company is being wound up by the Court or subject to the supervision of the Court, any attachment, sequestration, distress, or execution put in force against the estate or effects of the company after the commencement of the winding up shall be void to all intents." That is not a section which gives any power, yet the petitioner asks that under it we shall here exercise a power.

We are referred to other sections which are said to give us the necessary power. Section 85 was referred to. But that refers to a period between the time of presenting a petition for winding up and an order for winding up being pronounced. But there is no corresponding period in voluntary windings up. There is no petition, and no order by the Court. Everything is done by the company itself. Therefore it is impossible to bring this section within the reference in section 138.

We were also referred to section 87,—"When an order has been made for

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winding up a company under this Act, no suit, action, or other proceeding shall be proceeded with or commenced against the company except with the leave of the Court, and subject to such terms as the Court may impose." But this is not a section which directly confers a power on the Court. It provides that, when an order for winding up has been pronounced by the Court, no creditor shall be allowed to raise an action without the leave of the Court. That may be a good reason for restraining a creditor from doing, without leave, that which he is only entitled to do with leave of the Court, and the power necessary is implied in the section. But the important question is, whether it is one of the powers contemplated by section 138. The words are, "to exercise, as respects the enforcing of calls, or in respect of any other matter, all or any of the powers which the Court might exercise if the company were being wound up by the Court." There is here, it must be observed, a specification of one matter in respect of which the Court may interfere, viz., the enforcement of calls. The true construction of the section is, that the Court is to enforce orders for payment of calls and other orders of the same kind. The enforcement of calls is regulated by section 121. Sections 115, 117, and 118 confer similar powers. All these provisions, one can see very well, are just as useful and applicable to a voluntary winding up as to a winding up by the Court. Therefore the 138th section says that the liquidators may come to the Court and ask to have these powers exercised. I think the reasonable construction is to refer section 138 to a certain class of powers only. If you extend it to give the Court power to restrain the actions and diligence of creditors, the result will be serious. We must look ahead and see what would be the result. The liquidators in a voluntary winding up are placed in this position, that they may, under section 133, sub-section 7, without the sanction of the Court, exercise all the powers given to the official liquidator. The liquidator, without the sanction of the Court, may take any measures against creditors. But the creditors, it is contended, are not to be entitled to take any measures against them. I do not see, if the statute is construed as the petitioner contends, any mode by which the creditor can come to the Court. But he may be brought here by the liquidator. If the prayer of the petition were granted the position of a creditor would be, that the liquidator might do anything he liked against the creditor, whereas the creditor could do nothing against the liquidator or the company. This would be a very anomalous state of matters. Very important questions, requiring judicial intervention, may arise on both sides. That appears to me to be one of the results which would follow if the petitioner's argument were sound. In a judicial winding up the position of the creditors and liquidator is this: The creditors are restrained from doing anything without leave of the Court, but the liquidator may not, without the sanction of the Court, take any measures against the creditors; but in a voluntary winding up the liquidator is to have all the power without the sanction of the Court, while the creditors' hands are to be tied up. The result would be to enable the liquidator to do just what he liked. But any doubt is removed by a reference to two other sections (148 and 151), which, as a matter of construction, afford as strong an argument as could be imagined. They occur in a part of the statute dealing with voluntary winding up under supervision of the Court. The 148th section enacts,—"A petition, praying wholly or in part that a voluntary winding up should continue, but subject to the supervision of the Court, and which winding up is hereinafter referred to as a winding up subject to the supervision of the Court, shall, for the purpose of giving jurisdiction to the Court over suits and actions,

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be deemed to be a petition for winding up the company by the Court." But for this section we must assume that, in a voluntary winding up under the supervision of the Court, the Court would have no jurisdiction; and, if so *multo magis*, it can have no jurisdiction in the voluntary winding up. Sec. 151 enacts,—"Where an order is made for a winding up subject to the supervision of the Court the liquidators appointed to conduct such winding up may, subject to any restrictions imposed by the Court, exercise all their powers, without the sanction or intervention of the Court, in the same manner as if the company were being wound up altogether voluntarily; but, save as aforesaid, any order made by the Court for a winding up subject to the supervision of the Court shall for all purposes, including the staying of actions, suits, and other proceedings, be deemed to be an order of the Court for winding up the company by the Court, and shall confer full authority on the Court to make calls, or to enforce calls made by the liquidators, and to exercise all other powers which it might have exercised if an order had been made for winding up the company altogether by the Court; and in the construction of the provisions whereby the Court is empowered to direct any act or thing to be done to or in favour of the official liquidators, the expression official liquidators shall be deemed to mean the liquidators conducting the winding up subject to the supervision of the Court." This section not only repeats what is in section 148 in different words and with a different application, but it says, "the Court are to exercise all other powers which it might have exercised if an order had been made for winding up the company altogether by the Court," shewing that there are powers which the Court may exercise in a winding up under supervision of the Court which they cannot exercise in a voluntary winding up.

I am therefore of opinion, 1st, that there are powers which the Court may exercise in a voluntary winding up under supervision of the Court which they cannot exercise in a voluntary winding up; and 2d, that one of these powers is to stay actions, suits, &c. which is confined to voluntary windings up under supervision of the Court.

I have been anxious to explain the grounds upon which I think we ought to proceed, because I wish to avoid going into the English cases which have been quoted to us on the question whether creditors have anything to do with a voluntary winding up. That is a large and important question, and has never been decided or even raised here until the present petition. It is not necessary for the decision of the present case. Whatever may be the decision of that question the Court has no jurisdiction under section 138 to stay suits or actions in voluntary windings up. I therefore think the petition should be refused.

LORD DEAS.—The objection taken to the notice is that it does not say that the meeting was called for the purpose of passing a special resolution. But no form of notice is prescribed by the statute, and, looking to the definition of a special resolution in section 51, I do not see how the notice could contain such an intimation—(His Lordship here read section 51, quoted *supra*). Until you have the resolution passed by three-fourths of the members present in person or by proxy at that meeting, and confirmed by a majority of members present at a subsequent meeting, you have not got the elements which constitute a special resolution. But it is impossible to say that the notice given was not such as entitled the meeting to pass the resolution which was carried.

The second objection taken to the notice is that it did not sufficiently specify

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the motion which was to be proposed. The objection amounts to this, that there could be no good notice unless it specified one thing only as what was proposed to be done. There might thus have required to be three or four meetings—one to consider whether the company should be wound up at all, a second to consider whether it was to be wound up by the Court,—if not, a third to consider whether it was to be wound up voluntarily, and, if that was carried, a fourth to consider whether it was to be so wound up under the supervision of the Court. It was not the meaning of the statute that there should be numerous meetings required. When the notice distinctly presents the alternatives of winding up in one or other of certain specified modes which are sanctioned by the statute that is enough.

The next question is, whether we can be called upon to stop the proceedings of this creditor. The result I have come to is that by sections 85 and 148, taken together with section 151, there is a power given to the Court to stay proceedings in judicial windings up, and also in voluntary windings up under the supervision of the Court. But I am of opinion that section 138 does not give the Court jurisdiction to stay proceedings in voluntary windings up. The words are—(reads section 138, quoted *supra*). In voluntary windings up the creditors are no parties to the proceedings, and it is *prima facie* improbable that jurisdiction should be given to the Court to stay proceedings which a creditor thinks it right to take for his interest. Accordingly I do not find that power in the words of the statute. If the members or any of the other creditors object to these proceedings their remedy plainly is to apply to the Court for supervision of the voluntary winding up, and they may then obtain a stay of these separate proceedings. That is quite a sufficient remedy. It would, I think, be extravagant to hold that the only power of coming to the Court was left in the hands of the company, and I do not take that view. But, confining myself strictly to the terms of the statute, I do not think we have power to grant the prayer of this petition.

LORD ARDMILLAN.—This is an application by the liquidator in a voluntary winding up to stay the proceeding of a creditor. I think the notice of the meeting to be held on 4th February 1875 is sufficient. No particular terms of notice are directed by the statute, and all the intimation required is given. I have nothing to add to what your Lordship has stated on this point.

The second question, viz., the interposition of this Court to stay the diligence of creditors in a voluntary liquidation is important. I am of opinion that when a company is wound up judicially, or where a winding up, voluntary at its commencement, is placed under judicial supervision, the rights and interests of creditors may be brought within the jurisdiction of the Court.

But a voluntary winding up is just an arrangement by contributories—that is, by the debtors. The creditors are not parties; they cannot apply to the Court for interposition in their favour; nor can the company or the contributories or the liquidator obtain the interposition of the Court against them.

The case of a contributory required to pay calls, and meeting a demand for calls by setting against that demand a claim as a creditor, has occurred in England. I do not think that case is in point, because, as a contributory, he is within the scope of the voluntary liquidation.

But a creditor of the company is outside of the procedure for voluntary liquidation, and the provisions of the 138th section are, I think, limited to "the matter of the winding up," or the exercise of powers in the enforcement of calls, or in

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the winding up, and within the scope of it. The creditor not being a contributory, not being liable to a demand for calls, not requiring leave to proceed, and not liable to be restrained from proceeding without leave, is, in my view, beyond the scope of the voluntary winding up. In order to obtain the authority of the Court to control his proceeding the winding up must be judicial, or brought under judicial supervision.

Several decisions in England have been urged on us as authorities.

I agree with your Lordship in your view of the 87th, 148th, and 151st sections, and I agree also that in declining to interfere with this creditor, who is not a shareholder under this voluntary winding up, we are acting on a sound principle, and not running counter to these English decisions.

LORD MURE.—I have very little to add, for I agree with your Lordship in the chair that these notices ought not to be construed too critically; and I think that the notice of 25th January may on fair construction be read as meaning that a resolution to wind up the company voluntarily was to be proposed.

Upon the second point I had at first some difficulty, because of the very broad and general terms of the 138th section of the statute, on which the petition is rested. But, after careful consideration of the other provisions of the statute to which your Lordship has referred, I have come to the conclusion that no power is conferred on the Court by this statute to stay proceedings in the case of a voluntary winding up. The 163d section, upon which the petition is also rested, has plainly no application, and, as regards section 138, I am satisfied that there are other matters, besides that of restraining proceedings at the instance of individual creditors, to which that section may be held to apply. But what I desire to be understood as resting my opinion mainly upon are the provisions of section 148 and section 151, by which special power is given to the Court, in voluntary windings up under supervision of the Court, to exercise such powers as those here in question, viz., the same powers as to staying proceedings as are given where a company is being wound up "altogether by the Court." These provisions would, I conceive, have been unnecessary upon the supposition contended for by the petitioner, and are altogether inconsistent with the notion that by section 138 these same powers had already been conferred upon the Court in all cases of voluntary winding up.

THE COURT pronounced this interlocutor:—"Refuse the petition, and decern: Find the petitioner liable in expenses, and remit," &c.

W. & J. BURNESS, W.S.—P. H. CAMERON, S.S.C.—Agents.

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Mar. 11, 1876. Clydesdale Bank v. Royal Bank.

CLYDESDALE BANKING COMPANY, Pursuers.—*Balfour—Readman.*
ROYAL BANK OF SCOTLAND, Defenders.—*Fraser—Rutherfurd.*
WILLIAM MACKINNON (Paul's Trustee), Defender.—*Alison.*

Bank—Crossed Cheque—Forgery.—In an action by the Clydesdale Bank against the Royal Bank for payment of £4800, the pursuers made the following averments:—A forged cheque for £4800 drawn in the name of a customer of the Clydesdale Bank, payable to D P or bearer, and crossed, bearing also a forged indorsation in name of D P, was cashed by a clerk of D P at the Royal Bank, of which D P was a customer. The proceeds were employed by the clerk in paying a balance due by D P on the Stock Exchange. The Royal Bank having, on the same day, presented the cheque at the Clearing House had the amount credited

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to their account with the Clydesdale Bank. Ten days afterwards the Clydesdale Bank discovered that the signatures of the drawer and endorser of the cheque were forged, and intimated that they would hold the Royal Bank responsible. *Held* that, according to the pursuers' averments, the Royal Bank had only acted as the agent of D P, and was not liable.

1st Division. Lord Rutherfurd Clark. R.

THE CLYDESDALE BANKING COMPANY raised this action against the Royal Bank of Scotland and Daniel Paul, stock-broker, Glasgow, and afterwards insisted in it against William Mackinnon, trustee on his sequestrated estate, for payment of £4800.

The pursuers alleged that on 30th November 1875 a crossed bank cheque for £4800 was presented to them at the Clearing House, Glasgow, by the Royal Bank, for which the Royal Bank received credit in their account with the pursuers. The said cheque bore to be drawn upon the Clydesdale Bank by Dixon Brothers, who were customers of the Clydesdale Bank, in favour of Daniel Paul (who was a customer of the Royal Bank) or bearer. The cheque bore to be endorsed by Daniel Paul.

The pursuers further averred;—(Cond. 2) "Previous to its presentment, the said bank cheque or draft had been delivered by the defender, Daniel Paul, or by a clerk or servant for whom he is responsible, at the office in Royal Exchange Square, Glasgow, of the defenders, the Royal Bank, and the person by whom the same was presented received in exchange therefor from the defenders, the Royal Bank, the sum of £4800 therein contained. The words 'Royal Bank of Scotland, Glasgow Clearing House, 30th November 1875,' were impressed on the front or face of said bank cheque or draft previous to the same being presented to the representative of the pursuers in the Glasgow Clearing House. It is believed and averred that the proceeds of the said cheque were, on or about the 30th November last, paid by the defender Paul, or by some one acting on his behalf, to the secretary of the Glasgow Stock Exchange, of which exchange he was at the time a member. The day on which the money was so paid was 'settling day' on the Glasgow Stock Exchange; and on that day there arose a balance against Paul on the statement made up by the exchange officials, which balance, according to the rules of the exchange, it was necessary should be paid before a stated hour on that day. Failing payment Paul would, in accordance with the rules of the exchange, have been declared a defaulter, and expelled. At all events, the proceeds of the said cheque were paid to, or applied on behalf of the defender Paul, and he received the full benefit of the entire amount thereof. The cheque in question being crossed, should not have been paid by the Royal Bank in cash, but should have been put to the credit of the account of Mr Paul, and had this course been followed the fraud would have been detected."

The defender Paul in his answer "denied that it was negotiated or presented by or paid to the defender Paul, or any person having his authority, or was applied for his behoof, or that he received any benefit therefrom. *Quoad ultra* denied. Explained that the defender Paul never knew or heard of the existence of the document till on or about 10th December 1875, after Alexander Martin, a clerk, who had been in the said defender's employment, and who, as the said defender afterwards discovered, had been engaged in extensive and unprofitable speculations on his own account, had absconded. The defender believes and avers that the contents of the pretended cheque, if paid by the Royal Bank of Scotland, were applied by the said Alexander Martin to his own purposes."

The pursuers further averred that they had subsequently discovered that the signature of the drawers, Dixon and Company, and of the indorser, Paul, were forgeries.

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The Royal Bank in their defences stated,—"After passing through the Clearing House the documents are forthwith examined at the offices of the banks respectively, and, if found to be regular and in order, the vouchers are placed to the debit of the proper accounts, and the negotiation as between the delivering and receiving banks is completed. Further, by the usage of bankers, and by the regulations of the Glasgow Clearing House, cheques or drafts, and other documents negotiated as aforesaid, and which are not in order or irregular, must, to preserve recourse, be returned in the course of the day on which they are received to the bank by or through which they were delivered at the Clearing House. The explanation in answer is denied. The defenders had no intimation of the claim now made until 10th December 1875, of which date they received a letter from the pursuers enclosing the said cheque, and stating that the signature of Dixon Brothers had been discovered to be a forgery. Dixon Brothers were customers of the pursuers on and after 30th November 1875. It is now believed and averred that the signature of Dixon Brothers, as drawers of the said cheque, was forged by a clerk (formerly in the employment of the defender Mr Paul), who absconded prior to 10th December 1875. The defenders have been deprived of means of recovering the money, which they would have had but for the pursuers' delay in giving notice of the forgery, and returning the cheque."

The pursuers stated in answer,—"The usage and practice here stated is substantially correct; but it is explained that the regulations of the Glasgow Clearing House, in regard to cheques and other documents, apply only to genuine, and not to forged or fabricated documents."

The pursuers pleaded;—(1) The said bank cheque or draft having been paid or accounted for, as condescended on, on the faith and understanding that the same was the genuine cheque or draft of the parties by whom it purports to be drawn and endorsed, and the signature of the drawer on said cheque having been discovered not to be genuine, but forged or fabricated, the pursuers are entitled to repayment of the sum contained therein, with interest, as concluded for. (2) *Separatim*, Assuming the signature of the endorser to be a forgery as alleged, the Royal Bank were guilty of negligence in cashing the cheque, and their defences ought to be repelled.

The defenders, the Royal Bank, pleaded;—(1) The pursuers' averments on record are irrelevant. (2) The pursuers are precluded from maintaining their claim against the Royal Bank by their delay in intimating the alleged forgery; and, *separatim*, by their failure timeously to return the cheque libelled to the said bank, in accordance with the usage of bankers and the regulations of the Clearing House.

The Lord Ordinary pronounced this interlocutor:—"Assoilzies the Royal Bank of Scotland from the conclusions of the libel, and decerns: Finds them entitled to expenses, allows an account, &c.: And, as regards the case between the pursuers and the defender Paul and his trustee, before answer, allows the parties a proof of their respective averments." *

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* "NOTE.—In the opinion of the Lord Ordinary no relevant case is stated against the Royal Bank.

"A crossed cheque, purporting to be drawn by Dixon Brothers on the Clydesdale Bank, in favour of Daniel Paul or bearer, was presented to the Royal Bank. It was, as the pursuers allege, so presented by 'Daniel Paul, or by a clerk or servant for whom he is responsible.' The pursuers did not dispute that Paul was a customer of the Royal Bank. The cheque being crossed could not, according to rule, be paid otherwise than through a banker.

"The Royal Bank regarded the cheque as in order, and paid the contents to

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The pursuers reclaimed, and argued;—When money was paid by mistake, and when the consideration wholly failed, the money fell to be repaid. A bank which took a crossed cheque from a customer acted as the agent of their customer, and as the principal would have been responsible the agent could not be in a better position.[1]

Senior counsel were not called on.

LORD PRESIDENT.—This is a question of some interest and importance, and if I had entertained any doubt of the soundness of the Lord Ordinary's judgment I should have desired to hear farther argument, but the case is, I think, free from difficulty. The cheque bears to be for the sum of £4800, drawn by Dixon Brothers on the Clydesdale Bank in favour of Daniel Paul or bearer. It was crossed "generally," as it is called, which means that "and Co." was written between the two lines, and according to the usage of bankers such a cheque cannot be paid except through a bank. The meaning of that is that the party in whose favour the cheque is drawn must go to his own banker and get him to obtain payment of the contents of the cheque. This law stood upon custom for a long time, but in 1856 it was recognised by statute. It is important to observe the words of the enactment.[2]—"In every case where a

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the person by whom it was presented. It was thereafter presented for payment to the pursuers, on whom it was drawn. It was paid, and the cash was retained by the Royal Bank.

"The Royal Bank were, in the opinion of the Lord Ordinary, the mere agents for recovering payment of the cheque. That they paid in anticipation does not, he thinks, affect the position. They took the risk of the cheque being honoured by the pursuers. But when it was honoured, they received the money on account of the person who presented it to them; and having already paid him the money, they are in the same position as if they had first presented the cheque for payment, received the money, and then handed it over to him. There is no allegation that they were not in good faith, or that they were in any way richer by the transaction.

"The question is, on whom the loss shall fall? The Lord Ordinary is of opinion that it cannot fall on the Royal Bank. It was the duty of the pursuers, before they paid the cheque, to satisfy themselves that it was genuine. They accepted it as genuine, and accordingly paid the money. They cannot recover the loss from the person, who, as the Lord Ordinary thinks, was the mere agent for collection.

"It is said that before it was presented to the pursuers the cheque had the name of the Royal Bank impressed on its face. This, in the opinion of the Lord Ordinary, does no more than charge the bank with the receipt of the money.

"Further, it was admitted that the pursuers did not give notice to the Royal Bank that the cheque was forged till 10th December. The delay in giving notice is, as the Lord Ordinary thinks, sufficient to absolve the Royal Bank.

"It was maintained that a distinction might be taken, inasmuch as the signature of Paul was forged as well as that of Dixon. The Lord Ordinary does not think so. If the Royal Bank had any reason to think that the cheque was irregular the pursuers would have had something to say. But there is no allegation to that effect.

"The cases referred to were Cox, 9 B. and C., 902; and Smith, 1 Marshall, 453, and 6 Taunton, 76.

"As regards the other defender, the Lord Ordinary has before answer allowed a proof."

[1] Jones v. Ryde, May 4, 1814, 1 Marshall's Reports, 157; Bruce v. Bruce, May 4, 1814, 1 Marshall's Reports, 165; Gurney v. Womersley, Nov. 4, 1854, 4 Ellis and Blackburn, 133.

[2] 19 and 20 Vict. c. 25, sec. 1.

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Mar. 11, 1876. Clydesdale Bank v. Royal Bank.

draft on any banker made payable to bearer, or to order on demand, bears across its face an addition, in written or stamped letters, of the name of any banker, or of the words 'and company,' in full or abbreviated, either of such additions shall have the force of a direction to the bankers upon whom such draft is made that the same is to be paid only to or through some banker, and the same shall be payable only to or through some banker." It does not mean that the banker who is to obtain payment of the cheque is to be in right of the cheque; rather he acts for his own customer. This cheque was paid to Daniel Paul, who was a customer of the Royal Bank. The Royal Bank advanced the amount of the cheque at once. The circumstance of their doing so only shews that whether the Clydesdale Bank had any funds of Dixon Brothers or not the Royal Bank had faith in the solvency of their own customer. Their having advanced money to Paul does not alter their position with regard to the Clydesdale Bank, because when they go to it they go as representatives of their own customer, Paul. They act only as the hand or agent of Paul. The Clydesdale Bank, on the other hand, when the cheque was presented, paid the money on the understanding and belief that this was the genuine signature of Dixon Brothers. It turned out that this was not a genuine signature, and the question is, who is to bear the loss? The Clydesdale Bank, when they paid money on a draft of their own customer, were bound to satisfy themselves that the signature was genuine. The Royal Bank, which presented the cheque, had not necessarily any knowledge of the signature, but the Clydesdale Bank must have known the signature of their own customer. They were in the everyday habit of cashing his cheques. It seems to me that in a question between the two banks the Clydesdale is liable.

We have nothing in the meantime to do with the case between the Clydesdale Bank and Paul, which must be determined according to the facts as they shall appear in the proof.

Lord Deas, being a shareholder of the Royal Bank, declined.

Lord Ardmillan.—I have come to the same conclusion. The Lord Ordinary has put the case well. Of course it is distressing to decide, when the loss must fall upon one or other of two innocent parties; for there has been entire good faith.

The Royal Bank were not bound to know, and could not be expected to ascertain the genuineness of the signature, as the cheque was drawn by persons who were not their customers. The cheque was drawn on the Clydesdale Bank and presented to the Royal Bank, and the Royal Bank merely acted as the medium for cashing it. The signature has turned out to be a forgery, and the question is on whom the loss is to fall. There is no ground for holding that the Royal Bank acted otherwise than in regular course, and in good faith, and they merely were the hands through which the crossed cheque, drawn on the Clydesdale Bank by their customer, found its way to the Clydesdale Bank.

Lord Mure.—I concur. I think the case is ruled by the doctrine in the case of the Caledonian Insurance Company, 21 D. 1197, and 23 D. (H. L.) 3.

The Court adhered.

Ronald, Ritchie, & Ellis, W.S.—Dundas & Wilson, C.S.—J. W. & J. Mackenzie, W.S.—Agents.

GEORGE JOHN NINIAN HOME, Petitioner.—*Balfour—Keir.*
FERDINAND COSPATRICK LOGAN HOME, Respondent.—*Asher—Hunter.*

No. 97.

Mar. 15, 1876.

Home v. Home.

Entail—Disentail—Election.—An heir in possession of an entailed estate succeeded to another estate under an entail which required him to denude of one of them. *Held* that before making his election he could not make up a title to, or disentail, the second estate.

1ST DIVISION. Lord Rutherfurd Clark. B.

IN 1830, by disposition and deed of tailzie, the late General Home of Broomhouse conveyed, under the fetters of a strict entail, the estate of Broomhouse to a series of heirs. The lands were conveyed "with and under the condition, as it is hereby expressly provided, that the heirs-male of my body, and the whole other heirs of tailzie above mentioned, shall be obliged constantly to use, bear, and retain the surname of Home, and arms and designation of Home of Broomhouse, and none other, in all time after their succession or attaining possession of the said estate; but with power to the heirs-male of my own body, and the other heirs-male of tailzie above mentioned, to conjoin any other arms therewith, but no other surname; and in case any of my heirs-male of tailzie have already succeeded or shall succeed to another estate, where they shall be obliged by the entail thereof to assume another name and designation than 'Home of Broomhouse,' then and in that case he or they shall forfeit, amit, and lose all right, title, and interest which they can have to my lands and estate, and shall be holden and obliged immediately thereupon to denude themselves of my said lands and estate hereby disponed, and to convey and dispone the same *habili modo* to the next heir-male called to the succession of the said lands and estate by these presents, unless they choose to relinquish the said other estate and continue 'Home of Broomhouse,' which they are at liberty to do in their option: Excepting always in the cases of titles of honour conferred by the King's Majesty on any of my said heirs-male of tailzie, which they shall be at liberty to use and conjoin with the said name and designation of Home of Broomhouse; and with and under this further condition, that in case any of the heirs-male of my body, or of the other heirs-male of tailzie above mentioned, have already succeeded or shall succeed as heirs to any other heritable estate than the lands and others above disponed, of the annual value of three hundred pounds sterling or upwards, then and so often as the same shall happen, such heir-male of tailzie so succeeding shall forfeit, amit, and lose all right, title, and interest in and to my said lands and estate above described; and the same shall fall, accresce, and devolve to the next heir-male hereby called to the succession thereof, in the same manner as if the heir-male succeeding as aforesaid to such other estate had been naturally dead: Declaring, nevertheless, that this irritancy shall not be incurred, if the heir-male who has already succeeded or so succeeding to another heritable estate, of the value above mentioned, shall renounce and relinquish the same within a year and day after his succession to and possession of the same, jointly with my foresaid lands and estate hereby disponed."

The entailer died in 1850, and was succeeded in the estate of Broomhouse by his nephew, Colonel George Logan of Edrom, who assumed the additional surname of Home, and in accordance with a relaxation in his favour of the provisions of entail contained in a deed of revocation and alteration, held the two estates of Broomhouse and Edrom till his death on 28th June 1870.

Colonel Logan Home possessed Edrom under a disposition and deed of taillie which contained the following condition:—"First, That the said George Logan, my eldest son, and the whole heirs of taillie and heirs

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whomsoever succeeding to the said lands and barony of Edrom, shall be bound and obliged to use, bear, and constantly retain, in all time after their succession thereto, the surname of Logan, and arms and designation of Logan of Edrom, with power, nevertheless, to conjoin any other surnames, arms, or designations therewith if they shall think fit."

Colonel Logan Home's eldest son, William James Logan Home, succeeded on his father's death to both estates, but not being able to hold both under the entail of Broomhouse, he gave up the name of Logan, and conveyed Edrom to his younger brother, George John Ninian Logan Home, who, in accordance with the entail of Edrom, took the name and designation of Logan of Edrom.

William died on 29th September 1875, and the succession to the estate of Broomhouse opened to his brother George, who adopted the name of Home.

George attained the age of twenty-one years on 30th January 1876, and thereafter he presented a petition for disentail of the estate of Broomhouse. Ferdinand Cospatrick Logan Home, the petitioner's immediately younger brother, and his curator, lodged answers. They stated,—"The petitioner is thus not heir of entail in possession of Broomhouse in the sense of the 2d section of the Act 11 and 12 Vict. cap. 36. He possesses the estate not 'by virtue of' the tailzie, but in violation of it. He has taken no steps to perform the condition under which alone he is entitled to retain Broomhouse, viz., that of relinquishing Edrom in favour of the next heir of entail, as his elder brother relinquished it in the petitioner's favour in similar circumstances. Nor has he, though continuing his possession of Edrom, conveyed Broomhouse to the respondent. An action against the petitioner, raised on 28th January 1876, is at present depending in the Court at the instance of the respondent for the purpose of vindicating his right to the estate of Broomhouse."

The Lord Ordinary pronounced this interlocutor:—"Finds that the petition cannot proceed until the petitioner has judicially declared that he elects to take the estate of Broomhouse and to surrender the estate of Edrom." *

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* "NOTE.—This petition has been presented with the view of disentailing the estate of Broomhouse. It is not disputed that the petitioner is the heir under the destination. But it is maintained that he has forfeited the estate; or otherwise, that he has no right to disentail it until he declares his election to take it, and surrender the estate of Edrom.

"Accordingly the respondent has raised an action to have it declared that the petitioner has forfeited the estate of Broomhouse; or otherwise, that he is bound to convey Edrom to the respondent. The respondent pleads that the petition should be sisted to await the issue of the declarator.

"The petitioner does not disguise that he intends, if possible, to retain both estates. His purpose is by disentailing to get rid of the condition in the Broomhouse entail, which disables him from holding Edrom along with Broomhouse. He urges that the object of the respondent might be gained if the petition were sisted, and asks that his right to proceed with the disentail shall be decided in the petition itself. It is plain that the petition may be defeated by mere efflux of time, and the Lord Ordinary is not disposed to allow this to happen. He thinks that he is bound to consider at once whether the petitioner is entitled to go on with the proceedings which he has instituted.

"At the date when the succession to Broomhouse opened to him the petitioner was heir of entail in possession of Edrom. By that entail he is bound to bear the surname and arms of Logan of Edrom.

"It is clear from that clause that the petitioner could not, so long as both entails stood, hold both estates. But if he could disentail the estate of Broomhouse he might get rid of the condition, and thus retain the entailed estate of Edrom."

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The petitioner reclaimed, and argued;—The possession of the character of heir of entail was enough to entitle him to disentail.[1] In any case the entail allowed him a year to make his election.

LORD PRESIDENT.—I do not think there can be any doubt about the soundness of the Lord Ordinary's interlocutor in this case. It is necessary to attend at once to the precise words of the clause and the state of the facts. The petitioner's father, Colonel George Logan, possessed both estates, although under the entail of Broomhouse it is impossible for the heir of entail in possession to hold both the estates of Broomhouse and Edrom, an exception having been made in his favour. Upon his death in June 1870 his elder son William took Broomhouse, but he conveyed Edrom to his younger brother, the present petitioner, who has been in possession of the latter estate since 1873. William died in September 1875, and thereupon the succession to Broomhouse opened to the petitioner, who now proposes to make up a title to that estate and then to disentail it under the second section of the Act 11 and 12 Vict. cap. 36. In this way he wishes to get rid of the fetters of the Broomhouse entail, and to relieve himself of the obligation which lies upon him, upon his succeeding to Broomhouse, either to give up Edrom on the one hand, or to forfeit Broomhouse and remain in possession of Edrom.

The question is whether he is entitled to do this. The obligation in the Broomhouse entail relating to this must be read by itself, and the clause which follows, providing for the event of the heir of Broomhouse succeeding to

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"The Lord Ordinary is of opinion that the petition cannot be allowed to proceed until the petitioner elects to take the estate of Broomhouse and relinquish the estate of Edrom. The petitioner has not declared his election, and refuses to declare it. The Lord Ordinary put it to the petitioner's counsel whether he had elected to take Broomhouse, and the counsel declined to answer the question. This was quite right, because an answer in the affirmative would involve the petitioner in an obligation to denude of Edrom, which he is anxious to avoid.

"The Lord Ordinary is of opinion that the petitioner is entitled to proceed with the disentail of Broomhouse, provided that he declares his election to take that estate and surrender Edrom. But the petitioner maintains that he is not bound to make any declaration one way or another, and that the consequences of his proceeding with the disentail must be made the subject of another action with reference to the estate of Edrom. The Lord Ordinary has not been able to adopt that view.

"It is quite true that an heir can disentail, though liable in a certain event to denude. No better illustration can be given than the case of Preston Bruce. But here there is a material difference. The event has arisen which forces the petitioner to surrender the one estate or the other. He may take the estate of Broomhouse, or he may retain Edrom. He cannot, under the entails, retain both. He is thus put to his election. Before he can deal with Broomhouse, he must, as the Lord Ordinary thinks, declare that he elects to take it, and that in such a manner as to ensure that all the legal consequences of the election shall follow. In the opinion of the Lord Ordinary, he has not forfeited his right to Broomhouse. But he cannot, it is thought, be considered the heir in possession of that estate until his election is declared. It is possible that, on a construction of the clause above quoted, the petitioner may not be put to an immediate election. But until it is made, his rights as heir, except for purposes of mere administration, must remain in abeyance.

"The Lord Ordinary has, for the reasons above stated, thought it right to decide the question rather than sist the petition until the issue of the declarator."

[1] Preston Bruce, March 6, 1874, *ante*, vol. i. p. 740.

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another estate of the annual value of £300, in which case the heir is allowed a year and a day before making his option, has nothing to do with the present matter. It is unquestionably true that the present petitioner has already succeeded to an estate other than Broomhouse, which obliges him to assume another name than that of "Home of Broomhouse," and there cannot be a doubt that he is in the predicament contemplated in the clause of the entail. He has succeeded to Edrom, and entered into possession of it; the succession has now opened to Broomhouse, which compels him to take the name of "Home of Broomhouse" and deprives him of the name of "Logan of Edrom."

The obligation is to the effect that the heir must denude of Broomhouse when the succession opens, and if he does not denude the only other alternative is that he must give up Edrom. It is plain that the option must be exercised immediately, equally in the one case as in the other. The election must take place the moment the succession to Broomhouse opens. That is the conclusion of the whole question. The petitioner is not entitled to make up a title to Broomhouse. The deed of entail excludes him from doing so, unless upon a condition which he will not purify. I think that if the next heir had applied for an interdict to prevent the petitioner making up his title I should not have hesitated to grant it.

While denuding is a thing which does not require to be done in a few days or in an unreasonably short time, it is plain that the petitioner is not entitled to do anything with the estate beyond what is necessary for purposes of administration. He cannot make up a title, and I am therefore clearly of opinion that the Lord Ordinary is right.

LORD DEAS concurred.

LORD ARDMILLAN.—This is a clear case. I cannot say that I entertain any doubt upon it. The latter clause, which has been mentioned, does not touch the point now before us. It does not relate to succession to Edrom, or to an estate held on an entail requiring the adoption of a different name and arms. As your Lordship has explained, it has nothing to do with this question.

Before this petition was presented the petitioner had succeeded to Edrom, another estate, of which it was a condition that the name of the heir in possession should be other than "Home of Broomhouse." In that case he must elect. He must either forfeit Broomhouse, or, taking it, must relinquish Edrom to the next heir of entail.

In that position, the petitioner holding Edrom, also claims Broomhouse, and being in the course of making up a title to Broomhouse, he declines to elect, and occupies the period during which he may elect in proceedings intended and calculated to get rid of the obligation altogether. He is proceeding to make up a title to Broomhouse without surrendering either estate, and without electing,—a proceeding to get rid of the express provisions of the entail, and to defeat the rights of succeeding heirs which I do not think the petitioner is entitled to adopt.

The case of Preston Bruce was different from the present. In that case there was no heir in existence, and no present date of election; and the event contemplated in the entail had not arisen as it has here.

LORD MURE concurred.

THE COURT adhered.

T. & R. B. RANKEN, W.S.—DALGLEISH & BELL, W.S.—Agents.

THOMAS AITKEN, Pursuer.—*Fraser—M'Kechnie.* No. 98.
JAMES KIRK, Defender.—*J. P. B. Robertson.*

Mar. 15, 1876.
Aitken v. Kirk.

Agent and Client—Ad Valorem Fees.—Held that any person (not prohibited by the Stamp Act of 1870) may charge the same *ad valorem* and other fees for preparing conveyances as members of any of the incorporated societies of law-agents are entitled to charge.

1st DIVISION. Sheriff of Midlothian and Haddington.

THOMAS AITKEN, who designed himself as "accountant and notary-public, 51 Hanover Street, Edinburgh," raised an action under the Debts Recovery Act in the Sheriff Court of Midlothian against James Kirk, merchant, Edinburgh, concluding for payment of £34, 17s. 3d., being the amount of an account. The account, *inter alia*, contained entries for several meetings which were not charged, and then was as follows:—

"Nov. 27. Drawing disposition by Mr David Millar Dunlop in favour of Mrs Caroline Neville or Kirk, .	£9	9	0	
Having received back disposition, revised—				
Paid for stamp for disposition, .	7	10	0	
Extending disposition—4 sheets, .	0	8	0	
Revising fees, being one-half of drawing fees of—				
1st. Disposition by Mrs Kirk in favour of Investment Company for £1200—6 sh., .	3	18	9	
2d. Ratification by Mrs Kirk, .	0	5	0	
3d. Bond by Do.—8 sh.,	1	6	0	
Framing warrant of registration on disposition, . . .	2	2	0	
Agency recording same, . .	0	10	0	
Paid recording dues of disposition,	0	12	6	
				£26 1 3"

The defence was that to the extent of these sums the account was "not due."

The Sheriff (Davidson) remitted the account to the Auditor of the Court of Session "to consider, tax, and report." The Auditor reported that on the assumption that the pursuer was entitled to charge for the conveyancing business according to the table of fees of the societies of W.S. and S.S.C., the account was correct.*

* "NOTE.—. . . None of the business charged in the account is of a notarial character; but it is maintained by the pursuer, that, holding a certificate as a notary, he is entitled to perform business of every description except Court business, and to charge therefor in accordance with the table of fees in force for the time regulating the charges of members of the societies of W.S. and S.S.C. The Auditor does not consider it within his province to dispose of this question, which is one of very considerable importance, and he has therefore reserved it for the decision of the Sheriff. The Auditor believes that many persons, even without the qualification of a certificate as notary, act as conveyancers, and charge the conveyancing fees under the table of the societies of W.S. and S.S.C. He is not prepared to hold that persons so acting are entitled to charge the conveyancing fees; and it appears to him questionable how far a notary-public (even though certificated by the Inland Revenue) is entitled to more than a *quantum meruit* for any business transacted by him other than business of a proper notarial character. If the pursuer's contention be well-

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The Sheriff pronounced this interlocutor:—"Finds that the pursuer is not entitled to charge for the conveyancing business in the account sued for under the table of fees allowed to Writers to the Signet and Solicitors before the Supreme Courts of Scotland; and with regard to the sum which he ought to receive for the said business, remits again to the Auditor of the Court of Session to tax that part of the account in question, on the footing that the pursuer is only entitled to charge *quantum meruit*, and report."

The Auditor having reported,* the Sheriff pronounced the following in-

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founded, the expenses attending the professional education, apprenticeship, and entrance of the members of the societies of W.S. and S.S.C., and other chartered or incorporated bodies of legal practitioners, appear to the Auditor to be very much money thrown away, in so far as the matter of professional emolument is concerned.

"The portion of the account covered by the reservation is the branch headed, 'title in Mrs Kirk's favour to Warrick Villa, and loan thereon,' and the amount is £26, 1s. 3d. It is proper to note that the defender, in settling with the seller of the property, has been allowed deduction from the price of £8, 13s. 6d., being one-half of the items of £9, 9s., £7, 10s., and 8s., and that the sums of £7, 10s. and 8s. are outlays. For the business detailed in the other branches of the account the charges made and sustained do not amount to more than a *quantum meruit*."

* "When the renewed remit was made, the Auditor requested the pursuer to give him a detailed note of his time and trouble in connection with the deeds mentioned in the account. This the pursuer declined to give, on the ground that, notwithstanding the judgment of the Sheriff as to the principle of charge, he intended to maintain his right to the full *ad valorem* charges made by conveyancers in Edinburgh. . . . . .

"In the absence of details other than those given in the account, the Auditor cannot form any accurate estimate of the time during which the pursuer was engaged in the business of the defender; and it has been with some difficulty that he has ascertained the length of the deeds not stated in the account. The purchase of the house appears to have been made by the defender himself, and the pursuer was instructed to prepare the conveyance, and accompanied the defender to the office of the investment company to arrange for a loan. The Auditor has no information as to the extent of the progress of titles of the property, or as to the time occupied in their examination. The conveyance was a short one, and its preparation simple. The revisal of the security deeds was also a simple matter. If time alone were to be regarded, the pursuer would, in the opinion of the Auditor, be suitably remunerated by what are known as the regulation fees of the deeds, viz.:—For drawing the conveyance, 28s.; and for revising the other deeds, 20s., 5s., and 26s.—together, £3, 19s. But the element of responsibility is not to be disregarded, and it is in respect of this element that the members of the societies of W.S. and S.S.C., who have tables of fees, state their charges *ad valorem*. The Auditor does not regard the *ad valorem* charges in the account as too high to cover the responsibility of an educated and qualified conveyancer. The question remains, and it is stated without any reference to the status of the pursuer—Is every man who undertakes the responsibility of preparing deeds entitled to the same remuneration as the conveyancer who has had a full professional education, and, after examination, has been admitted a member of a body recognised as conveyancers? The pursuer, as a notary-public after examination, and holding a certificate from the Inland Revenue as a notary, is undoubtedly in a more favourable position than a person acting as a conveyancer without any recognised qualification whatever; but it may be held that the pursuer's qualification is a limited one, and confines him to proper notarial business. This, however, is a question for the Sheriff. If he shall be of opinion that the pursuer is entitled to be remunerated as a general conveyancer, not by time merely but by *ad valorem* fees, then it seems to the Auditor that the

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terlocutor:—"Finds that, from the branch of the account sued for which relates to the 'title in Mrs Kirk's favour to Warrick Villa, and loan thereon,' and amounting to the sum of £26, 1s. 3d., there falls to be deducted the sum of £7, 13s. 3d., thus leaving as a proper charge under the said branch of the account the sum of £18, 8s.: Therefore decerns against the defender for the sum of £27, 4s.: Finds no expenses due; and decerns."

The pursuer appealed.[1]

LORD PRESIDENT.—There can be no doubt of the general proposition that there is no set of men who enjoy a monopoly of conveyancing. A person who wishes to make up a title to an estate may employ any man he pleases if he has confidence in his skill. There was no limitation until the statute of 1870, and then, for revenue purposes, the classes of persons who were allowed to practise conveyancing were reduced to certain grades of the legal profession, who were required to take out licences annually It enacts by section 60,—"Every person who not being a sergeant-at-law, barrister, or a duly certificated attorney, solicitor, proctor, notary-public, writer to the signet, agent, procurator, conveyancer, special pleader, or draftsman in equity) either directly or indirectly, for or in expectation of any fee, gain, or reward, draws or prepares any instrument relating to real or personal estate, or any proceedings in law or equity, shall forfeit the sum of fifty pounds." The present pursuer and appellant escaped from the operation of the section because he belonged to a class exempted as notaries-public. It was quite lawful for this gentleman to accept the employment, but if Kirk was not well assured of his skill he acted very foolishly in employing him. Having employed him it is a strong thing for the client to turn round and say, "You are an ignorant man." If a man who is entitled to act as conveyancer is employed and does so act, are we to inquire if he is well educated, and, if not, how are we to inquire into his skilfulness?

It seems to me that this gentleman was just as much entitled to charge *ad valorem* fees as any practitioner. It is the client's business to see and know that the person he employs is properly skilled.

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charges in the account may be allowed as the measure of the *quantum meruit*. If, on the other hand, the Sheriff shall be of opinion that the qualification is a limited one, the charges already indicated may be regarded as the proper allowance, but with an addition of £3, 6s. 6d., in so far as the conveyance is concerned, seeing that the defender has been relieved of one-half of the fee of £9, 9s. by the seller of the house. The outlays (£7, 10s., 8s., and 12s. 6d.) will, of course, be sustained; and the Auditor is also of opinion that the charges of £2, 2s., for warrant of registration, and 10s. for recording, should be allowed. The preparation of the warrant is not strictly proper notarial business; but the warrant and recording have come in place of the instrument of sasine, and may thus be held as within the province of the notary. If the latter view shall be adopted by the Sheriff, there will fall to be deducted from the fees of the conveyance £4, 14s. 6d., and from the fee for revisal of the disposition to the investment company £2, 18s. 9d., the other charges and outlays being sustained as stated."

[1] *Pursuer's Authorities.*—Stamp Act, 1870, 33 and 34 Vict. c. 97, sec. 60; Galloway v. Ranken, June 11, 1864, 2 Macph. 1199, 36 Scot. Jur. 601; Gemmel's Executor v. Moon, Feb. 14, 1838, 16 S. 500, 10 Scot. Jur. 280; Gibson v. Dodds, Jan. 15, 1829, 7 S. 254; Taylor v. Forbes, Jan. 13, 1853, 24 D. 19.

Defender's Authorities.—Cooke v. Falconer's Representatives, Nov. 26, 1850, 13 D. 157, 23 Scot. Jur. 55; Begg's Law Agents, p. 64; Winton v. Airth, July 17, 1868, 6 Macph. 1095, 40 Scot. Jur. 622.

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LORD DEAS.—I am afraid there is no law to prevent any man from writing a disposition, if employed to do so, and the revenue laws are satisfied. It would be very wholesome if this were otherwise, for deeds unskilfully framed not only lead to expense in litigation, but tend to unsettle and render uncertain the law of heritable rights. If the party may be employed, it necessarily follows that he is entitled to be paid. If he is not a good conveyancer, and the deed is bungled, he will, of course, be liable for the consequences. I know of no way of estimating the rate of payment by the skill and education of the conveyancer.

The Stamp Act of 1870 requires a certificate or licence to be taken out before the writer of the deed can make a charge against his employer. But it is not said that anything of that sort is here wanting. A notary-public pays the same amount of licence as a writer to the signet.

The inexpediency of employing persons who are not properly qualified to write deeds is a matter for the employer. But I have no doubt that the examiners of notaries-public are entitled to ask, and do ask, questions calculated to test the ability to write dispositions. If any blunder occurs in a notarial instrument the notary is responsible, and how he could have sufficient skill to know the accuracy of such an instrument connected with heritable rights, without a knowledge of conveyancing, I do not well see. But that does not enter into the present question. It is enough that the notary has the licence.

The question of remuneration thus comes to be a question of *quantum meruit*, and on that point we might have required a report from the Auditor. But as he has already reported his opinion that on the footing of *quantum meruit* the pursuer is entitled to the *ad valorem* fees, it seems superfluous to require any further report.

LORD ARDMILLAN.—I agree with your Lordships. There is only one point on which I have any doubt. A man may at his own risk employ a person not specially qualified. There is no monopoly of conveyancing. Were it not for the Act of 1870, that person might charge for his services. But that Act has the effect of limiting the number of persons who, being so employed, are entitled to charge. The pursuer is among the number of those who can so charge, and he holds a certificate. He is entitled to remuneration on the footing of *quantum meruit*. But to allow him to charge *ad valorem* fees is to permit him to adopt as the measure of his charges a table of fees framed by and for a different class of practitioners. It is here that I have a little doubt. I am not sure that a person who is not one of the class to which the table of fees applies is entitled to adopt the table of fees. I observe that a remark is made by the Auditor to the effect that if the pursuer is entitled to be remunerated as a general conveyancer, not by time merely, but by *ad valorem* fees, then it seems to the Auditor that the charges in the account may be allowed as the measure of *quantum meruit*. This remark appears to me important; and assuming the correctness of this opinion by the Auditor, it does not matter whether you reach the result by *ad valorem* fees or by the rule *quantum meruit*. The only thing I doubt is whether this gentleman can use the table of fees as the rule of his charges, but as the two modes of charging would in this case lead to the same result I think that the Auditor's report gets us out of the difficulty.

LORD MURE concurred.

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THE COURT pronounced this interlocutor:—"Recall the interlocutor of the Sheriff dated 17th February 1876: Decern against the defender (respondent) in terms of the conclusions of the summons: Find the pursuer and appellant entitled to expenses both in the inferior Court and in this Court; allow accounts thereof," &c.

DANIEL TURNER, L.A.—KEEGAN & WELSH, S.S.C.—Agents.

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Mar. 16, 1876.
Middleton v. Lord Advocate.

SIR GEORGE N. BROKE MIDDLETON, Bart., Appellant—*Asher—Mackintosh.*
THE LORD ADVOCATE, Respondent.—*D.-F. Watson—Rutherfurd.*

Property and Income Tax Act, 1842, 5 *and* 6 *Vict. c.* 35, *schedule B—Deer Forest—Assessment.*—The lessee of a deer forest is liable to be assessed under schedule B of the Property and Income Tax Act, in respect of occupancy, to the extent of the rent actually paid, and not merely to the extent of the rent which the land would yield if let for pastoral or agricultural purposes.

1ST DIVISION. B.

AT a meeting of the Income Tax Commissioners for the county of Inverness, on the 2d December 1875, Sir George N. B. Middleton, Bart., appealed against the assessment of £4, 15s. (under schedule B of the Act 5 and 6 Vict. c. 35, and subsequent Acts), on £1520, made on him as occupier of the deer forest of Invermoriston, &c. for the year ending 5th April 1876.

The following case was stated by the commissioners for the opinion of the Court of Exchequer:—"The appellant pays a rent of £2000 for the furnished house of Invermoriston, with deer forest, including the privilege of shooting deer thereon, and certain grouse shootings and fishings; and the assessor, in fixing the amount at £1520, allowed a deduction of £480 in respect of the houses, with the furniture, and the grouse shootings,—without, however, admitting that grouse shootings are not assessable.

"On behalf of the appellant, it was stated that the house, with furniture, and the grouse shootings, were under-estimated, and the assessor agreed to a further deduction of £320,—thus making the estimated rent of the deer forest, with the privilege of killing deer thereon, £1200.

"The appellant objected to this assessment, in respect that it included the portion of the rent paid by him for the privilege of killing deer within the forest, which portion of the rent, he maintained, was not assessable under schedule B, and claimed to have it reduced to the annual grazing value of the forest. He stated—and this was admitted by the surveyor—that the rent paid for the forest, including the privilege of killing deer thereon, was much above the rent that would be paid for it as a sheep farm. He referred to rule 7, under which the schedule B duty is charged, and rule No. 1, schedule A, of 5 and 6 Vict.,[1] where the properties to be charged are declared to be those 'capable of actual occupation,' and maintained that the forest was capable of actual occupation only in so far as the land was concerned (the mere privilege of shooting deer, for which so much was paid, not being capable of occupation), and that nothing beyond the ordinary value of the land could be charged for profits of occupation, the duty under schedule B being really chargeable in respect of profits only.

[1] The Act of 1842 directs, by section 63, rule 7, schedule B, that duties under schedule B shall be charged upon certain occupants according to the general rule in rule 1, schedule A, sec. 60, which enacts that "the rule shall be construed to extend to all lands, tenements, and hereditaments or heritages capable of actual occupation, of whatever nature and for whatever purpose occupied or enjoyed."

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"In support of the assessment, the surveyor referred to rule 7, which provided for the schedule B duty being charged in addition to the duty to be charged under schedule A, 'according to the general rule in number 1, schedule (A), before mentioned, on the full amount of the annual value thereof.' That rule extended to all lands, 'for whatever purpose occupied or enjoyed;' and under the Property Tax Acts (and Valuation of Lands Acts, which rule the property tax valuations), the rent, where a *bona fide* rent is paid, is held to be the annual value.

"The appellant had the exclusive use or occupation of the forest, and the rent paid by him was its agreed-on actual value. He maintained, therefore, that the appellant was chargeable on the rent he actually paid under his lease, without reference to the rent the forest might bring if let as a sheep farm or otherwise.

"The commissioners found that the assessment appealed against was made according to the amount of rent fixed in terms of the lease between the appellant and the trustees of the late James Murray Grant of Glenmoriston, dated 18th June and 2d July 1872, therefore refused the appeal, but, in respect that the assessor consented to allow the sum of £800 as a deduction from the actual rent payable by the appellant to the said trustees, restricted the amount of the assessment to £1200."

Lord Shand appointed the case to be heard before the First Division.

Sir G. N. B. Middleton argued;—A deer forest was not included in "lands, tenements, and hereditaments or heritages capable of actual occupation," and, as matter of fact, was not occupied. There was an attempt here to assimilate the position of a tenant of a deer forest to that of an agricultural tenant. The tenant of a forest made no profit out of his tenancy, and it was upon profit that assessment under the Act was made. That constituted the difference between assessment under the Property and Income Tax Act and that under the Poor-Law Act, where a game tenant had been held to be in the occupation of land, and so assessable. The terms and objects of the two Acts were thus different.[1]

Lord President.—My Lords, it appears from the case before us that the appellant, Sir George Broke Middleton, pays a rent of £2000 for the furnished house of Invermoriston, with a deer forest (including the privilege of shooting deer), and certain grouse shootings and fishings; and the assessor, in fixing the assessable amount at £1520, which was his original charge, "allowed a deduction of £480 in respect of the houses, with the furniture and the grouse shooting, without, however, admitting that grouse shootings are not assessable."

The appellant maintained before the Income-Tax Commissioners that the house with the furniture and grouse shootings were under-estimated, and that the deduction should be larger; and it appears that the assessor agreed to a further deduction of £320, thus making the assessable rental £1200.

Now, it is to be taken into consideration in this question, that that rent of £1200 is paid for a deer forest, that is to say, it is a rent paid for the occupation of the ground of which that deer forest consists, and for the exclusive occupa-

[1] Pollok, Gilmour, and Co. v. Harvey, June 5, 1828, 6 S. 913; Macpherson v. Macpherson, May 24, 1839, 1 D. 794, 11 Scot. Jur. 475, 5 Bell's Appeals, 280, 18 Scot. Jur. 619; Sinclair v. Duffus, November 24, 1842, 5 D. 174, 15 Scot. Jur. 40; Menzies v. Menzies, March 10, 1852, 14 D. 651, 24 Scot. Jur. 365; Stirling Crawford v. Stewart, June 6, 1861, 23 D. 965, 33 Scot. Jur. 498; Leith v. Leith, June 10, 1862, 24 D. 1059, June 5, 1862, 34 Scot. Jur. 523.

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tion of that ground for the purpose of sport; and the question is, whether the appellant is assessable under schedule B of the Income-tax Act for the forest. Schedule B grants to Her Majesty a duty for "all lands, tenements, and heritages in Scotland, in respect of the occupation thereof, for every 20s. of the annual value thereof the sum of 2½d." You will observe that it is in respect of the occupation of land, &c., in Scotland. In schedule A there is a corresponding sum charged against the owner of the land "in respect of the property thereof, for every 20s. of the annual value thereof the sum of 7d." So that every acre of land in Scotland is made the subject of assessment in this way to the amount of 7d. in the pound for every owner, and to the amount of 2½d. in the pound for every occupier of such subject. The two assessments plainly go together. They are intended to apply, and do apply, to the same subjects, and the tax is payable as assessment upon the annual value.

The way in which these assessments are to be laid on is regulated by the 60th and 63d sections of the statute. The first rule under the 60th section is this—"The annual value of lands, tenements, hereditaments, or heritages charged under schedule A shall be understood to be the rent by the year at which the same are let at rack-rent, if the amount of such rents shall have been fixed by agreement, commencing within the period of seven years preceding the 5th day of April next before the time of making the assessment; but if the same are not so let (at rack-rent), then at the rack-rent at which the same are worth to be let by the year, which rule shall be construed to extend to all lands, tenements, hereditaments, or heritages capable of actual occupation, of whatever nature, and for whatever purpose occupied or enjoyed, and of whatever value,"—excepting certain subjects which are specified in rules Nos. 2 and 3, which are not applicable to the present case.

The 63d section has this rule, No. 7—"The duties last before mentioned shall be charged in addition to the duties to be charged under schedule A on all the properties in this Act directed to be charged to the said duties, according to the general rule in No. 1, schedule A, before-mentioned, on the full amount of the annual value thereof, estimated as by this Act is directed."

In laying on these duties under this statute the question is to be considered—what is a heritage?—and there can be no doubt that according to the description of the statute the ground in question falls within that description. Then, in the second place, the annual value is to be ascertained by the actual rent, if it is the full rent of the subject. And we have in this case the rent ascertained in quite a satisfactory way. That, the Act says, is to be taken as the annual value; and the owner is to pay on that annual value 7d. in the pound, and the occupier is to pay 2½d. Now, surely all that is very clear and plain, and admits of no difficulty of construction at all. The only question raised here, as I understand it, is, whether this gentleman, Sir George Middleton, is the occupier of a heritable subject within the meaning of the statute. Now, I should have thought that it was too late to question that unless some distinction could be shewn between this statute and the Poor-Law Amendment Act; because the question has been settled under the Poor-Law Amendment Act by the case of Stirling Crawford v. Stewart, and settled upon this precise ground, that the tenant of a shooting is a person in the occupation of land, and is assessable as such. He is assessable as a tenant or occupier under the Poor-Law Amendment Act, and the occupier is a person assessable under this Act also. Therefore, unless some distinction can be pointed out between the one Act and the other,

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the present case is perfectly hopeless, for Mr Mackintosh, with all his ingenuity, has been unable to point out any distinction, unless it consists in this—that the present Act is intended as a tax upon profits, whether they arise from lands or from trades and professions. And that is quite true; but there is a material distinction between the provisions of the Act as regards profits arising from the one source and as regards profits arising from the other. In the case of profits arising from trades and professions, the Act says that there shall be an estimate made of what the profits are, and we know that it is a very rough and round kind of estimate that can be made in that case. But in the case of lands, the statute requires no such estimate of profits. It fixes the mode in which profits are to be estimated—a statutory mode of proving what the profits are,—and that is by taking the actual annual value of the land, which it defines to be the rent payable, if it be the full rent, or the rack-rent, as the statute calls it, or what the rent would be if it be not let. That is precisely the rule which is to be applied. So that, as far as lands and heritages are concerned, the rule of assessment under this statute, and the rule of assessment under the Poor-Law Act, are identical; and therefore I think the determination of the commissioners is sound.

Lord Deas.—There is, I think, some distinction between poor-law cases and the present case. Poor-rates are payable upon the annual value, taking one year with another, one-half by the landlord and the other half by the tenant. The first thing to be ascertained in such a case is, of course, the annual value of the lands and heritages. That can only be ascertained by taking the rent. When it is required that one-half shall be paid by the landlord and the other half by the tenant there is a division of liability between them upon the annual value—the annual value being what is paid by the tenant. But this was not a tax upon the profit made by the tenant, it was a tax upon the whole annual value of the subject.

In the present case the one-half was not payable by either the landlord or the tenant. There is a larger tax upon the landlord and a smaller one upon the tenant. The question, however, I think, comes to be, notwithstanding this mode of division, whether it is not really a division of the tax between the two of the whole annual value, just as under the Poor-Law Act, with the difference simply that in the one case the assessment is equally divided, while in the other case it is unequally divided. Although there is that difference, the assessment is laid on as in the Poor-Law Act itself, and if that be sound, it is no matter whether the tenant makes profit out of it or not. It is not on the footing of the amount of profit that the liability is laid on, but on the footing that the lands are of a certain annual value, to be divided in certain proportions between the landlord and the tenant. I have come to the same result as your Lordship in the chair.

Lord Ardmillan.—In the case before us I do not think there is any difficulty at all. The tax is partly on the profit of the property, and partly on the income. Schedule A is distinct as to its being a tax on "all lands, tenements, hereditaments, and heritages, in respect of property, for every 20s. of the annual value thereof 7d." Schedule B is in the same terms in regard to the occupation of lands, tenements, hereditaments, and heritages, the amount in that case, however, being only 2½d. in the pound. Then, when you proceed to the more detailed enactments

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on the subject, you have section 60, where the rules for estimating lands mentioned in schedule A—that is, for the ascertainment of the tax on the property—are laid down. You have it there again put expressly on the ascertainment of the annual value; and under section 63, which gives the detailed enactment for assessing and charging properties under the Act (schedule B) on the occupant, you have again the very same words—the annual value. Whatever the thing be, it is a tax both in regard to the proprietor and in regard to the occupant. Now, if there is in this case a rent accruing to the proprietor of the deer forest, it is the annual value of the property so far as it is paid for the deer forest. The rent is, besides, the annual value of the deer forest to the occupant. Both landlord and tenant are therefore within the enacting words of the statute. The time was when a difficulty was raised, which does not occur here at all, whether game was a fit subject of such enactment or of assessment at all, on the ground that game, or the shooting of game, was a personal privilege or enjoyment. That question has long ago been settled. There is a whole string of cases, and I think the case in which the subject was perhaps most deliberately and satisfactorily dealt with was the case of Menzies v. Menzies. So that, considering the numerous cases we have on that subject, it cannot be doubted that game let is property let. The privilege of shooting game let to a tenant is part of a right of property; unlet game raised a different question, and unlet game must be estimated as of so much annual value. The case of Crawford v. Stewart was of much the same character. The fact that under the poor-law the landlord pays one-half does not raise a different principle; for where the landlord pays on the annual value, and the tenant does the same, you may call it one-half, or the other the other half, which each pays, but it is the annual value still. It is the criterion of the landlord's and of the tenant's liability.

In regard to a deer forest it is obvious that there is this other consideration, that there is no means of ascertaining, except by pure hypothetical conjecture, the rent of the land apart from the deer shooting. In the case of a grouse shooting, there may not be a very great sheep stock upon it, but there is a sheep stock often put upon it; and it is capable of being let for pasture for cattle and sheep, whether it is so or not. But in the case of a deer forest everything else is excluded. In order to make it a deer forest it is made a desert, where "nothing but the antler'd monarch roams." That is the very reason why it is impossible to reach the rent of the land, if it is merely a deer forest, otherwise than by taking the rent as the annual value, and the annual value as the rent.

The only difficulty suggested in dealing with the case is an attempt to say that if it is not done in regard to grouse, why assess in regard to deer? But we have not that before us. There have been distinctions drawn on such matters; and even in this case the assessor has very handsomely—if I may so say—lowered the assessment as far as he could go.

LORD MURE.—I agree with your Lordship in the chair that there is no substantial distinction in principle between this case and that of Crawford v. Stewart which has been referred to. The question was there raised under the Poor-Law Act; and as I understood the arguments of the appellant, the main ground on which it was contended that a different rule should be here applied was that the assessment in question is levied in respect of profits, and that a party holding a lease of a deer-forest makes no profit out of it in the ordinary sense of

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the expression. But this assessment, although it may be called a duty on profits, is appointed to be laid on upon "annual value" in respect of occupancy as well as property, and that whether the occupant actually makes a profit or not. It is levied in respect of the rent where there is a lease, and where there is no fixed rent in respect of the value which "one year with another" the property may be expected to yield, and although the occupant may in some years make no profit, or even a loss, he still pays, because it is presumed that one year with another he makes a profit. And so here it is, I think, to be presumed that a party who gives a large rent for a deer forest gets some benefit by it; and in this way makes a profit out of the enjoyment of the deer forest, and so comes within the very words of section 60 of the "Property-Tax Act," by which this matter is regulated, by the reference made to it in section 63, and which provides for the tax being levied on all lands "for whatever purpose" they may be "occupied or enjoyed."

LORD DEAS.—I should explain that in what I have said about the application of the poor-law case I am quite aware that the division there between the landlord and the tenant is not between individual landlords and individual tenants, but landlords as a class and tenants as a class. But that makes no difference in the principle, or in the result at which I arrive, as the principle I go upon is this—that it is a tax upon the whole of the annual value, and divided between the two in certain proportions. It does not, therefore, matter to the principle what the proportions are, whether one-half or some other proportion.

THE COURT pronounced this interlocutor:—"Affirm the judgment of the commissioners: Find the appellant, Sir George N. Broke Middleton, Bart., liable in costs, and remit," &c.

ADAM & SANG, W.S.—DAVID CROLE, Solicitor of Inland Revenue.—Agents.

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Mar. 17, 1876. Dudgeon v. Thomson, &c.

RICHARD DUDGEON, Complainer.—*Balfour—Hunter.*
THOMSON AND COMPANY, Respondents.—*Asher—Jameson.*

Process—Interdict—Breach of Interdict—Note of Suspension and Interdict—Res Judicata—Patent.—The holder of a patent obtained interdict against a person to prevent infringement, the Court overruling an objection to the validity of the patent. Thereupon the respondent immediately assumed a partner. Another note of suspension and interdict was presented by the holder of the patent against the new firm. *Held* that the complainer's proper remedy was a complaint for breach of interdict against the respondent in the former process, and not a new note of suspension and interdict.

1ST DIVISION. Lord Rutherfurd Clark. B.

SEE 11 Macph. p. 863, 45 Scot. Jur. p. 528.

Mr Richard Dudgeon, who was the inventor of improvements in apparatus for expanding boiler tubes, obtained a patent for the exclusive using, exercising, and vending it in the United Kingdom. On 30th March 1872 he presented a note of suspension and interdict to prevent William Thomson, engineer in Glasgow, infringing his patent. The Lord Ordinary granted the prayer of his note, and his interlocutor was adhered to by the First Division of the Court. The report of this judgment (11 Macph. p. 863, 45 Scot. Jur. p. 528) fully sets forth the particulars of the patent.

The judgment of the First Division was given against Mr Thomson on 4th July 1873, and on the 30th Mr Thomson entered into an agreement of copartnery with Benjamin Donaldson, clerk in Renfrew, the partnership being for fourteen years. On 24th April 1874 William Thomson obtained

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letters-patent for a new or improved expander of boiler tubes, which he alleged was entirely different from the patent of Dudgeon.

On 30th November 1875 Richard Dudgeon brought a note of suspension and interdict against "William Thomson and Company" infringing his patent obtained in 1868 for "improvements in apparatus used in expanding boiler tubes." This prayer was identical with the prayer of the note of suspension and interdict against William Thomson presented in 1873. The complainer averred that the respondents were in the course of infringing the patent by making and selling tube expanders of the kind specified, and that these infringements "have been and are being carried on by the said William Thomson, or at least he has been and is actively participating in the said infringements."

The complainer pleaded;—(1) The respondents having infringed the complainer's patent rights, as above condescended on, and having refused to discontinue said infringement, the complainer is entitled to have interdict as craved. (2) The respondents' pleas are excluded *exceptione rei judicatæ*, in respect that the said pleas were either proponed and repelled or competent and omitted in the process mentioned in the complainer's statement. (3) At all events the judgments pronounced in the said process constitute *res judicata* against the respondent Thomson, and any firm of which he is a partner, and which makes tools under a title derived from him or with his authority or consent.

The respondents pleaded;—(2) The alleged letters-patent founded on by the complainer are null and void and invalid, in respect, &c. (3) *Separatim*, the suspension ought to be refused with expenses, in respect the respondents have not infringed the letters-patent founded on by the complainer.

The Lord Ordinary pronounced this interlocutor:—"Repels the second and third pleas in law stated for the complainer; and in respect the complainer has intimated his intention of reclaiming against this interlocutor, finds him liable in the expenses since the closing of the record, and remits," &c.*

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* "NOTE.—In this case the complainer seeks to have the respondents interdicted from infringing the letters-patent granted to him in 1866. As one of their answers the respondents allege that the letters-patent are invalid by reason of prior public use; but the complainer maintains that they are not entitled to assail the patent on this ground, because of the judgment which he obtained on the 4th of July 1873, whereby William Thomson, one of the partners of the respondents' firm, was interdicted from infringing the pursuer's patent.

"In the record the complainer alleges that William Thomson is the only partner of the firm of Thomson and Company, the respondents, but a contract of co-partnery is produced, which shews that that firm consists of two partners, viz., William Thomson and Benjamin Donaldson. In consequence the complainer did not press his allegation that Thomson was the sole partner of the firm. But he pointed out that the company was formed to carry on the business formerly carried on by Thomson, and to work certain patents which he has obtained.

"The question is, whether the judgment of 1873 can be pleaded against the respondents, so as to exclude them from entering upon the question of prior use. The Lord Ordinary thinks that it cannot. The respondents are not identical with William Thomson, and in particular, the rights of Benjamin Donaldson cannot be identified with his. The complainer has brought a new process against a different party, and the Lord Ordinary conceives that that party cannot be excluded by the previous judgment from stating any relevant defence. The opposite view would result in this,—that any firm, of which Thomson is a partner, would be bound by that judgment.

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The complainer reclaimed, and argued;—The plea of *res judicata* should have been sustained. The partnership was a mere device to get rid of the interdict formerly granted.[1] The effect of the Lord Ordinary's judgment would be that any person might get rid of the plea of *res judicata* by assuming a partner.[2] Identity of persons is not necessary for the plea of *res judicata*. Identity of interest was enough.[3]

Argued for the respondents;—The partnership was not a device to escape from the former interdict. It was a *bona fide* partnership. The respondents were in the position of pursuers in trying to shew the invalidity of the complainer's patent, and the plea of "competent and omitted" only applied to defenders. The grounds on which the respondents challenged the complainer's patent were different from those in the former process.[4]

At advising,—

LORD PRESIDENT.—This is an application for interdict on behalf of Mr Dudgeon, who is owner of a patent for improvements in apparatus used in expanding boiler tubes. The interdict asked against the respondents, Thomson and Company, is against their infringing the patent by "making, vending, or using, in whole or in part, the improvements in apparatus used in expanding boiler tubes, described in the specification filed on 30th August 1866, amended and altered as aforesaid, in pursuance of the proviso contained in the said letters-patent, and in particular from making, vending, or using any apparatus for expanding boiler tubes constructed or used in the manner described in the said specification, amended and altered as aforesaid, or in manner substantially the same, and from infringing the said letters-patent, amended and altered as aforesaid in any other manner of way." Now, it appears that there was a previous proceeding of the same kind directed against one of the partners of William Thomson and Company, and in that process the validity of the patent was called in question by the respondent. But the objection was not given effect to, and interdict was pronounced in the terms I am about to read:—"The Lord Ordinary sustains the reasons of suspension: Suspends, prohibits, interdicts,

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"It was contended that the judgment was to be taken as *res judicata* against the respondents' firm, because they have acquired right to the patents held by Thomson. In the opinion of the Lord Ordinary this circumstance cannot enlarge the rights of the complainer. The judgment would not be binding on a simple assignee of the patents, and it cannot, it is thought, bind the company, merely because they are assignees.

"The complainer may enforce to all legal effect the existing interdict against Thomson. The present judgment does not affect his rights in that respect, but instead of enforcing that interdict he has raised a new process against the firm, which, in the opinion of the Lord Ordinary, must be dealt with independently of the previous case."

[1] Campbell v. Aitken, May 31, 1837, 15 S. 1049; Earl of Leven and Melville v. Cartwright, June 12, 1861, 23 D. 1038, 33 Scot. Jur. 521; Caledonian Railway v. Lockhart, May 26, 1855, 17 D. 775, 27 Scot. Jur. 465.

[2] Gray v. M'Hardy, June 4, 1862, 24 D. 1043, 34 Scot. Jur. 521.

[3] Carmichael v. Anstruther, June 19, 1866, 4 Macph. 842, 38 Scot. Jur. 440; Padwick v. Stewart, March 4, 1874, *ante*, vol. i. p. 697; Huntly v. Nicol, Jan. 9, 1858, 20 D. 374, 30 Scot. Jur. 211.

[4] Gillespie v. Russel, June 26, 1857, 19 D. 897, 29 Scot. Jur. 415; Strathmore v. Strathmore's Trustees, May 24, 1833, 11 S. 644, 5 Scot. Jur. 382; Gardiner, &c., v. Leith Dock Comrs., June 17, 1864, 2 Macph. 1234, 36 Scot. Jur. 617, March 12, 1866, 4 Macph. (H. L.) 14, 38 Scot. Jur. 279; Russel v. Crichton, June 19, 1838, 16 S. 1155, 10 Scot. Jur. 505; Sykes v. Wilson, Feb. 2, 1866, 4 Macph. 349, 38 Scot. Jur. 181.

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and discharges, in terms of the note of suspension and interdict." Now, your Lordships will not fail to observe that the words of the prayer of the note, which was granted by Lord Mackenzie, and afterwards affirmed by this Division of the Court, are identical with the words of the prayer of the note here.

The allegation of the complainers is this:—"The respondents, who carry on business as engineers in Glasgow, have since 28th May 1875 infringed, and they are at present in course of infringing, the said letters-patent, altered and amended as aforesaid, by making, vending, or using improvements in apparatus used in expanding boiler tubes of the description set forth in the said specification and disclaimer and memorandum of alteration, or of a description substantially the same. The respondents have, within the said period, made and sold, and still are making and selling in Glasgow and elsewhere, tube expanders of the description set forth in the said specification, as altered as aforesaid, or of a description substantially the same. The said infringements of the complainer's said patent have been, and are being, carried on by the said William Thomson, or at least he has been and is actively participating in the said infringements." Then he sets forth in the 12th statement:—"The complainer has repeatedly required the respondents to desist from infringing the complainer's said patent, but they refuse to do so, and the present action has therefore been rendered necessary. In particular the complainer's law-agents, of this date (10th November 1875), intimated to the respondents that they had been instructed by the complainer to call their attention to the respondents' infringement of the complainer's said patent, and to intimate that, failing their receiving from the respondents an undertaking immediately to discontinue the infringement, proceedings would at once be instituted against the respondents to enforce the complainer's rights. Of this date (25th November 1875), after further correspondence, the respondents, through their law-agents, wrote as follows, *videlicet*,—'In reply to yours of the 23d and 24th, we enclose (1) a cutting from a mechanical journal shewing on the left side a drawing of Mr Dudgeon's expander, and on the right side a drawing of Mr Thomson's expander; and (2) a separate drawing of "Thomson's new expander, patented in 1874." Our clients have made and sold expanders under their patent, conform to these drawings, but no expanders of any other sort, and certainly nothing at all resembling Mr Dudgeon's machine.'" Then in the 13th article he says:—"The drawings referred to in the said last-mentioned letter are herewith produced and referred to. The drawings marked A and B thereon represent machines or implements which are infringements of said patent altered and amended as aforesaid."

The respondents, in answer to this, say that they are not infringing. But they further plead the invalidity of the complainer's patent, and they plead that on different grounds from those stated in the former process. The complainer says that this is *res judicata* as being "competent and omitted" in the former process. The Lord Ordinary has repelled this plea, and this reclaiming note has been presented against his judgment.

But it appears to me that before considering that plea there is a preliminary question, and that is, whether the complainer has chosen the proper remedy. The complainer alleges that the firm of Thomson and Company is a mere name for William Thomson. But, whether that be so or not, if the allegations of the complainer are true, it is clear that a breach of interdict has been committed by Mr Thomson. Whether Mr Donaldson has been participant in the breach of interdict does not appear. It seems to me that we cannot allow the complainer

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to proceed unless he shall present a complaint against Thomson for breach of interdict. We ought not to grant a second interdict when the first has been broken. The interdicts of this Court must be obeyed.

The only course is that the present process should be sisted in order to allow the complainer to bring a complaint for breach of interdict.

LORD DEAS concurred.

LORD ARDMILLAN.—There are two questions raised here, but I quite agree that the preliminary question is whether the appropriate remedy has been taken. If Thomson be substantially the offender, if he has broken and is breaking the interdict, the proper proceeding is for breach of interdict. If the interdict is broken the proper remedy is against the breaker. Whether Thomson by taking a partner can get rid of the interdict is another matter. The question of *res judicata* is a separate matter. I may have formed an opinion on that matter, but I do not express it. All that we ought to do at present is to sist process. That is the proper procedure.

LORD MURE concurred.

THE COURT pronounced this interlocutor:—"Sist process to give complainer an opportunity of presenting a petition and complaint for breach of the interdict granted by the interlocutor of Lord Mackenzie, dated 31st January 1873, adhered to by this Division of the Court on 4th July following, reserving all questions of expenses."

D. CURROR, S.S.C.—AULD & MACDONALD, W.S.—Agents.

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WILLIAM ANDERSON (Watson and Campbell's Trustee), Appellant and Respondent.—*D.-F. Watson—Balfour.*

WILLIAM MACKINNON (Crawford's Trustee), Respondent and Appellant.—*Asher—Pearson.*

Bankruptcy—Cautioner—Bill of Exchange—Ranking.—A guaranteed payment of debts due by B to C. C, by discounting B's bills, obtained full payment of B's debt; but in consequence of B and C afterwards becoming bankrupt, the bank with whom the bills had been discounted ranked on C's estate for the full amount of the bills and obtained payment of a dividend. *Held* that as C's estate had not lost any part of B's debt except the dividend repaid to the bank, his trustee could not claim more under the guarantee, and that A having become bankrupt, C's trustee could be ranked on A's estate for that amount only.

Bankruptcy—Double Ranking—Bill of Exchange.—A accepted bills for accommodation of B, who discounted them at a bank. A and B having become bankrupt the bank ranked on both estates for the full amount of the bills. A's trustee claimed to retain a debt due by him to B's estate as a security for the dividend on the bills paid by him on B's account to the bank on the ground that he was entitled to be reimbursed for his loss by B.

Held that the bank having been already ranked on B's estate for the full amount of the bills, A's trustee could not also be ranked for the same debt, and therefore was not entitled to retain the sums due to B's estate either in security or in satisfaction.

Bankruptcy—Double Ranking—Bill of Exchange—Cautioner.—A cautioner was called on to pay a debt on failure of the principal debtor. In an accounting between the estates of the principal debtor and of the creditor who had both become bankrupt the cautioner maintained that the debtor's estate was entitled to

credit for sums lost through accommodation bills discounted for behoof of the creditor. *Held* that as the discounting banks had already been ranked for the bills on the creditor's estate there could not be a second ranking.

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1ST DIVISION.

Sheriff of Renfrew.

M.

THE following questions arose in the sequestration of Alexander Crawford, timber merchant, Greenock, who was sequestrated on 14th August 1874. William Mackinnon was appointed trustee on his estate.

(1) On 22d February 1872 Crawford granted to Watson and Campbell, iron merchants, Glasgow, a letter of guarantee, bearing "I hereby undertake liability for and guarantee payment to you of all sums due or to become due to you by Messrs Thomas Shaw and Company, rivet manufacturers, Greenock, upon promissory-notes, bills, drafts, cheques, or other obligations made, granted, accepted, indorsed, or delivered, or hereafter to be made, granted, accepted, indorsed, or delivered by them to you or to any person or persons on your behalf, and also of all sums due or to become due by them to you upon accounts opened or to be opened for goods supplied or to be supplied by you to them." Watson and Campbell were sequestrated on 17th March 1874, and William Anderson was appointed trustee. Shaw and Company were sequestrated on 30th March 1874.

At the date of Watson and Campbell's sequestration there were bills drawn by them, and accepted by Shaw and Co., and indorsed to banks, amounting (less rebate of interest) to £11,025, 8s. 5d. Of these £3,402, 10s. 5d. were accommodation bills not falling under the guarantee, thus leaving £7,622, 18s. The banks ranked for the full amount of the bills on each of the bankrupt estates of Watson and Campbell and Shaw and Co. They were paid a dividend of 4s. 8½d. from Shaw and Co.'s estate. The amount of dividend on Watson and Campbell's estate had not been ascertained, but was expected to be about 2s. in the pound. The trustee on Watson and Campbell's estate claimed to rank on Crawford's estate under the guarantee for £7,622, 18s., less £2619, 2s., the dividend received by the banks from Shaw and Co.'s estate. Crawford's trustee maintained that Watson and Campbell's trustee was only entitled to rank on Crawford's estate for the amount of the dividend which they had paid to the banks on the bills.

(2) On 28th March 1873 the following agreement was entered into between Watson and Campbell and Shaw and Company:—"Thomas Shaw and Company having this day handed up to Watson and Campbell the acceptances of Alexander Crawford, timber merchant, Greenock, to the said Watson and Campbell, for the sum *in cumulo* of £8000, it is hereby declared and agreed that the proceeds of said acceptances, when discounted by the said Watson and Campbell, are to be applied to the uses and purposes of the said Watson and Campbell and the said Thomas Shaw and Company, in equal proportions, and the bills, when at maturity, are to be renewed upon the said Alexander Crawford granting fresh acceptances to the said Watson and Campbell for that purpose, and the said Watson and Campbell are to supply the said Thomas Shaw and Company with such sums as may be required for their business purposes from time to time, until the total amount so supplied shall amount to the half of the proceeds of said acceptances." Crawford granted acceptances to Watson and Campbell for £8000, and these were discounted and one-half of the proceeds paid to Shaw and Company, and the other half to Watson and Campbell. Crawford's trustee alleged that Crawford got no value for Watson and Campbell's half of these acceptances, but this was denied by Watson and Campbell's trustee. The banks who discounted the bills ranked on the estate of Watson and Campbell for the full amount of the bills. Crawford's trustee paid to the banks a dividend of £666, 13s. 4d. on the bills for £4000 received by Watson and Camp-

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bell, and he maintained that he was entitled, as Crawford received no value for his acceptances, to set off that sum against the claims of Watson and Campbell under the guarantee referred to in the first branch of the case. Watson and Campbell's trustee resisted this claim, on the ground that it would be a double ranking for the bills on which he had already paid a dividend to the banks.

(3) Crawford's trustee further maintained that, as £3402, 10s. 5d. of the £11,025, 8s. 5d. bills drawn by Watson and Campbell and accepted by Shaw and Company were for the accommodation of Watson and Company, that, as cautioner under the guarantee of Shaw and Company, he was entitled to see that Shaw and Company were allowed a proper amount of dividend for Shaw and Company's loss on these accommodation bills. Watson and Campbell's trustee having paid a dividend to the banks upon the £3402, 10s. 5d. resisted the claim, on the ground that to allow a dividend to Shaw and Company would be a double ranking for the same debt.

Watson and Campbell's trustee having claimed in Crawford's sequestration in accordance with his contentions mentioned in the preceding narrative, Crawford's trustee pronounced the following deliverance:—"The trustee calls upon the claimant to amend his affidavit in terms of the 51st section of the 'Bankruptcy (Scotland) Act, 1856,' to the extent of ranking on the bankrupt estate for the dividends actually paid from the estate of Watson and Campbell, on the amount contained in the bills referred to in his claim and affidavit, under the deductions mentioned therein. The claimant is called, in the event aforesaid, to free and relieve the trustee and the bankrupt estate of the sum of £666, 13s. 4d., being the amount of the dividend declared, and about to be paid, as well as the amount of any dividends hereafter to be declared on the sum of £4000, being one-half of the proceeds of certain acceptances, amounting in all to the sum of £8000, of the bankrupt to Thomas Shaw and Company, coppersmiths, Greenock, for which the bankrupt got no value, and which were granted to Watson and Campbell for their accommodation to the extent aforesaid of £4000, all in terms of an agreement between Watson and Campbell and Thomas Shaw and Company, of date 28th March 1873. He is further called to relieve the trustee and the bankrupt estate of the sum of £3402, 10s. 5d. of the acceptances referred to in the claimant's affidavit, in respect the acceptances were to that extent for the accommodation of Watson and Campbell, and have been paid by the said Thomas Shaw and Company, the parties for whom the bankrupt was cautioner."

Watson and Campbell's trustee appealed to the Sheriff, and pleaded;—(2) Alexander Crawford's obligation being to make good to Watson and Campbell whatever sum Thomas Shaw and Company failed to pay, it is *jus tertii* to the respondent what dividends Watson and Campbell's estate has paid, or may yet yield, to the indorsees of the bills in question. The appellant claims no more than Alexander Crawford undertook to pay. (3) The appellant having retired or secured the retirement of the bills in question, by allowing the indorsees to rank and draw dividends from Watson and Campbell's estate upon the full amounts thereof, is *in titulo* to enforce the obligation contained in said undertaking to the extent of his claim; and to confine the appellant's claim to a dividend upon a dividend, as contended for by the respondent, would be to violate the terms of the undertaking, and to relieve Alexander Crawford of his obligation at the expense of Watson and Campbell's creditors, and, *inter alia*, of the holders of said bills. (4) The respondent being no party to the agreement of 28th March 1873, cannot found upon it, and Watson and Campbell's estate having already been ranked on for the £8000 referred to in the trustee's deliverance, no second claim or double ranking can be

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made or given in respect of any part of it. (5) Watson and Campbell's estate having already been ranked on for the £3402, 10s. 5d. referred to in the deliverance appealed against, and the appellant having deducted it claiming upon this estate, it cannot be set against the appellant's claim a second time.

Crawford's trustee pleaded;—(2) The appellant being only entitled to rank on the estate of the bankrupt Crawford for the dividends paid, or that may be paid, from the estate of the said Watson and Campbell on the amount contained in the bills referred to in his claim and affidavit, less the deductions mentioned therein, the deliverance of the trustee ought to be sustained, and an amended affidavit lodged, or the appeal dismissed with costs. (3) The appellant, in the event foresaid, being bound to deduct from the amount of his claim the foresaid sum of £666, 13s. 4d., being the dividend paid from the estate of the bankrupt Crawford on the one-half of the foresaid sum of £8000 ranked thereon, and for which the bankrupt got no value, and also any further dividend which may be paid thereon, the deliverance of the trustee ought to be sustained and an amended affidavit lodged, or the appeal dismissed with costs. (4) The appellant in the event foresaid being bound to deduct from the amount of his claim the foresaid sum of £3402, 10s. 5d. of accommodation to Watson and Campbell, or at all events the dividend paid from the estate of Thomas Shaw and Company thereon, the deliverance of the trustee ought to be sustained, and an amended affidavit lodged, or the appeal dismissed with costs.

The Sheriff-substitute (Smith) pronounced an interlocutor finding, *inter alia*, "that the appellant is entitled to be ranked for the whole balance which was due by Shaw and Company to Watson and Campbell, amounting, as above, to £5003, 16s., and that the respondent has failed to establish his claim to set off the £666, 13s. 4d. paid or allowed as a dividend on the foresaid sum of £4000 against the appellant's ranking: Therefore ranks the appellant for the said sum of £5003, 16s.: Finds the appellant entitled to the expenses of process; allows," &c.*

Crawford's trustee appealed to the Court of Session.

Argued for him;—(1) The trustee on Watson and Campbell's estate was only entitled to rank for the amount of dividends which they had paid to the banks on the bills, which was the whole loss which they had suffered by the failure of Shaw and Company. Watson and Campbell having only paid a dividend to the banks could not maintain that they were in right of the bills.

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* "NOTE.—The principal question at issue is whether the appellant, as trustee, is entitled to rank under the guarantee for the whole sums due by Shaw and Company, or only for the dividend which the appellant may be able to pay on the bills covered by the guarantee. The Sheriff-substitute fails to see why the creditors of Watson and Campbell should not get the benefit of the undertaking by Crawford to pay all Watson and Campbell's advances to Shaw and Company. If Watson and Campbell had remained solvent, Crawford's trustee must have paid, or rather allowed, a ranking for everything due under the guarantee. Why should Watson and Campbell's insolvency put him in a better position? As regards the claim to set off the £666, 13s. 4d. against the appellant's ranking, the Sheriff-substitute thinks that the respondent has shewn no good reason for it. The bills referred to in the agreement between Watson and Campbell and Shaw and Company, on which the respondent founds, have been ranked already on Watson and Campbell's estate. . . . The sum of £3402, 10s. 5d. has been deducted from the amount of the bills falling under the guarantee, and full credit has been given for the dividend received from the estate of Shaw and Company."

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(2) Crawford having granted the acceptances for the accommodation of Watson and Campbell, and having paid a dividend on the bills to the banks, was entitled to retain the sum due under the guarantee in satisfaction or in security of the sums which they had paid.

(3) Crawford's trustee being cautioner for Shaw and Company was entitled to see the accounting properly conducted between them and Watson and Campbell. Watson and Campbell ought to repay Shaw and Company the amount which they had paid to the banks as dividend on the accommodation bills.

Watson and Campbell's trustee argued;—(1) He was entitled to full indemnity under the guarantee. The Sheriff had given too much, but yet Watson and Campbell's estate ought to be ranked for the full amount of the bills to the effect of drawing no more than the dividend which they paid to the bank. The amount the trustee might claim was different from the sum he might receive on a ranking, and all he desired was to be kept free from loss.[1]

(2 and 3) The claim of Crawford's trustee amounted to a demand for double ranking on the same estate for the same debts.

At advising,—

LORD PRESIDENT.—The appellant here is trustee on the sequestrated estate of Alexander Crawford, and the respondent is trustee on the sequestrated estate of Watson and Campbell. Three questions have arisen between them, all of some interest and importance.

1. The first arises on a letter of guarantee granted to Watson and Campbell by Alexander Crawford before his sequestration, by which he undertook liability for and guaranteed "payment to you of all sums due or to become due to you by Messrs Thomas Shaw and Company, rivet manufacturers, Greenock, upon promissory-notes, bills, drafts, cheques, or other obligations made, granted, accepted, indorsed, or delivered, or hereafter to be made, granted, accepted, indorsed, or delivered by them to you or to any person or persons on your behalf, and also of all sums due or to become due by them to you upon accounts opened or to be opened for goods supplied or to be supplied by you to them." At the date of the sequestration of Watson and Campbell, which occurred on 17th March 1874, there were in the hands of various banks a large number of bills with the names of Watson and Campbell and Shaw and Company. Shaw and Company were sequestrated on the 30th of the same month, so that the sequestrations were practically contemporaneous. The total amount of these bills, less rebate of interest, was £11,025, 8s. 5d., but it appears that £3402, 10s. 5d. of these bills, drawn upon and accepted by Watson and Campbell, were accommodation bills, and did not import any debt due by Shaw and Company. Accordingly the trustee on Watson and Campbell's estate deducts that amount from the total amount of the bills, and states the debt due by Shaw and Company at £7622, 18s., for which (under deduction of the dividend paid by Shaw and Company's estate to the bank) he claims to rank on Crawford's estate under the guarantee. The banks holding the bills ranked both on the estate of Watson and Campbell and on the estate of Shaw and Company for the amount of the bills. The

[1] 1 Bell's Com. (5th ed.) p. 348; 2 Bell's Com. (5th ed.) pp. 338, 339, 527, 528; Keith v. Forbes, June 11, 1794, 3 Paton's Appeals, 350; Bankruptcy Act, 1856, 19 and 20 Vict. c. 79, secs. 56-60; Fall's Creditors v. Sir Wm. Forbes & Co., May 27, 1790, M. 14,135; Black v. Melrose, Feb. 29, 1840, 2 D. 706, 15 Faculty Decisions, 719, 12 Scot. Jur. 393.

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dividend payable by Watson and Campbell is not yet ascertained, but if, as is expected, it be 2s. in the pound, the ranking would amount to about £1100, of which between £700 and £800 would effeir to the debt due by Shaw and Company to Watson and Campbell. It is necessary, in order to judge of the claim under the guarantee, to see what Watson and Campbell have lost, and what, consequently, they are entitled to be relieved of out of the estate of Crawford. These bills having been accepted by Shaw and Company for value were discounted by Watson and Campbell and they received the proceeds, and thereby Watson and Campbell obtained payment of the full amount due to them by Shaw and Company. If nothing more had taken place, and the bills had been retired by Shaw and Company, Watson and Campbell's debt would have been fully paid. But both these firms have become bankrupt, and the banks are entitled to rank and have ranked on both estates. Now, to the extent of the dividend to be paid to the banks by Watson and Campbell's estate upon the £7622, 18s. bills, and to that extent only, has that estate been damaged by the failure of Shaw and Company, for whom Crawford granted the cautionary obligation. Watson and Campbell obtained the full benefit of the discounting of the bills, and all that their estate has been made to refund is just the dividend paid to the banks on the amount of the bills, and that is the amount which Crawford was liable for under his guarantee. If he was solvent he would be liable for that amount,—but Crawford has become bankrupt. The consequence is that Watson and Campbell have a bankrupt cautioner instead of a solvent one, and they must be prepared to take a dividend instead of a full payment.

It was maintained that Watson and Campbell's trustee was entitled to rank on Crawford's estate for the full amount of the bills, to the effect of drawing what they have to pay as a dividend to the banks. The full amount of the debt was £7622, 18s., but that has been already paid to Watson and Campbell by the banks, and all that has to be paid back is the dividend. To that extent they are creditors of Crawford. This contention is entirely founded on an attempt to drag in a principle which has here no application, viz., that a creditor may go against several co-obligants for the full amount of his debt to the effect of obtaining full payment. This is not a case of co-obligants, but a simple case of one obligant with a cautioner. The creditor comes against the cautioner. What room can there be for saying that the creditor in the cautionary obligation is to have a preference over all the other creditors of the cautioner? If a creditor in an obligation of guarantee is allowed to rank to the effect of obtaining from the cautioner the full amount of the debt guaranteed after having obtained payment in full from the banks and having only paid them back a dividend, that might be to reimburse him of his whole loss at the expense of the other creditors of the cautioner. I am therefore very clearly of opinion that Watson and Campbell's trustee is only entitled to rank on Crawford's estate for the amount they have paid on the bills.

2. The next question is of an entirely different kind, and arises in this way. Crawford granted certain bills for £8000 for the accommodation of Watson and Campbell and Shaw and Company when all of them were solvent. These bills, in which Crawford was acceptor, were discounted, and Watson and Campbell and Shaw and Company each received £4000. The averment of Crawford's trustee is that Crawford got no value for the proceeds of the bills which were paid to Watson and Campbell. The fact as to value is disputed, but we may assume in the meantime that Crawford got no value. It is clear

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that if Crawford had been solvent he would have been obliged to pay the amount of the bills to the banks, and would have been entitled to rank on the estate of Watson and Campbell for the full amount. But there are other circumstances which must be taken into account. The banks have claimed dividends on this £4000 from Crawford's estate, from Shaw and Company's estate, and also from Watson and Campbell's estate. Now, the dividend which the banks claim to draw from Crawford's estate is £666, 13s. 4d. What Crawford's trustee maintains is that he is entitled to claim this £666, 13s. 4d. upon Watson and Campbell's estate, and as he is bound under the guarantee to pay a sum of money to Watson and Campbell's estate, he maintains that he may retain that sum as in security or in satisfaction of his claim for £666, 13s. 4d. What he proposes to retain is the dividend to be paid from his estate to Watson and Campbell. Now, if Crawford's trustee had been entitled to rank on Watson and Campbell's estate for the £666, 13s. 4d. I should have been of opinion that he was entitled to retain the sum due under the guarantee. But the right of retention depends on whether there is a debt due for which Crawford is entitled to be ranked on Watson and Campbell's estate. I am of opinion that there is not, on the ground that it would be a double ranking for the same debt. The bills for £4000 have been ranked on the estate of Watson and Campbell by the banks. They have received a dividend, and when a bankrupt estate pays a dividend it pays the debt. The banks are also entitled to rank on Crawford's estate, because his name is on the bills. But a cautioner is not entitled to rank on the bankrupt estate of the principal debtor which has already paid the debt by a dividend. Therefore I am against Crawford's trustee on this point.

3. Crawford's trustee maintains that the bankrupt, as cautioner for Shaw and Company, is entitled to see that accounts are properly settled between the estates of Shaw and Company and Watson and Campbell, and that proposition is sound. Now, of the bills which have been ranked on both estates it appears that to the extent of £3402, 10s. 5d. these were for the accommodation of Watson and Campbell. What Crawford's trustee maintains is that in settling accounts this sum of £3402, 10s. 5d. should be placed to the debit of Watson and Campbell, or at all events to the extent to which Shaw and Company's estate has been injured. The banks have ranked on both estates, and drawn a dividend on both. But the bills being for the accommodation of Watson and Campbell it is said that Shaw and Company should be relieved of the loss which they have sustained by having been obliged to pay a dividend on the bills. I do not dispute that Crawford's trustee is entitled to put himself in the place of Shaw. But what he is pleading for is to have a double ranking, the banks having been ranked already both on Shaw and Company's estate, and also on Watson and Campbell's. This is just an attempt to make Shaw and Company rank on Watson and Campbell for a part of the debt for which the banks have already been ranked. I am clear, therefore, that the claim must be disallowed.

While Crawford's trustee, therefore, was right on the first point, he is wrong on both the others.

Lord Deas.—On the first question the Sheriff-substitute says that he "fails to see why the creditors of Watson and Campbell should not get the benefit of the undertaking by Crawford to pay all Watson and Campbell's advances to Shaw and Company. If Watson and Campbell had remained solvent Crawford's

trustee must have paid or rather allowed a ranking for everything due under the guarantee. Why should Watson and Campbell's insolvency put him in a better position?" But this involves the whole of the first question. If the bankruptcy of Watson and Campbell does not put Crawford's trustee in a better position, the judgment of the Sheriff-substitute will be correct.

In the case of Melrose v. Black, 29th February 1840, 2 D. 706, and F. C., Mr Melrose held the bills of certain persons pledged to him for the debt of another person, and he claimed to rank on the estate of each of these persons to the effect of obtaining full payment of his debt. The persons who granted the bills were no parties to the arrangement by which the bills were given to Melrose, and they maintained that each of them was entitled to rank on the estate of the person who had pledged these bills to Melrose, and that Melrose was not entitled to rank on that estate after having ranked on the estates of the granters of the bills. The argument turned on the question whether Melrose was in the same position as if he had held a cautionary obligation, in which case the cautioners would be bound to relieve him of the whole loss sustained by the bankruptcy of the principal debtor. Lord Cunninghame, in a note to his interlocutor passing the note of suspension, gave his opinion that Melrose was not entitled so to rank. Lord Jeffrey, also, was of the same opinion, and so decided. When the case came to the Inner-House there was a full discussion at the bar, and the Court seemed to be in favour of the interlocutor. The only opinion fully reported as delivered, at that first advising, is that of Lord Medwyn, and that is only to be found in the Faculty Collection. His Lordship said that he entertained doubts, while Lord Glenlee expressed himself in favour of the interlocutor. The result, however, was that minutes of debate were ordered, which were drawn by me as counsel on one side, and by Lord Curriehill, then Mr Marshall, on the other. By this time I had come upon the case of Fall and Company against Sir William Forbes and Company, 27th May 1790, M. 14,135, which somehow had been lost sight of by the authorities. Even after that, however, there was great difficulty, for when the case came to be advised on the minutes of debate it was delayed till next day. Lord Medwyn then delivered an elaborate opinion against the interlocutor. The Lord Justice-Clerk said that he had been in favour of the interlocutor, but had changed his opinion on reading the minutes of debate; while Lord Meadowbank said,—"I was of the same opinion that your Lordship entertained at first, and even yesterday I came here prepared to adhere to the interlocutor. But after a communication with my brother Lord Medwyn last night I was led again to consider the case, and have now come to be of the same opinion as your Lordship on the grounds he has stated. I am therefore glad that the case was delayed till to-day." The claim of Melrose was sustained.

Melrose, however, was solvent, and was in right of the bills. Here all the parties are bankrupt, and none of them are in right of the bills (which are in the hands of the banks), except to the extent of the dividend paid on the bills. It seems, therefore, plain, that Watson and Campbell's trustee can only rank to the extent of the dividend. It may be a question whether he can rank even for the dividend, but I am clearly of opinion that the case of Melrose does not warrant any further ranking.

On the second question, with regard to the sum of £666, 13s. 4d., for which Crawford's trustee claims to rank on the estate of Watson and Campbell, I agree with your Lordship that this would be a double ranking. That is conclusive

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against the claim. It is true that in the case of Fall and Company, the judgment of this Court had been,—"The Lords found that Sir William Forbes and Company are entitled to rank for the whole of their debt as it stood at the date of the sequestration, without previously imputing thereto the sums they have received from the bills indorsed to them in security; and found that Sir John Anstruther is entitled to be ranked for the debts due to him by Messrs Fall arising from the bills paid to Sir William Forbes and Company." If that second branch of the case be law, Crawford's trustee would be entitled to rank for the £666, 13s. 4d. But the unsoundness of this second branch of the case of Fall and Company was fully recognised in the case of Melrose. Accordingly, you will find that Lord Medwyn, after observing that he was confirmed in his opinion by the first branch of the case of Sir William Forbes and Company in Fall's bankruptcy, went on to say,—"No doubt it was also held that the surety should rank likewise. On this point the decision has not been followed in subsequent cases, and on this principle, that it was just the same as if the party had put his name as cautioner on a bill. But on the first point the decision has been followed in like cases, especially in that of Robertson." Now, at the discussion in the present case I perfectly recollected and stated that one branch of the case of Fall and Company had been held good, while the other was held bad. The Dean of Faculty thought the case had gone to the House of Lords. About this I was sure there was some mistake, and it turns out that the Dean had in his view a different case of Sir William Forbes and Company altogether, which did go to the House of Lords, but to which I did not at all refer. If the second branch of Fall and Company's case had been law it would have been an authority for Crawford's trustee on the second question we are considering here, but that is certainly not so.

With reference to the third question, an account must be made out before we can say which estate is creditor. The date of sequestration is the *punctum temporis* to be looked to, and nothing which has happened subsequently can be taken into account.

On all the three points I agree in the result arrived at by your Lordship.

Lord Ardmillan.—On the first question raised I have really no doubt. Crawford gave a guarantee to Watson and Campbell that Shaw's debts to them should be paid. He guaranteed no debt except debt due by Shaw to Watson and Campbell. He was not a party to the bills referred to in this part of the case. The only ground of his liability is the guarantee. Watson and Campbell got cash at the bank for the bills granted by Shaw to them. The banks, therefore, became the holders and the creditors on these bills. The drawers and acceptors were liable to the bank. As between themselves, Shaw and Company were liable to Watson and Campbell to the extent to which Watson and Campbell, as drawers, paid the bank what Shaw and Company, as acceptors, should have paid.

To that extent, and no further, were Shaw and Company indebted to Watson and Campbell, and to that extent also, and no further, was the debt of Shaw and Company within the guarantee by Crawford.

The sequestration of Watson and Campbell was on the 17th March, and the sequestration of Shaw and Company was on the 30th March 1874. At both of these dates the banks were the holders and the creditors in the bills, and Watson and Campbell, who had got cash for the bills, were not then the creditors

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of Shaw and Company. Apart from the payment of the dividend from Watson and Campbell's estate, Shaw and Company were not the debtors of Watson and Campbell on these bill transactions, and there can be no claim on this guarantee beyond the debt due by Shaw and Company to Watson and Campbell.

But Crawford's estate was also sequestrated in August 1874; and it is said that that makes a difference. I think it does not.

If Watson and Campbell had remained solvent they could have recovered all the amount of these bills from Crawford under the guarantee. The Sheriff remarks this, and correctly. But, then, Watson and Campbell would have paid the amount of all the bills, and would just have brought the debt within the guarantee, and have recovered what they paid. But here they have paid only the dividend, and what they have paid is, I think, the measure of what they can recover. Then, take another supposition. If Watson and Campbell had been sequestrated, and if Crawford had been solvent, the claim against him would have been only to the extent of the payment made, that is, of the dividend. Beyond that amount Watson and Campbell had not paid, for Shaw was not bound to pay Watson and Campbell, nor can Crawford be further bound on his guarantee than Shaw was under his obligation. Then what is the effect of Crawford's sequestration on the claim of Watson and Campbell?

I think Watson and Campbell, the creditors of Crawford, are entitled to payment so far as Crawford's estate can pay, but they are not preferable creditors. The law places Crawford's creditors on a footing of equality. If Watson and Campbell were entitled to rank on Crawford's estate for a larger sum than Crawford was bound to pay, while the other creditors were ranked only for the sums which he was bound to pay, then that would be a preference, an inequality of ranking, a breach of the principle of equal and equitable division.

On this point I have no difficulty in concurring with your Lordship.

The other two questions, the 2d and 3d, here raised, involve, as I think, one point, but that is a point of much importance not now open, and not to be lightly opened. The banks have ranked and drawn dividends on all these estates. There cannot be double ranking on a sequestrated estate for the same debt. This has, I think, been settled. The authority of Professor Bell (2 Bell's Com. 527, 528) is distinct, and his reasoning in support of the doctrine which he states is, in my opinion, forcible, and I am not aware of any opposing authority. Payment of dividends on a debt is payment of the debt; and there can be no double ranking.

The right of retention by Crawford depends on the right of Crawford to rank on Watson and Campbell's estate. If he had no such right, he cannot retain. I am of opinion that Crawford had no right to rank on Watson and Campbell's estate. The banks holding a bill with several names on it have several parties indebted to them, and on the bankruptcy of these parties the bank can claim on each estate.

But when a bill held by the bank has been ranked as a debt on one estate, there cannot be a second ranking on the same estate in respect of the same debt and the same bill. That would be a double ranking for the same debt on the same estate, which, in my opinion, is not permitted. In a sequestration which contemplates and secures equality of distribution this double ranking is unfair on principle, and is not recognised by any authority.

LORD MURE.—The three questions here raised are of importance, and not free

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from difficulty. As regards the ranking on Crawford's estate under the letter of guarantee, that question appeared to me at first to be rather complicated. But when examined it resolves, I think, into these, viz., of what sum is the trustee on Watson and Campbell's estate entitled to be relieved in respect of that letter by the trustee on Crawford's estate? and in what way and to what extent is he to be relieved? As regards the sum itself, it appears to me that Watson and Campbell's trustee is entitled to be relieved of, that is, to rank for, whatever sum that estate has had to pay in respect of the bills due to it by Shaw and Company; or, in other words, for whatever loss the estate has sustained through Shaw and Company of the nature specified in the letter. Now, the loss which Watson and Campbell's estate has sustained is just the sum which they have had to pay as a dividend upon the bills in question which were held by the bank; and for that sum they are, I think, entitled to be ranked on Crawford's estate, but only *pari passu* with his other creditors. For Watson and Campbell are, I conceive, under these proceedings, simply creditors of Crawford for the amount of that sum; and I am not aware of any grounds in law, and there are certainly none in equity, for holding that a creditor under a letter of guarantee of this description is in a more favourable position in the matter of ranking than any other creditor of a bankrupt.

On these grounds I am opinion that the interlocutor appealed from should be altered, in so far as it proposes to rank the trustee upon Watson and Campbell's estate for anything beyond a dividend upon the dividend actually paid to the bank by that estate. But, in other respects, the judgment of the Sheriff is, I think, well founded, and ought to be adhered to, and that substantially upon the same grounds as those which have been explained by your Lordship in the chair.

THE COURT pronounced this interlocutor:—"Recall the interlocutor of the Sheriff-substitute of 17th January 1876: Find that the trustee on the sequestrated estate of Watson and Campbell is entitled to rank on the sequestrated estate of Alexander Crawford for the dividends actually paid from Watson and Campbell's estate on the bills referred to in his claim, and for no more: Find that the trustee on the sequestrated estate of Alexander Crawford is not entitled to retain the dividend payable to the trustee on Watson and Campbell's estate in security or satisfaction of the sum of £666, 13s. 4d. claimed by him, and that he is not entitled to be ranked on Watson and Campbell's estate for the said sum of £666, 13s. 4d., or any part thereof: Find that the trustee on the sequestrated estate of Alexander Crawford is not entitled to require the trustee on Watson and Campbell's sequestrated estate to give any relief to the sequestrated estate of Shaw and Company in respect of the dividend paid from that estate on bills accepted or drawn by Shaw and Company for the accommodation of Watson and Campbell, or to state the amount thereof, or of any dividend paid thereon by Shaw and Company's estate, as an item to the debit of Watson and Campbell in balancing accounts between the two estates: Remit to the trustee in Alexander Crawford's sequestration, being the appellant in this process, to give effect to the above findings, and to rank Watson and Campbell's trustee accordingly: Find the said appellant entitled to expenses in this Court, modified to two-thirds of the taxed amount thereof; allow an account," &c.

HAMILTON, KINNEAR, & BEATSON, W.S.—MASON & SMITH, S.S.C.—Agents.

JOHN GILRAY (Robertson's Curator), Applicant.—*Black.* No. 102.

Judicial Factor—Curator Bonis—Powers—Sanction of the Court to a purchase of heritage by a curator bonis.—Circumstances in which the Court approved of a purchase of heritage by the *curator bonis* of a lunatic made without a previous application to the Court. Mar. 18, 1876. Gilray.

(SEE 10 Macph. 715, 44 Scot. Jur. 392.) 1ST DIVISION. Lord Rutherfurd Clark. B.

On 2d April 1867 John Gilray, coal merchant in Edinburgh, was appointed *curator bonis* to William Robertson, ironfounder, Oakfield Foundry, who had become a lunatic. In his report to the Accountant of Court, dated 10th December 1875, the curator made the following statement:—

The ward, previous to the time he became insane, carried on the trade of an ironfounder in the foundry. On the *curator bonis* being appointed, he continued to carry on the business of his ward, rendered it very remunerative, and increased it to a considerable extent.

The ward, at the date of the curator's appointment, was proprietor of one-half of the tenement of land No. 112 Pleasance, Edinburgh, the lower flat as well as the ground to the back of which was used by him as part of the foundry premises.

The Local Authorities, on 30th September 1873, intimated to the ward and his curator, under the Public Health (Scotland) Act, 1867, that a nuisance existed in connection with the premises, and that proceedings under the said Act, to have the said nuisance discontinued or removed, would be immediately taken. This order practically condemned the property as it stood, or at all events occasioned such a thorough repair as to be unprofitable, and indeed impossible without taking down nearly the whole property, and incurring a heavier outlay than has been put out by the curator as aftermentioned, while the return to the ward's estate would have been much less. This tenement was entered by only one common stair, and the other half of the tenement belonged to a Mr Kettle, who had been out of this country for many years. The rents of Mr Kettle's half had been drawn by holders of a bond for £400, granted by him upwards of forty years ago over this and some other property. These parties declined to concur with the curator in making the repairs so ordered, while these could not have been carried out by the curator alone on the half of the property belonging to his ward. To get over the difficulty, however, the holders of the aforesaid bond agreed to expose for sale the half of the property held by them, and this was done, when the curator, in order to conserve the property belonging to his ward, was in a great measure forced to purchase the other half at the price of £260. At the time that this property was so purchased it would have been highly impolitic and injudicious for the curator to have made any application to the Court, as in order to have justified the purchase he would have required then to have shewn the value which he put upon the property, and to have explained his object in making the purchase. To have done so would have resulted in a competition, which would have raised the price of the property far beyond that for which he acquired it. One of the advantages derived by the ward's estate from this purchase is the retention of the ground on which the tenement stood, part of which, and also the lower flat of the house, was used in connection with the foundry; and also the preservation of the usefulness of the back-ground attached to the ward's other property, which would by itself have been too limited to be of much use. The foresaid purchase also gives entire property of an entry common to the two properties, and enables the curator to shut this

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entry up, and retain it as his own. The ward's half of the property produces a gross rental of £14, but after the foresaid intimation from the authorities, and for a year prior to the purchase of the property, the ward's half had stood empty and uninhabited.

Since the purchase the curator has erected new buildings in connection with the foundry. These will materially increase the business facilities of the foundry, and also increase the value of the property belonging to the ward.

In carrying out these erections the *curator bonis* incurred the expenses afterwards referred to, videlicet:—

I. The price paid for said subjects, and the expenses of the transfer thereof, was	£263 16 11
II. He has also paid the accounts to tradesmen, amounting to	381 17 3
	£645 14 2

Before erecting the said buildings and incurring the accounts before mentioned, the curator got the sanction of the heir-at-law of the ward to these proceedings, and an undertaking by him that the sum so expended by the curator should be a burden on the heritable property of the ward in the event of the said heir succeeding to the property.

The ward's wife and family also approve of the curator's proceedings, and have written a letter to that effect.

The foundry proper is rented by the curator from year to year, but these premises were insufficient for and could not be used separately as a foundry. In this way the rent is cheap, and the curator is not likely to be put out as tenant. If he were to be so, he might now be able to carry on business in the ward's own property and the property purchased, although he is better with both these and the foundry proper.

The *curator bonis* would here beg to remind the Accountant that if the foundry business had been abandoned, or in any way materially interfered with, so that no profits had arisen therefrom, the ward's estate would long before this time have been exhausted, or at least greatly reduced, by the expenses of the maintenance of the ward and of the ward's family.

The *curator bonis* now proposes to borrow £200 over the said subjects, as now altered and improved, to enable him to meet the bills granted for part of these expenses, without interfering unduly with the capital of his ward, or curtailing the said business. If this advance is granted the *curator bonis* believes that he could pay it off in a few years.

In these circumstances, the *curator bonis* craved the Accountant "to report these matters to the Lord Ordinary, with the view (first) of having the foresaid purchase by the *curator bonis* sanctioned and approved of; and (second) of granting warrant and authority to the *curator bonis* to borrow £200 over the said subjects."

The Lord Ordinary pronounced this interlocutor:—"Remits to Mr William Watherston, builder, Edinburgh, to inspect the subjects mentioned in the said report, and to inquire and report on the condition and value of the same,—(1) as at the date of the factor's purchase thereof, and (2) as the subjects now exist; together with any other facts and circumstances bearing on the question; whether the factor's said purchase and his subsequent expenditure on the said subjects, all mentioned in the report, were necessary or prudent in the interests of the ward and his estate." *

* Mr Watherston reported:—"I.—The tenement, which belonged to two

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The Lord Ordinary reported the case.*

Argued for the curator;—The curator had traded with the estate, and proprietors, was in a semi-ruinous condition, and in such a state that the property of William Robertson (the ward) could not be repaired without at the same time repairing the property recently acquired by Mr Robertson's *curator bonis*.

"The expense of the repairs necessary to put the premises in a proper habitable condition to the satisfaction of the Local Authority would have been such as to deter the *curator bonis* from executing the repairs, as the return on the outlay from rental would have been quite inadequate. The fair market value of the property and pertinents belonging to the co-proprietor with the ward, as at February 1875, would be £260 sterling to a purchaser other than the ward; but to him or his estate the property and pertinents were of greater value, in consequence of his having acquired by the purchase the exclusive right to three pieces of ground in connection with the property; these are situate on the east, north, and south of the tenement, which would give a feuing area of the value of £25 at the least.

"Considering the whole of these circumstances, I am of opinion that it was really a matter of necessity for the curator to purchase the intervening half of the ruinous tenement, if he meant to conserve the advantages and rights of his ward's property. To have allowed another party to have purchased this half would have materially lessened the value of the rest of the ward's property. I am also satisfied that, as a matter of prudence and policy, the factor acted rightly in purchasing the south half of the ruinous tenement as quietly as he possibly could.

"The area so acquired was of more value to the ward's estate than for feuing, as by its acquisition the foundry business carried on in adjoining premises would be more easily and profitably conducted by the increased area obtained for the manufacture of light and heavy castings.

"Before these operations could be carried on it was necessary to erect walls to enclose the front next the street, and brick or other pillars to carry beams, in order to have the area roofed in and protected from the weather. This has been carried out in a very judicious and inexpensive manner, and the result is a large and well-lighted casting-shop, which would readily command a rent, for such purpose or many other purposes, of about £50 sterling per annum; but it is of more value than this at present, from its connection with the other works of which the ward is lessee.

"The reporter is of opinion that the purchase of the property by the *curator bonis*, and the subsequent expenditure thereon, has been of great importance to the ward's estate in carrying on the foundry business; and apart from that it leaves a subject of a marketable description, and of greater value than the half of the old tenement belonging to the ward, the cost of the other half tenement acquired by his *curator bonis*, and the subsequent expenditure of £381, 17s. 3d."

* "NOTE.—The case is so special that, in the opinion of the Lord Ordinary, it should be dealt with by the Inner-House.

"1. The *curator bonis* asks judicial sanction for the purchase of heritable property which he made without the authority of the Court. He says, with great force, that if he had asked for authority beforehand he would have raised the price against the estate, but if he chooses to act beyond his powers it may be questionable whether he can obtain the subsequent sanction of the Court.

"2. It is not disguised that the purchase was made, to some extent at least, with the view of enabling the *curator bonis* to carry on the business of the foundry to better advantage. The business has been successfully managed, and the Court has allowed the curator a commission for his past management, as it was beneficial to the estate. But in giving the opinion of the Court the Lord President (Accountant of Court, 10 Macph. 715) said—'We cannot sanction his carrying on the manufacturing with the funds under his charge, and we must not do what would imply an approval of his doing so.'

"3. But the curator states that the purchase was in truth a matter of neces-

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made 33 per cent, instead of getting 4 per cent, as he would have done if the money had been invested on heritable security. He had thus been able to support the family of the ward, as well as the ward, which he could not otherwise have done. The Court ought to sanction the purchase.[1]

LORD PRESIDENT.—The circumstances here are very favourable to the application. The purchase of this property was in a manner forced on the curator in order to prevent the estate of the ward from being destroyed, and he seems to have made a good purchase, and to have turned it to good account. The price of the property was £263, and the sum expended on alterations was £381. It is impossible not to see from the report of Mr Watherston that the money was well spent, and that the property was acquired on the most favourable terms. The purchase was beyond the power of the curator, and if there had not been a good reason for his acting as he did we could not now have sanctioned it. But the explanation he gives is a good one. If he had disclosed the reasons which induced him to make the purchase by coming to the Court he would have raised the price of the property, and might have been altogether prevented from acquiring it.

The only point of difficulty is whether there is any precedent for our sanctioning a proceeding which was taken at the curator's own hand. I do not think that there is. We have authorised the purchase by a curator of a property which was of great advantage to his ward. That was done in the case of Watt. The *alveus* of the river Tay opposite the ward's land was there offered to the curator by the officers of the Crown, and he was authorised to make the purchase. That being so, it might have been proper to give this curator the power if he had come to us to ask for it. As he has given a good reason for not coming, I am disposed, if your Lordships agree with me, to sanction what he has done.

He also asks authority to borrow £200 in order to pay off what remains of the price, and expenses incurred in the alterations. I think that it follows of necessity from our sanctioning the purchase that he should be allowed to borrow the money, and I am not disposed to raise any difficulty on this point.

LORD DEAS.—It is plain that if the curator had not taken the course he did there would not have been anything for the support of the wife and family, and perhaps not even enough for the ward. If the curator had come to the Court before making the purchase he might have had a difficulty in satisfying us both of the advantage and necessity of making it. But there is no such difficulty now. I think we would outrage common sense if we were to refuse to sanction what he has done, which really was necessary to prevent ruin to the

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sity in order to preserve the estate. He says that the repairs which had been ordered by the Local Authority to be made on the estate of the ward could not have been executed without at the same time repairing the property which the *curator bonis* acquired, and that the owners or bondholders of that property refused to concur in executing the repairs which were ordered. The reporter to whom the Lord Ordinary remitted does not go quite so far, but he is satisfied that the purchase was very beneficial to the estate of the ward, and represents it to have been in a certain sense a necessity. He is also of opinion that the sum laid out in repairs has been properly expended."

[1] Watt, February 23, 1856, 18 D. 625, 28 Scot. Jur. 280.

ward and the family. If there be a rule against sanctioning the purchase of heritable estate for parties under curatory we are not to stretch that rule to the effect of bringing ruin on the parties, whether they be lunatics or not. I remember a case, not long after I came to the bar, of a Mrs Ritchie, a respectable widow, who had a family of daughters, and as curator for them she employed the money belonging to them in the purchase of house property in George Street, which fell largely in value, and she was held bound to take the property to herself, and account for the price paid. If we were to take that course with the curator here he would have reason to be well pleased, for it would be very much to his pecuniary advantage.

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I have no hesitation in concurring with your Lordship.

LORD ARDMILLAN and LORD MURE concurred.

THE COURT pronounced this interlocutor:—"Remit to the Lord Ordinary to grant the prayer of the curator's application."

D. CURROR, S.S.C.—Agent.

GEORGE FYFFE CHRISTIE AND OTHERS (Chairman and Directors of the Glasgow and District Co-operative Society, Limited), Petitioners.—*Henderson.*

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Mar. 18, 1876.
Christie, &c.
1ST DIVISION.
B.

Joint Stock Company—Petition—Winding up under supervision of the Court—Companies Act, 1862, *secs.* 147, 148, *and* 151.—A petition for continuing the voluntary winding up of a company, subject to the supervision of the Court, in order that the liquidator might be in a position to apply to the Court for orders to restrain creditors from using diligence against the company, was presented by the directors of the company with the concurrence of the liquidator five days before the Court rose for the spring vacation.

Intimation was ordered to be made on the walls and in the Minute-book for two days, and advertisement in the "Edinburgh Gazette," "The Glasgow Herald," and "Daily Mail" newspapers, and on the last day of session an order was pronounced continuing the voluntary winding up subject to the supervision of the Court, "with liberty to creditors and contributors to apply to the Court by motion."

MITCHELL & BAXTER, W.S.—Agents.

WILLIAM HORN HENDERSON, Complainer and Appellant.—*Burnet.* ALEXANDER M'KENZIE, Respondent.—*Strachan.*

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Henderson v. M'Kenzie.

Statute 34 *and* 35 *Vict., cap.* 56 (*Dogs Act*, 1871), *sec.* 2—*Relevancy.*—Section 2 of the "Dogs Act, 1871," enacts that "any Court of summary jurisdiction may take cognisance of a complaint that a dog is dangerous and not kept under proper control." *Held*, that the Act was not restricted in its application to dogs dangerous to human beings.

THE following case in appeal by William H. Henderson, procurator-fiscal for the county of Linlithgow, against Alexander M'Kenzie, was stated by the Sheriff-substitute (Home) of Linlithgow for the opinion of the Court of Session.

2D DIVISION.
Sheriff of Linlithgow.
R.

"This is a cause brought before the Sheriff Court of Linlithgowshire at the instance of the appellant against the respondent, under 'The Summary Procedure Act, 1864' (27 and 28 Vict. cap. 53). It alleges that

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the respondent had been guilty of an offence against, or had contravened the provisions of the second section of 'The Dogs Act, 1871,'* (34 and 35 Vict. cap. 56), in so far as 'the said Alexander M'Kenzie had, on or about the 9th day of September 1875, and still has in his possession, within or at or near his dwelling-house or premises at Whitburn aforesaid, a dog of the retriever breed, or of some other breed to the complainer unknown, which is dangerous, and not kept under proper control; and the said dog by itself, or in company or in concert with another dog belonging to the said accused, and which he has since caused to be destroyed or put away, did (first), on or about the said 9th day of September 1875, and in or near a field on the farm of Blaeberryhill, in the parish and county aforesaid, now or lately occupied by David Grieve, farmer there, chase for a considerable time and distance a flock of greyfaced lambs, or other description of sheep, the property or in the lawful possession of Walter Dandie, then and now or lately residing at Blaeberryhill aforesaid, and did severely bite and shake or worry one of said sheep, and injure and terrify the remainder of the flock; and (second) on or about the said 9th day of September 1875, and in or near a field commonly called the 'Townhead' field, situated on the farm of Whitedalehead, in the parish and county aforesaid, and now or lately occupied by Robert Gardner, bank-agent in Whitburn, did chase and pursue for a considerable time and distance a flock of two-year-old sheep, or other description of sheep, the property or in the lawful possession of the said Robert Gardner, did force and compel or otherwise cause the said sheep to leap the wall between said field and the Cleuch Turnpike Road, and did chase or pursue the said sheep along said road into or towards the village of Whitburn, all in said parish and county, whereby one of said sheep was staved or otherwise injured in both or one of its shoulders, and the remainder of the flock were injured or terrified, in consequence whereof, or of part whereof, the said Alexander M'Kenzie is liable to be ordered to keep the said dog under proper control, or to destroy it, and failing his compliance with such order, is liable to a penalty not exceeding twenty shillings for every day during which he fails to comply with such order.'

"The respondent was cited, and accordingly appeared before the Sheriff-substitute at Linlithgow on 19th October 1875, and the complaint having been read over to him, it was pleaded on his behalf that the libel was irrelevant and incompetent, and did not come within the meaning of the Act founded on, in respect the operation of that Act was limited to dogs which were dangerous to human beings, while the libel only alleged that the respondent's dog was dangerous in respect of its having chased, injured, and terrified sheep. The appellant contended that the Act was not so limited, and that it applied to all dogs which in the opinion of the Court of summary jurisdiction were dangerous to human beings, or to animate or inanimate property.

"The Sheriff-substitute sustained the objection to the relevancy, and dismissed the complaint.

"The appellant (and complainer) appealed against said judgment, and

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* Section 2 of 34 and 35 Vict. cap. 56, enacts—"Any Court of summary jurisdiction may take cognisance of a complaint that a dog is dangerous, and not kept under proper control, and if it appears to the Court having cognisance of such complaint that such dog is dangerous, the Court may make an order directing the dog to be kept by the owner under proper control, or destroyed, and any person failing to comply with such order shall be liable to a penalty not exceeding twenty shillings for every day during which he fails to comply with such order."

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applied in writing within three days after such determination to the Sheriff-substitute to state and sign a case in terms of section 3 of 'The Summary Prosecutions Appeals (Scotland) Act, 1875,' and the same is hereby stated accordingly.

"The questions of law for the opinion of the Court of Session are—(1) Is the second section of 'The Dogs Act, 1871,' limited in its operation to dogs which are dangerous to human beings, and which are not kept under proper control? (2) If not, is the libel relevant in regard to dogs that are dangerous to sheep?"

Argued for the appellant;—There was nothing in the second or any other section of the Act restricting the operation of the Act to dogs dangerous to human beings. It was sufficient if they were dangerous to property, such as sheep and cattle. The only reported case under the Act was an English one, and from the report it did not appear what was the kind of vice for which the dog was challenged.[1]

Argued for the respondent;—The words "savage and dangerous" in the Act referred to human beings only. The respondent could not know that the dog was dangerous to property.[2]

At advising,—

LORD ORMIDALE.—The questions which the Court has to answer in this case depend for their solution upon the meaning and effect of the Act 34 and 35 Vict., cap. 56, entituled "An Act to provide further protection against dogs."

Founding on this Act the procurator-fiscal for the county of Linlithgow presented a complaint to the Sheriff, setting out that the respondent, Alexander M'Kenzie, had been guilty of an offence, or had contravened the provision of the second section of the Act, in so far as he had, on or about the 9th of September last, and continued to have, in his possession, within or near his dwelling-house or other premises at Whitburn, a dog "which is dangerous and not kept under proper control; and the said dog by itself, or in company or in concert with another dog belonging to the said accused, and which he has since caused to be destroyed or put away, did," on or about said 9th of September, chase for a considerable distance two flocks of sheep, and did severely bite and shake or worry one and injure others of them.

This complaint was objected to by the accused as irrelevant and incompetent, and as not coming within the meaning of the Act founded on, in respect the operation of the Act was limited to dogs which were dangerous to human beings, while the libel only alleged that the respondent's dog was dangerous in respect of its having chased, injured, and terrified sheep.

The Sheriff-substitute sustained this objection, and dismissed the complaint; whereupon the prosecutor appealed in terms of the "Summary Prosecutions Appeals (Scotland) Act, 1875 (38 and 39 Vict., c. 62), and applied to the Sheriff-substitute to sign and state a case for the opinion of a superior Court. That having been done, and counsel for the parties having been heard, the Court has now to give judgment in answer to the following two questions submitted in the case:—1st, "Is the second section of the Dogs Act, 1871, limited in its operation to dogs which are dangerous to human beings, and which are not

[1] Pickering v. Marsh, June 3, 1874, 43 L. J. new ser. (Mag. Ca.) 143, 22 W. R. 798.

[2] Fleeming v. Orr, April 3, 1865, 2 Macq. 14; 26 and 27 Vict., cap. 100.

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kept under proper control?" And 2d, "If not, is the libel relevant in regard to dogs that are dangerous to sheep?"

These questions involve very much the same thing, and in the present instance an answer either affirmative or negative to the first must also dispose of the second. Now, in regard to the limitation of the Act to dogs which are dangerous to human beings there is certainly nothing in it expressly to that effect. Neither am I satisfied, looking at the statute in all its clauses, that any such limitation was intended. The title of the Act is quite general, being simply "An Act to provide further protection against dogs;" and the preamble is in the same terms. The second section, again, of the Act, being that on which the complaint is founded, provides "that any Court of summary jurisdiction may take cognisance of a complaint that a dog is dangerous and not kept under proper control;" and if it appear that such dog is dangerous, the Court may make an order directing the dog to be kept by the owner under proper control, or destroyed, and that, failing compliance, he shall be liable to certain penalties. Now, it is not said here that the dog must be dangerous to human beings, although if that had been meant nothing could have been more simple or easier than to have so expressed the enactment. Nor can I find anything in the other sections of the Act indicative of a limitation of the second section to dogs dangerous to human beings.

But it is only with the second section of the Act we have to deal at present; and considering that it contains no express limitation of its operations to dogs dangerous to human beings, but that in the generality of its words it is fairly, and I think not unreasonably, applicable to dogs dangerous to sheep, and it may be to other property, as well as human beings, I am of opinion that the first question submitted in the case must be answered in the negative; and if so, it necessarily follows that the second question must be answered in the affirmative, as there can be no question or doubt, I think, that the complaint is relevant.

The result, therefore, is that the interlocutor or deliverance of the Sheriff-substitute, sustaining the respondent's objection, must be reversed, and the complaint allowed to proceed with a view to an investigation and disposal of its merits.

LORD GIFFORD concurred.

LORD JUSTICE-CLERK.—I felt at first considerable difficulty in this case, for I am not disposed to hold that a dog can be said to be dangerous in the sense of this statute because he is liable to injure property. I am quite clear that "dangerous" does not mean "mischievous." But I have come to agree with your Lordships that this complaint is sufficiently relevant, and that there was no ground for refusing to proceed with the case. The quality of being dangerous relates not to the acts of the dog, but to his nature and disposition. The Sheriff is to be satisfied that he is savage, ferocious, or dangerous. This nature may be shewn and proved in a variety of ways; and although the mere act of chasing sheep may not of itself, or in all cases, indicate that a dog is dangerous, the nature of the animal may be shewn in that way as well as in others. The mistake in the questions put to us, as well as in the judgment, consists in supposing that "dangerous" must be defined in relation to some object. It is not so. It is the savage nature of the animal of which the Sheriff is to be satisfied.

I propose that we should answer the first question in the negative, and with regard to the second question find that the libel is relevant. I do not think that the statement of what the dog did adds to the relevancy. No. 104. Mar. 18, 187 Henderson v. M'Kenzie.

LORD NEAVES was absent.

THE COURT pronounced this interlocutor:—"Sustain the appeal; answer the first question in the negative; on the second question find the libel relevant; reverse the judgment appealed from, and remit to the Sheriff to proceed with the cause: Find no expenses due to or by either party, and decern."

JAMES AULDJO JAMIESON, W.S., Crown Agent—T. GARDENER (Sol., Bathgate), L.A.—Agents.

THOMAS JACKSON AND ANOTHER, Pursuers.—*Gloag—M'Laren.*
THE REV. JOHN M'MILLAN AND ANOTHER (Sproat's Trustees), Defenders.—*Asher—Keir.*

No. 105. Mar. 18, 1876 Jackson, &c. v. M'Millan, &c.

Succession—Vesting.—A testator by holograph will expressed his wish that his whole estate should be liferented by his wife, and that at her death his moveable property should be equally divided between his younger children, "or, if dead, their nearest lawful heirs, share and share alike, and nominated" trustees to carry out his intentions. *Held* that the younger children's shares vested at the testator's death.

Observations (*per* the Lord Justice-Clerk) on the canons of construction to be applied to testamentary deeds in questions of vesting.

2D DIVISION. Ld. Curriehill I.

THE deceased Thomas Sproat of Kirkcudbright, by holograph will, dated 15th November 1853, stated,—"I wish my spouse, should she survive me, to have her lifetime of the whole of the house and premises now occupied by me, as well as the interest of all monies that may be due me, or laing in the bank, or lent out on bills or receipts, and that during her natural life; and that, at her death, my said cash, property, and all other effects (with the exception of my dwelling-house, offices, and field of ground, which I wish to be given to my eldest son William, or his heirs lawfully begotten) shall be equally divided between my other children, or, if dead, their nearest lawful heirs, share and share alike, and should their respective shares prove of more value than the house and property to be William's, my wish is that a portion of cash, to make his share equal to the others, be added to his property, so as all my children may receive an equal share in value, and that the bills for lent cash to William and John be counted as part of their respective shares, or paid up to their mother, as she has a life interest in the whole of my effects; and as my son David has been assisting me in my trade these many years, is very likely to carry it on after my decease, and to take up my vessels at a valuation, and seeing that he has had no fixed salary, and received nothing from me except his bed and board and clothing, and the sloop 'Friends,' already in his name, but the profits of her has been regularly received by me, my wish is that he should have £200 sterling, as well as the sloop 'Friends,' over and above his equal share of my effects, with his brothers and sister. The above is the substance of my will and testament, and to see the above testament put into effect I do hereby appoint the Rev. John M'Millan of the Free Church, and Mr Thomas Whitewright, druggist of this town, my executors and trustees for carrying out my wishes as stated above."

Thomas Sproat died in July 1854, and was survived by his widow and four sons and a daughter. One of his sons, John, mentioned in the fore-

No. 105. Mar. 18, 1876. Jackson, &c. v. M'Millan, &c.

going excerpt from his will, died on 28th September 1865, and his estates were sequestrated on 3d April 1866. Mrs Sproat, the testator's widow, liferented the estate till 3d November 1874, when she died. John Sproat's trustee, with the concurrence of a creditor to whom John's interest in his father's estate had been assigned by the trustee and commissioner, thereupon raised this action against Thomas Sproat's trustees for payment of the share of Thomas Sproat's succession effeiring to John.

They pleaded that the provisions in favour of John Sproat vested at the testator's death.

The trustees pleaded that no right had vested in John Sproat, he having predeceased the liferentrix.

On 15th November 1875 the Lord Ordinary held that the provisions in favour of the younger children vested at the testator's death.*

The defenders reclaimed, and argued;—The period of vesting intended by the testator was at the death of the liferentrix. That view was strengthened by the use of the words "if dead," which meant dead at the date of the expiry of the liferent. That alone was conclusive against vesting *a morte testatoris*. There was here no direct gift to the children as in the cases where vesting *a morte* had been sustained.[1]

Argued for the pursuers;—A bequest to A in liferent, and after her death to B and his heirs in fee, did not suspend vesting.[2]

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* "NOTE.—. . . . The defenders, who are the executors and testamentary trustees of Thomas Sproat, maintained in opposition to the pursuers, the trustee on John Sproat's sequestrated estate and his assignee, that the shares of Thomas Sproat's estate provided to the children did not vest in any of them at the death of the testator, or until the death of the liferentrix. I am opinion that the defenders' construction of the settlement of Thomas Sproat is not the sound one, and that the shares of the children vested at the death of the testator, and that only the payment was postponed until the death of the liferentrix. The settlement was executed by the father, and purports to deal with his whole estate, and to divide the same equally among all his children, subject to the liferent of their mother, and without any destination to survivors or any ulterior destination except to the 'lawful heirs' of the children themselves. I think that there is here no reason for holding that the vesting was suspended until the period of distribution, or that the payment was postponed for any other purpose than to secure the widow's liferent. The cases of Marchbanks, 14 Sh. 521, and Cochrane, 17 D. 103, particularly the latter, appear to me to resemble the present in all essential particulars, and in both the interposition of a liferent was, in the absence of a survivorship clause or destination over, held insufficient to suspend vesting.

"Various other considerations strengthen the view which I have taken of the meaning of the present settlement, and in particular the declarations—(1) That the bills for lent cash to William and John, two of the sons, should be counted as part of their respective shares; and (2) That David, another son, should receive (obviously at the testator's death) a payment of £200, and possession of the sloop 'Friends' 'over and above the equal share of my effects with his brothers and sister,' all tending to shew that the testator regarded the liferent of the mother as merely a burden upon his children's shares, and not as postponing the vesting of their interest until her death. In short, the 'lawful heirs' of the children, 'if dead,' were merely conditional institutes appointed to take in the event of the children themselves predeceasing their father, the testator."

[1] Elliot v. Elliot, June 21, 1873, 11 Macph. 745, 46 Scot. Jur. 446; Miller v. Finlay's Trustees, Feb. 25, 1875, *ante*, vol. ii., H. of L. 1; Provan v. Provan, Jan. 14, 1840, 2 D. 298, 12 Scot. Jur. 257; Johnston v. Johnston, June 9, 1840, 2 D. 1038, 12 Scot. Jur. 502.

[2] Marchbanks v. Brockie, Feb. 18, 1836, 14 Sh. 521; Cochrane v. Thomson, Nov. 29, 1854, 17 D. 103, 27 Scot. Jur. 25.

At advising,— No. 105.

Mar. 18, 1876. Jackson, &c. v. M'Millan, &c.

LORD JUSTICE-CLERK.—I am of opinion that the provisions contained in this settlement to the younger children of the testator vested from his death. The instrument which we have to construe is an informal document, in which the testator says that he "notes down and subscribes the following particulars as to my affairs after my death." He first provides to his wife, should she survive him, the liferent of the whole of the house and premises occupied by him, and the interest of all money that may be due to him, or lying in the bank, or lent out on bills, and then he directs that at her "death my said cash, property, and all other effects (with the exception of my dwelling-house, offices, and field of ground, which I wish to be given to my eldest son William or his heirs lawfully begotten) shall be equally divided between my other children, or, if dead, their nearest lawful heirs, share and share alike." The question is, whether the share of one of the children, John Sproat, who survived the testator and predeceased the liferentrix, vested in him, and passed to the trustee on his sequestrated estate. I entertain no doubt that it did, and that the postponement of payment until the death of the widow had no effect in postponing the vesting of the share.

I do not intend to go over authorities which have been so frequently analysed, but to say a few words on the practical tests to be applied in such cases. The object is to ascertain what the testator meant from what he has said; and any general rules are not technical, but merely canons to be applied as the words may seem to require.

In *mortis causa* settlements, legacies and provisions are presumed to take effect and vest from the testator's death; and in the case of provisions to the testator's immediate children this presumption is unusually strong. The postponement of the term of payment has of itself no effect in overturning this presumption. In every executry estate some time must elapse before the funds of the deceased can be realised, and sometimes, from the nature of the investments, the interval may be considerable. But this does not prevent vesting from taking immediate effect. A postponed term of payment only affects vesting when it is adjected as a condition of the gift itself, and is not merely a burden on or qualification of the right. Thus when a testator postpones payment of the fee, in order to provide for a temporary and intermediate interest in the income or produce of the estate, such as a liferent or an annuity, vesting takes place notwithstanding *a morte testatoris*, because the interposed interest is only a burden on the gift. The legacy is unconditional, although the enjoyment of it is qualified. The legacy vests, but only under the qualification that the legatee shall not be entitled to demand payment until the specified time arrive. The other class of cases, which is entirely distinct, includes those in which survivance of the term of payment is a condition of the legacy itself, and in which there is no legacy, unless the condition be fulfilled. In these cases, survivance of the term of payment is of the essence of the gift. In order therefore to determine in any given case whether survivance of such a term be a condition of the gift or the postponement be only a burden on it, it is of the last importance to ascertain what is the primary object of the testator in postponing payment, and if the words indicate that the primary object was to secure an interposed interest, especially if they disclose no other, the presumption is strong that the legacy is not conditional, and that its enjoyment only is qualified.

It is this consideration which gives importance to any ulterior destination

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which may be adjected to the gift, for if there be any separate and independent interest contingently favoured it will then be easier to presume that favour to that interest was in part at least the reason for postponing payment. But to have this effect the interest must be substantially separate, and such as to indicate specific favour on the part of the testator. But a legacy to A and his heirs, or A and his children, is not the separate institution of a new and independent object of the testator's bounty, but the expression of a derivative interest favoured by the testator only out of regard to the legatee whose children or heirs are mentioned. They only find a place in the destination through the relation which they bear to the *persona prædilecta;* and in cases like the present, in which the gift is only inferred from the direction to divide, the instruction to the trustees to pay to the heirs of the legatee, if he predecease the period of division, may be regarded more as the natural result of the legacy having vested than as an indication of the reverse.

There may of course be words used by the testator in fixing a postponed period of division which, without any destination over, indicate a postponement of vesting also; as, for instance, considerations personal to the legatee himself, or relative to the property bequeathed. But in the present case no such elements occur. The sole object for the postponement of the term of payment which is disclosed in this writing is the protection of the widow's liferent. The case of Marchbanks, referred to by the Lord Ordinary, is precisely in point.

I should have held therefore from the words I have read that this provision vested in John Sproat. It is true that there are no words of gift or bequest apart from the direction to divide. But in an informal memorandum of the testator's testamentary wishes such as the present I consider this element as of no consequence.

The rest of the document entirely confirms this view. There follows a provision in regard to certain bills for lent cash due by William and John, as to which he provides that they "be counted as part of their respective shares or paid up to their mother, as she has a life interest in the whole of my effects." The plain meaning of this is that the share devolving on the two sons shall at once be imputed in extinction of these bills, but that if their mother survives the testator the sons shall account to her for the interest during her life. I think it is plain that it was not intended that William and John should pay up the principal to the executors and trustees, who are afterwards named.

The provision in regard to his son David, which immediately follows, leads to the same inference. He is to be entitled to the sloop "Friends," which stood in his name, and that plainly from the death of the testator, as the executors manifestly were given no concern with it. The sum of £200 he is to have over and above his share of the residue as in lieu of wages which he had previously earned. It would be out of the question to hold that this sum vested in any one but himself, and, on the whole matter, I entertain no doubt that the conclusion at which the Lord Ordinary has arrived is right.

LORD ORMIDALE and LORD GIFFORD concurred.

LORD NEAVES was absent.

THE COURT adhered.

RONALD, RITCHIE, & ELLIS, W.S.—DAVID MILNE, S.S.C.—Agents.

THE SCHOOL BOARD OF THE ROYAL BURGH OF DUNBAR, Pursuers.—*Balfour—Jameson.*
THE PROVOST, MAGISTRATES, AND TOWN-COUNCIL OF THE ROYAL BURGH OF DUNBAR, Defenders.—*Burnet—Low.*

No. 106.

Mar. 18, 1876.
School Board of Dunbar v. Magistrates and Town-Council of Dunbar.

School—Burgh School—Education (Scotland) Act, 1872, *sec.* 46.—*Held* that the annual sum payable by the town-council of a burgh out of the common good to the school board, under section 46 of the Education Act, 1872, was a fair average of what the burgh school had actually cost the burgh, and that in computing this average retiring allowances to teachers and expenditure upon the school buildings were to be taken into account.

Observed that a retiring allowance payable to a teacher, amounting to his full previous salary, under an agreement with the town-council current at the date of the Act, was to be regarded as exceptional.

2D DIVISION. Lord Shand. R.

THE school board of the burgh of Dunbar raised the present action against the provost, magistrates, and town-council of the burgh, for declarator that the defenders were bound to pay to the pursuers the annual sum of £102, being, as the pursuers alleged, the sum which it had been the custom of the burgh, prior to the passing of the Education (Scotland) Act, 1872, to contribute to the burgh school of Dunbar out of the common good of the burgh, or from other funds under the defenders' charge.*

The defenders admitted their liability to make an annual payment of £60, but not more.

The difference between these sums was made up of a retiring allowance to Mr Lyon, a former teacher, who had retired in 1851 upon the agreement that the burgh should pay him his full salary as a retiring allowance.

During the fifty years preceding the passing of the Education Act several changes had been made in the number of teachers and in the nature of the instruction given in the burgh school. There was no fixed annual sum which the town-council had been in use to expend upon the school. They had on several occasions granted retiring allowances, of small amount, to retired teachers, and these allowances were paid to such retired teachers until their death. There was no understanding that when the holder of a retiring allowance died the fund set free should be applied to his successor in office or to the school in any shape.

Between 1865 and 1872 the salaries and allowances had been as follows:—Master's salary, £50; sewing mistress's salary, £10; retiring allowance to Mr Lyon, £42.

The defenders maintained that in calculating the annual sum which they had been in use to contribute to the burgh school Mr Lyon's retiring allowance was not to be taken into account.

The Lord Ordinary pronounced this interlocutor:—"Finds that the defenders are not bound to make payment to the pursuers at each term of Martinmas annually of more than £60 per annum, being the sum which they offer to pay in all time coming in the defences; and in respect of that offer, and of the defenders' admission of liability for that amount,

* "The town-council of every burgh shall at the term of Martinmas yearly pay to the school board thereof such sum as it has been the custom of such burgh prior to the passing of this Act to contribute to the burgh school out of the common good of the burgh, or from other funds under their charge, and the same shall be applied and administered by the said school board for the purpose of promoting higher instruction."

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assoilzies them from the conclusions of the action, and decerns: Finds the defenders entitled to expenses, and remits the account thereof, when lodged, to the Auditor to tax, and to report." *

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* "NOTE.— . . The dispute between the parties turns upon the question whether Mr Lyon's retiring allowance is, within the meaning of the statute, a sum which it was the custom of the defenders, prior to the passing of the Education Act, to contribute to the burgh school. I am of opinion that it cannot be properly so regarded.

"There may be many cases in which a retiring allowance paid to a schoolmaster may properly be represented to be a part of the general annual contribution by the burgh to the burgh school. A burgh may have been in use for a period of time to pay a fixed annual sum, or a sum of nearly a fixed amount, partly in salaries, partly in prizes, partly in retiring allowances, or otherwise, for behoof of the burgh school, following the system or practice that where any retiring allowance shall cease by the death of the annuitant the sum thus set free shall continue to be applied either to increase the existing salaries of other teachers, or for some other school purpose. In such cases the retiring allowance may properly be represented as part of the sum which it has been the custom of the burgh to contribute annually to the school, and under the provisions of the statute the burgh is put under the obligation of continuing to recognise that permanent obligation in all time coming. If, however, the payment be not of this character, but is given to the retiring schoolmaster to cease at his death, and in the view that on that event occurring no such payment shall thereafter continue to be made to the burgh school, or for any purpose connected with the school, it appears to me that the provisions of the statute do not impose liability on the burgh to continue the payment. The Education Act transferred the burgh schools to the school boards to be elected under the statute, subject to the burden, also transferred from the burgh, of upholding and maintaining the schools thereafter in a proper state of efficiency; and section 46 of the statute appears to be mainly directed to the object of securing for the benefit of such schools the means of promoting higher education than might otherwise be given, where such means have previously existed, either in the form of income from funds entrusted to the magistrates or other persons as trustees for behoof of the burgh school, or of a payment which the magistrates have recognised as a permanent obligation on them, by having expended a certain amount annually, over a period of time, to or for behoof of the school; the annual payment which the magistrates have been in use to make for this purpose is made a burden on the burgh funds in all time coming.

"In this view of the statute it would be unjust to convert a payment of a temporary nature, such as a retiring allowance to a schoolmaster, which would cease entirely to be a burden on the burgh funds at the annuitant's death, into a permanent charge. Thus, in the present case, it may be anticipated that in a short time the annuity will come to an end, and the defenders reasonably object to the statute being so interpreted as to convert a temporary burden of £42 a-year into an obligation on them for all future time. There is nothing in the facts disclosed in the minutes of the council, or appearing either from the arrangements made when Mr Lyon retired, or when Mr Dick, the present master, received his appointment, to lead to the inference that when Mr Lyon's annuity should cease any part of the sum paid to him should thereafter be paid to a school fund, or in any way for behoof of the school. If Mr Lyon had died a year or a year or two before the Education Act passed it would, I think, have been clear that the sum of £60 only, which, in that case, the burgh would have continued to pay, as the salaries of the master and mistress of the school, was the amount which the burgh had been in the custom of contributing to the school prior to the passing of the Act. At the time of Mr Dick's appointment, August 1851, some time after Mr Lyon had resigned, it appears that the school was put in some respects on a different footing from that which had previously existed, probably for the reasons stated by the defenders in their statement 4th,

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The pursuers reclaimed.

In the course of the debate in the Inner-House the pursuers for the first time maintained that the sums expended by the town-council in repairs and cleaning of the school should be taken into account, and craved leave to amend their record accordingly.

Excerpts from the states of the burgh funds in process shewed that the sums entered as expenses on school varied very much from year to year, but averaged about £10 or £12 for the last twenty years.

At advising, the opinion of the Court was delivered by the

LORD JUSTICE-CLERK.—In this case the Court is of opinion that no further procedure should take place, and we intend to deal with it on the principle of equitable adjustment, namely, that the payment should be as nearly as possible what the school has actually hitherto cost the town; so that the town should be neither better nor worse for the transfer.

The granting of retiring allowances was part of the ordinary expenditure on the school, and must be taken into computation, but a retirement on full salary is exceptional, and it would be misleading to assume the full amount paid to Mr Lyon as the basis for an average. Taking the information which we have, and which we consider sufficient, on the whole matter, we are of opinion that the burgh should pay £80 annually to the school board.

In the circumstances, we will find no expenses due to or by either party.

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viz., that a number of other schools had sprung up in the town; and the subsequent minutes of the town-council shew that it was not contemplated to make any substantial change, or to devote any part of Mr Lyon's retiring allowance, after it it should cease, to increasing the other salaries, or for any other school purpose.

"The pursuers do not ask that the defenders should be ordained either to continue to pay the retiring allowance to Mr Lyon so long as he lives, or to pay the amount to them until that event, to enable them to discharge Mr Lyon's claim. It occurred to me that an arrangement to that effect would be a reasonable one to be adopted by the parties, who are both representatives of public interests, and I still entertain that opinion, believing that this would be carrying out the spirit of the provisions of the Act. The defenders, however, found upon the 55th section of the statute, which provides that the retiring allowances to schoolmasters 'shall be paid and provided by the school board having the management of such schools respectively,' as now imposing on the pursuers the obligation to pay Mr Lyon's annuity; they maintain that while, on the one hand, they are bound by the Act to give up the schools, and to continue to pay to the school board the amount of their permanent annual contributions to the school, they are relieved from all future burdens connected with the school, and are expressly relieved from the future payment of schoolmasters' retiring allowances. It might be naturally expected that the statute would have provided that a payment of a temporary nature, such as has been here made to Mr Lyon under an obligation granted by the burgh, and which cannot, I think, be regarded as in any sense permanent, should continue to be made by the burgh for the lifetime of the annuitant; but it may be that such cases are not common, and were thus not under the notice of the Legislature. However this may be, I am of opinion that the provisions of section 46, being the only section which imposes future obligations on burghs in reference to their burgh schools, does not impose on the defenders the obligation to continue to pay such an allowance as that given to Mr Lyon. The only payments there referred to are to be continued in all time coming, and for the reasons already stated I do not think the language used includes such a retiring allowance as that which is here the subject of dispute."

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THIS interlocutor was pronounced:—"Recall the interlocutor complained of: Find the respondents (defenders) liable to the pursuers in payment of £80 annually from Martinmas 1872, and in all time coming, and decern for payment thereof at Martinmas annually: Find no expenses due to or by either party."

MACKENZIE, INNES, & LOGAN, W.S.—J. & J. MILLIGAN, W.S.—Agents.

No. 107.

Mar. 18, 1876. Beattie v. Ures.

PETER BEATTIE, Complainer.—*Burnet—Low.*
JOHN URE AND ANOTHER, Respondents.—*D.-F. Watson—Mackintosh.*
JOHN URE AND ANOTHER, Petitioners and Appellants.—*D.-F. Watson—Mackintosh.*
PETER BEATTIE, Objector and Respondent.—*Burnet—Low.*

Property—Superior and Vassal—Conditions in Feu—Mutuality of Obligations between Co-Feuars—Jus quæsitum tertio.—A feu-contract of an area of ground in a suburban district contained an obligation on the vassal that the villas or other buildings to be erected thereon should be built with stone and lime. This obligation was embodied in the titles of two disponees to whom adjoining stances on the feu were conveyed. *Held* that the proprietor of one stance had a title and interest to insist upon the removal of a brick stable erected upon the other stance, although a man of skill, to whom the Court remitted, reported that the injury to the complainer's property would practically be the same if the building were of stone.

2D DIVISION. Lord Rutherfurd Clark. Dean of Guild of Crosshill. I.

MR PETER BEATTIE and Messrs John and Robert Ure were proprietors respectively of two conterminous building stances in the burgh of Crosshill, which is a police burgh under the Act of 1862. Both stances formed parts of a piece of ground which had been feued out to one John Renton under a feu-contract containing the following obligation:—"And the said John Renton also binds and obliges himself, &c., that the villa or villas, or other buildings to be erected on the said area of ground, shall be built with stone and lime, and covered with slates." The feu-contract was duly recorded in the Register of Sasines, and in accordance with a provision therein the restriction above quoted was validly referred to in the titles to both properties.

The Messrs Ure proceeded to erect certain brick stables on their ground. After the building had been begun, in consequence of an intimation by the magistrates of Crosshill that they claimed a jurisdiction in regard to the erection of all buildings within the burgh, the Messrs Ure presented a petition to the magistrates of Crosshill, addressed to the Lord Dean of Guild of the burgh of Crosshill, and his brethren in council, to authorise the erection of the said stables.

Mr Beattie lodged objections, founded on the clause in the titles above quoted. On 10th December 1876 the senior magistrate pronounced a deliverance sustaining the objections, and refusing the petition.*

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* "NOTE.— . . . It has been decided by a series of cases that, in the words of the Lord President (Inglis), 'When a superior feus out his land for building purposes, and lays all his feuars under the same obligations, there arises a mutuality of obligation amongst the feuars which depends upon the community of the relation to the superior. If all are bound to the superior, then the general rule undoubtedly is that they have right *inter se*, whereby they are enabled to enforce the common obligations against one another.' Such being the rule of law with reference to conterminous feus, *a fortiori* must it be the rule with reference to plots of ground which constitute portions of the same feu. See Robertson v. North British Railway Co., 18th July 1874, 1 Rettie, 1213." . . .

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The Messrs Ure, who maintained that the Dean of Guild Court had no jurisdiction to determine the question, disregarded the senior magistrate's deliverance, and proceeded with the erection of the stables.

Mr Beattie then presented a note of suspension and interdict in the Bill-Chamber against the Messrs Ure, to have the respondents prevented from proceeding with the buildings in question, or erecting any other building on their premises not built with stone and lime and covered with slates, and further, to have the respondents ordained to remove the brick building in so far as already erected.

The Lord Ordinary on the bills passed the note.

The complainer pleaded;—(1) The operations complained of being a violation of the conditions of the respondents' title, and in direct contravention of a decree by the magistrates or Dean of Guild Court of the burgh of Crosshill, the complainer is entitled to suspension and interdict against the respondents as craved. (2) The complainer holding the feu from the same superior as the respondents, and there being thus a mutuality of obligation between them, the complainer has an undoubted right to enforce the obligations contained in the respondents' feu-contract.

The respondents lodged answers, in which they averred that the complainer had allowed the building to be erected up to the joists without objection, and pleaded;—(1) the complainer has no title, and, *separatim*, has no interest to insist in the present application. (2) Upon a sound construction of the feu-contract libelled, the prohibition founded on by the complainer does not apply to buildings of the class and in the situation of that in question. (3) The complainer having allowed the said buildings to be erected to the extent mentioned without objection, he is not entitled to demand that the same shall be demolished. (4) The Dean of Guild had no jurisdiction to determine the questions raised by the complainer in his objections to the respondents' petition.

After the note of suspension and interdict was presented the Messrs Ure presented an appeal to the Second Division against the deliverance of the Dean of Guild.

The Lord Ordinary, in respect of the dependence of the appeal, made avizandum with the process of suspension and interdict to the Second Division.

After some debate in the Inner-House the Court, before answer, remitted to Mr George Bell, architect, Glasgow, "to visit and inspect the premises, and to report as to how far the building complained of operates injuriously to the property of the complainer; and generally on any matter connected with the cause which either party may desire, or which he may think important for the consideration of the Court."

Mr Bell reported that the wall of the building complained of, which abutted upon the complainer's boundary wall, was six feet in height above the complainer's wall, which was five feet in height and also of brick. The reporter was of opinion that the stretch of dead wall, as seen from the back windows of the complainer's villa, operated injuriously to the complainer's property in so far as the respondents' wall exceeded the complainer's wall in height. The report continued,—"In answer to queries put by the respondents, I have further to report that, in my opinion, the injury to the complainer's property would practically be the same if the building complained of was made of stone, or painted or plastered so as to resemble stone, although at the same time stone would harmonise better with the complainer's front building, and to some it might be more agreeable to have a look out on a stone wall than a brick wall."

The debate was then resumed.

Argued for the Messrs Ure;—They did not dispute the general doctrine

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of the mutuality of obligations between feuars laid upon them by a common superior. But while the right of the superior to enforce obligations laid upon his feuars by their titles was absolute, a feuar could not enforce such an obligation against a co-feuar, unless (1) the obligation affected his feu, and (2) unless he had a material interest in the obligation. The principle of *jus quæsitum tertio* presupposed a material interest. For instance, a restriction as to building contained in a feu-title could not be insisted upon by a feuar in another street altogether, who derived right from the same superior, and was placed under the same restriction.[1] It was plain from Mr Bell's report that Mr Beattie had no real interest to enforce the restriction in question. He could not prevent his neighbour doing much more offensive things,—erecting a stone wall of greater height, or opening windows looking into Mr Beattie's garden. The objection was therefore *in æmulationem vicini*, and ought to be repelled.

Lord Justice-Clerk.—It may be that although we decide in favour of Mr Beattie he may find that he has not increased the amenity of his house. But I must deal with the case according to law. It is irrelevant to say that a brick building must be allowed because a stone building in the same situation would have been equally injurious and could not have been prevented. The feu-title says the reverse. We must assume that the parties to the feu-contract proceeded on the footing that stone was better than brick.

The next question is, whether the restrictive words are applicable to stables. Throughout the deed the word "building" is used to signify anything erected on the ground, and, indeed, I see no reason why the generic term should not include stables.

If we had found that no injurious effect to the complainer was created by this building, it might come to be in law, as it is perhaps in fact, an emulous proceeding on the part of the complainer to object to its erection, and we might perhaps on the authority of some of the cases quoted have found that the complainer had no interest to enforce the prohibition. But that is not the case. Mr Bell no doubt says that the injury to the complainer's property would practically be the same if the building was of stone, but we cannot take cognisance of that. I therefore cannot resist the conclusion that Mr Beattie is entitled to prevail.

Lord Ormidale concurred, and suggested that the parties should come to an arrangement, by which the complainer should get a *quid pro quo* for not insisting on the removal of the building, in the shape of an obligation that it should not be raised in height, and no windows made in it overlooking the complainer's garden, or something similar.

Lord Gifford concurred.

Lord Neaves was absent.

These interlocutors were pronounced:—

In the suspension.—"Having resumed consideration of the cause along with the report of Mr George Bell, No. 16 of process, suspend the proceedings complained of, and decern in terms of the prayer of the note of suspension: Find the suspenders entitled to expenses in this Court," &c.

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[1] Gordon v. Majoribanks, Feb. 1818, 6 Dow's App. 87; Frame v. Cameron, Dec. 21, 1864, 3 Macph. 290, 27 Scot. Jur. 131.

In the appeal.—"Having heard counsel in the appeal, dismiss the same, and affirm the judgment complained of: Find the appellants liable in expenses in both Courts, and decern: Remit to the Auditor," &c. No. 107. Mar. 18, 1876. Beattie v. Ures.

MACKENZIE, INNES, & LOGAN, W.S.—RHIND & LINDSAY, W.S.—Agents.

JOHN WATSON, Pursuer.—*Fraser—MacLean.*
THE NORTH BRITISH RAILWAY COMPANY, Defenders.—*D.-F. Watson—Asher.*

No. 108. Mar. 18, 1876. Watson v. North British Railway Co.

Railway—Contract of Haulage.—When a railway company undertakes to haul along their line waggons belonging to private traders, the extent of their obligation is to use reasonable care and diligence.

Observed (*per* Lord President), In a contract to carry passengers by railway, if an accident occurs through a break-down of the plant, the presumption is that it is the fault of the railway company, because the plant is entirely their own, but in a contract to haul waggons, the plant being partly that of the railway company and partly that of the other party, there is no such presumption, and the burden of proving fault lies on the person who alleges it.

THIS was an action by John Watson, coalmaster, Glasgow, against the North British Railway Company for damages to the amount of £173 done to waggons belonging to the pursuer by the fault of the defenders. 1ST DIVISION, with Lord Curriehill. Lord Shand. B.

The pursuer was in the habit of sending his coals along the defenders' line in railway waggons belonging to himself. On one occasion the coupling between the foremost waggon and the engine broke. The defenders' servants re-attached the waggon by the side chains to the tender of the engine. Three or four miles further on the waggon again broke loose and was overturned, and several others behind it were also overturned and injured.

After a proof, the Lord Ordinary assoilzied the defenders.*

The pursuer reclaimed.

The Court ordered the case to be argued before five Judges.

The pursuer maintained that the defenders' servants had not re-attached the waggon in the proper way, and had afterwards gone at too great speed, and in other respects had failed to do what was right under the circumstances.

The majority of the Court, consisting of the Lord President, Lord Ardmillan, Lord Mure, and Lord Curriehill, were of opinion that it was proved that the damage sustained by the pursuer's waggons at the time and place mentioned in the record was caused by the fault of the defenders.

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* "NOTE.—With regard to the legal obligation which rested on the defenders there seems to be no dispute between the parties, and at all events the law is clear. The railway company undertook to carry coals for the pursuer in his own waggons at certain rates, and I do not think the pursuer has put his case at all higher than he was entitled to do when he states in article 7 of the condescendence that the defenders were bound to use all proper care and diligence for the protection of his waggons,—by which, I understand, is meant all reasonable care and diligence. The question of fact is whether such reasonable care and diligence was used. While I cannot say that the case is absolutely free from difficulty, I am nevertheless of opinion—and I do not say so with any great doubt as to the result, so far as my judgment is concerned—that the pursuer has failed to prove such fault upon the part of the defenders as amounts to want of reasonable care and diligence in the protection of the waggons while they were in the defenders' hands. . . . ."

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LORD DEAS expressed a different opinion, at the close of which his Lordship said—It is important to railway companies to know the nature of their liability in cases of this kind. It was said that their liability was that of carriers, but that contention was quite untenable. Then it was suggested that their liability was similar to what they lay under in conveying passenger trains, but that proposition is little less extravagant. The contract, if there was a contract at all, was one of haulage. The coupling which gave way was the property of the pursuers. If the defenders were under the reasonable belief that what they did was for the best under the circumstances, that is quite enough to relieve them. On the whole, I do not think that fault has been proved against the defenders in such a satisfactory manner as to warrant us in altering the interlocutor of the Lord Ordinary. There are some cases in which it is not of much moment that the Judge should have heard and seen the witnesses. In other cases that is of very considerable importance, and I think it was so in the present case.

LORD PRESIDENT.—The difference of opinion in the Court is entirely on the question of fact. We are all at one on the principle of law, which is well stated by the Lord Ordinary:—"The railway company undertook to carry coals for the pursuer in his own waggons at certain rates, and I do not think the pursuer has put his case at all higher than he was entitled to do, when he states that the defenders were bound to use all proper care and diligence for the protection of his waggons, by which I understand is meant all reasonable care and diligence. The question of fact is whether such reasonable care and diligence was used." I concur with Lord Deas in holding that the liability of the defenders rests on different grounds from the liability of common carriers in the carriage of goods, and that there is also an important distinction between the present case and that of injury to passengers. In the present case the train consisted of the plant, partly of the railway company and partly of the pursuer, and its safety depended on both being in good working condition. There was no presumption that if anything went wrong with the plant it was the fault of the railway company, whereas a break-down of the plant affords a presumption of liability in the carriage of passengers. Therefore I think that in the contract of haulage, where the injury is occasioned by a break-down of the plant, the burden of proving fault is distinctly on the person who alleges it, and so in this case on the pursuer.

I have thought it right to make these observations, lest there should be any misapprehension of the import of this judgment, or an impression that there was any difference of opinion among us on the law of the case.

THE COURT recalled the Lord Ordinary's interlocutor, and found that the damage had been caused by the fault of the defenders, and assessed damages in accordance with a joint minute for the parties.

J. W. & J. MACKENZIE, W.S.—ADAM JOHNSTONE, L.A.—Agents.

SUMMER SESSION.

HENRY SCOTT ANDERSON AND OTHERS (Oliver's Trustees), Petitioners.— *D.-F. Watson—Jameson.*

No. 109.

May 13, 1876.

Anderson, &c.

Trust—Power to Feu—Statute—Trusts (Scotland) Act, 1867 (30 *and* 31 *Vict. c.* 97), *sec.* 3.—Section 3d of the above Act empowers the Court to grant authority to trustees to grant feus of the estate under their management "on being satisfied that the same is expedient for the execution of the trust and not inconsistent with the intention thereof." A truster, who died in 1825, left the residue of his estate to be applied for behoof of a grammar school, and directed his trustees to let a park belonging to the trust-estate annually or on lease for a period not exceeding seven years, "declaring that my said park shall never be sold or disposed of." In a petition by the trustees for authority to feu the park, *held* that the Court could not grant authority to feu as that was contrary to the truster's intention as expressed in the trust-deed.

1st Division. Ld. Craighill. M.

JAMES DOUGLAS OLIVER, rector of the Selkirk Grammar School, who died in 1825, left a trust-deed and settlement conveying all his property. He directed his trustees after paying certain legacies that the residue of his funds should be applied for the purpose of providing medals for the scholars of the grammar school and for the education of children whose parents resided in Selkirk.

The testator at the time of his death was proprietor of a house, garden, and stables, which, in accordance with his directions, were sold by the trustees, and also of a park of rather more than one acre and a half called Tait's Hole, which was kept by the trustees and let for £5 per annum. The annual income from the rest of the funds amounted to about £24. The trust-deed contained the following directions:—"*Ultimo*, I ordain that my said trustees shall let annually, or on lease for a period not exceeding seven years, to the best advantage, my park called Tait's Hole, above disponed to them for the interest of the Grammar School of Selkirk, in all time after my death; declaring that my said park shall never be sold nor disposed of, nor ever let to my successor in office, and that no burdens be left upon it, or contracted upon it, after my death."

The trustees, being anxious to feu Tait's Hole, presented a petition for authority to do so under section 3 of the Trust Act of 1867.* They stated,—"The trustees have reason to believe that if they were empowered to grant feus they would soon be able to dispose of the whole ground at rates amounting at least to £12 an acre, thus adding £13 per annum to the income, to the material advantage of the trust, the usefulness of which would be much increased by this permanent addition, as it would put it in the power of the trustees to afford education to ten or twelve children above the present number."

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* By section 3 of 30 and 31 Vict. cap. 97, "Trusts (Scotland) Act, 1867," it is enacted that "it shall be competent to the Court of Session, on the petition of the trustees under any trust-deed, to grant authority to the trustees to do any of the following acts, on being satisfied that the same is expedient for the execution of the trust, and not inconsistent with the intention thereof; and the Court shall determine all questions of expenses in relation to such application, and when it shall be of opinion that the expense of any such application should not be charged against the trust-estate, it shall so find in disposing of the application" (*inter alia*)—"2. To grant feus or long leases of the heritable estate, or any part of it."

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The Lord Ordinary pronounced this interlocutor:—"Finds that the feuing of the heritable subjects called Tait's Hole, referred to in the petition, would be inconsistent with the intention of the trust represented by the petitioners as trustees: Therefore refuses the prayer of the petition, and decerns."

The petitioners reclaimed, and argued;—Circumstances have changed since the trust-deed was made, the subject having become an urban one. If the truster were alive now he would have given different directions. His reason for giving directions as to letting on lease for not more than seven years was to enable the beneficiaries to get the best income. The way of making the most of the field at the present time would be to feu it.[1]

LORD PRESIDENT.—We have power to grant the authority which is here asked, provided we are satisfied "that the same is expedient for the execution of the trust, and is not inconsistent with the intention thereof," which, in other words, means that it shall not be inconsistent with the intention of the truster. The power here asked is a power to feu. There is a prohibition against selling, but it is contended that there is no prohibition against feuing. What did the testator intend by the power which he conferred upon his trustees? He directs them to allow any residue to remain in the bank, "or otherwise invest it on security to their satisfaction, and add the interest of it annually to the rents of Tait's Hole, which are to be disposed of in the manner aftermentioned," that was, in providing for the education of a certain class of children. With regard to Tait's Hole, he directs,—"*Ultimo*, I ordain that my said trustees shall let annually, or on lease for a period not exceeding seven years, to the best advantage, my park called Tait's Hole, above disponed to them for the interest of the Grammar School of Selkirk in all time after my death; declaring that my said park shall never be sold nor disposed of, nor ever let to my successor in office, and that no burdens be left upon it, or contracted upon it, after my death: And I ordain that with the rents of Tait's Hole, and the interest of the residue of my other funds, if there be any residue, and of the £200 sterling before bequeathed for the use of James Oliver, if the same shall remain with or revert to my said trustees," that they shall do certain things.

What does the testator mean when he says that Tait's Hole shall never be sold or disposed of? It appears to me that these words can have no meaning, unless they cover such an alienation as is proposed here. The trustees are not entitled to grant long leases, or even leases of ordinary duration. They cannot exceed a lease of seven years. It would be strange if trustees who cannot let for more than seven years should be entitled to feu. They are expressly prohibited from selling. As to the meaning of the testator there is no doubt. The question is whether power to feu is consistent or inconsistent with the intention of the truster. I think that it is inconsistent with the express prohibition of the testator. While, therefore, I think that granting the power might be expedient for the execution of the trust, I think that it is impossible to hold it consistent with the intention of the testator.

This case appears stronger than the case of Hay. In that case the truster had created a trust for twenty-one years, with the view of paying off his whole debts. That was to be accomplished out of the general estate, and also out of

[1] Merchant Company of Edinburgh v. Heriot's Hospital, 1765, M. 5750; Hay's Trustees v. Hay Miln, June 13, 1873, 11 Macph. 694, 45 Scot. Jur. 430.

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the rents of the heritage. The project of the truster turned out to be impossible. The trustees found the estate bankrupt, because the expenditure exceeded the income by £100. This state of matters was becoming worse every year. There was a prohibition in the trust-deed against selling any part of the landed estate. In these circumstances, the trustees came to the Court and asked power to sell part of the estate, and if this had been done the other part would have been left to be entailed according to the intention of the testator. It was represented to the Court that the intention of the testator was impracticable, and if the power of sale was not granted the estate must be pulled to pieces by the diligence of creditors. The only course left was to carry out partially the intention of the testator, and to settle part of the estate as he had directed. This was a telling argument, but the Court felt themselves compelled by the terms of the Act to refuse the application because of the prohibition against selling. It appears to me that this is a stronger case than that, and that the proposal to feu is inconsistent with the intention of the testator.

LORD DEAS.—I concur. There is nothing in the deed to entitle the trustees to sell or feu this piece of ground. The deed is not fully printed, but I have read it and I find that the trustees are "ordained" to sell the truster's dwelling-house, stable, and garden, but, by the clause we are considering, it is expressly declared that the park called Tait's Hole shall never be sold or disposed of, nor any burdens contracted upon it. The Act of Parliament (30 and 31 Vict. c. 97) provides that we may authorise trustees to grant feus or long leases of the heritable estate if we are satisfied of two things,—1st. "That the same is expedient for the execution of the trust;" and 2d. "That it is not inconsistent with the intention thereof." Now, expediency is all very well. But how can we be satisfied that it is not inconsistent with the intention of the trust—that is to say, with the intention of the truster—to grant feus of this portion of the estate when the truster has expressly said that it shall never be sold or disposed of? I think that is out of the question.

LORD ARDMILLAN.—I concur. I am of opinion that in order to exclude the power and discretion of the Court it is necessary that the act which the Court is asked to sanction should be shewn to be inconsistent with the intention of the testator. It is not enough that it is beyond his intention so far as expressed; it must be opposed to his intention. But we have, as I think, a contrary intention expressed in this case.

Feuing may be regarded as an alienation of the subject, or as a location in perpetuity for an annual sum. Here a sale or alienation on the one hand, and a lease for any period beyond seven years on the other hand, are both excluded by the terms of the trust-deed.

LORD MURE concurred.

THE COURT adhered.

SCOTT MONCRIEFF & WOOD, W.S.—Agents.

No. 110.

May 16, 1876.
Greig v. Simpson and Craig.

GEORGE GREIG (Inspector of City Parish), Pursuer and Respondent.—*Hunter.*

ANDREW GRAY SIMPSON (Inspector of South Leith), Defender and Respondent.—*Trayner.*

JAMES CRAIG (Inspector of St Cuthbert's), Defender and Appellant.—*D.-F. Watson—M'Kechnie.*

Poor—Settlement—Relief—Desertion by a Husband.—In questions of parochial relief the rule that the desertion by a husband of his wife and children is during the period of desertion equivalent to his death applies in all such cases.

The rule applied in a case where a deserting husband who had a birth settlement in Scotland had (if he was alive) during the desertion lost a residential settlement by non-residence.

1ST DIVISION. Sheriff of Mid-Lothian and Haddington. M.

JOHN SCOTT was born in High Calton, Edinburgh, in the parish of South Leith, on 28th October 1835. He deserted his wife and family about 1st June 1868, when they were relieved down to June 1872 by the parish of St Cuthbert's, in respect of a residential settlement which he had acquired therein. They continued to reside there until June 1873, when they came to reside in the City Parish of Edinburgh. The wife, in June 1873, applied for and obtained relief for herself and children from the City Parish. Notice of such chargeability was sent to, and relief claimed from, the parish of South Leith, as the birth settlement of John Scott, and also to the parish of St Cuthbert's, in which he had acquired a residential settlement. On 12th November 1873 she again became chargeable to, and was relieved by, the parish of St Cuthbert's. Notice of chargeability was sent by that parish to, and relief claimed from, the parish of South Leith, in respect of John Scott's absence from St Cuthbert's Parish for more than the statutory period.

The inspector of the poor of the City Parish raised this action in the Sheriff Court of Edinburgh against the inspectors of South Leith and of St Cuthbert's for £3, 11s. 4d., the relief which the City Parish had given to the wife and family between 25th June and 4th October 1873.

The inspector of South Leith, the husband's birth settlement, pleaded; —(1) The residential settlement of John Scott at the date of the alleged desertion, and when the paupers became chargeable, having been in St Cuthbert's, and the said settlement having been maintained by the continued chargeability of the paupers on that parish, the defender is not liable for the sum sued for or relief claimed.

The inspector of St Cuthbert's, the husband's residential settlement, pleaded;—(1) *Esto* that the said John Scott acquired a residential settlement in the parish of St Cuthbert's prior to 1st June 1868, the same was lost by his absence from the parish for upwards of four years thereafter. (2) The said John Scott, of the date of notice of chargeability by the pursuer to the defender Mr Craig, having no residential settlement in the parish of St Cuthbert's, the parish of South Leith, as the parish in which the said John Scott was born, is liable in relief to the pursuer. (3) It being alleged by South Leith that liability attaches to St Cuthbert's in respect of a residential settlement therein acquired and retained, the onus lies on South Leith of explaining away the effect of the absence of John Scott from St Cuthbert's since 1st June 1868, and failing South Leith sufficiently discharging that onus, no residential settlement was retained in St Cuthbert's, and South Leith is liable in relief to the pursuer.

The Sheriff-substitute (Gebbie) pronounced this interlocutor:—(After findings in fact as above)—"Finds in law, with reference to the foregoing

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facts, that Jane Bald or Scott has not lost her residential settlement in St Cuthbert's Parish in consequence of her husband's absence for more than four years, and that it is still liable to maintain her and relieve the pursuer of the sum claimed: Therefore decerns against the defender James Craig, as inspector of poor of St Cuthbert's Parish and Canongate Combination, and as representing the parochial board thereof, in terms of the conclusions of the libel: Finds the said defender liable in expenses to both the pursuer and the other defender, the inspector of poor for the parish of South Leith," &c.*

The Sheriff affirmed this interlocutor.

The inspector of St Cuthbert's appealed, and argued;—If the husband was presumed to be alive, he had lost his residential settlement in St Cuthbert's Parish. If he were to come back, the parish of South Leith, his birth parish, would be bound to relieve him. A married woman has the status of her husband, and the parish of the husband is bound to relieve the wife and family.[1]

LORD PRESIDENT.—Has it not been settled that a wife deserted by her husband is in the same position as if he were dead? That was decided in the case of Beattie v. Greig[2] in July last.

Argued for the appellant;—The Court have never held that desertion is the same as death in the case of a husband who was a native of Scotland. If the husband has no birth settlement in Scotland it may be necessary to hold that his residential settlement is to continue, as that is the only settlement in the country. But that is not necessary in the case of a deserting husband who has a birth settlement in Scotland.

Counsel for the respondents were not called on.

LORD PRESIDENT.—The Dean of Faculty is right in saying that no case has been decided precisely similar to the present, but there is a principle running through a whole series of decisions applicable to the present case and all its circumstances.

The wife of John Scott was deserted by her husband on 1st June 1868, and she then, along with her children, became chargeable on and received relief

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* "NOTE.—The Sheriff-substitute is of opinion that the parish of St Cuthbert's is liable to maintain the pauper Jane Bald or Scott and her children. Although her husband deserted her and has been absent from that parish for more than four years she herself has never been absent for that period, and has received relief down to a recent time. The relief granted stopped the running of the period requisite for destroying the residential settlement acquired through him, and that settlement enured to her on her husband's desertion exactly as his death would have done.

"In Barbour v. Adamson, May 30, 1853, 1 Macq., 376, the House of Lords found the parish of the father's settlement, whether acquired by birth or residence, bound to maintain his children left destitute by reason of his being transported, and the same principle would seem to apply to the case of a wife of a deserting or transported husband. The opinions of some of the Judges in Masons v. Greig, March 11, 1865, 3 Macph. 707, 37 Scot. Jur. 348, go far to support the conclusion arrived at in the foregoing interlocutor."

[1] Gray v. Fowlie, March 5, 1847, 9 D., 811, 29 Scot. Jur., 363; Hay v. Croal, Feb. 5, 1858, 22 D., 507, 30 Scot. Jur. 272; M'Rorie v. Cowan, March 7, 1862, 24 D., 723, 34 Scot. Jur. 365; Carmichael v. Adamson, Feb. 28, 1863, 1 Macph. 452, 35 Scot. Jur. 286.

[2] July 1875, *ante*, vol. ii., p. 923.

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from the parish of St Cuthbert's down to June 1872. There was no question raised about that, because there was a residential settlement of the husband in St Cuthbert's. They then came to reside in the City Parish of Edinburgh, when the woman again applied for relief, which she received in June 1873. Then the present question arose. She was again relieved by St Cuthbert's Parish on 12th November 1873. But that parish, in respect that the husband and father had been absent for more than the statutory period, claimed relief from South Leith, which was the parish of the husband's birth. If the absence of the husband was capable of destroying the residential settlement, he had been absent long enough to have that effect. But the real question comes to be, whether the wife and family having, at the time of desertion, a residential settlement which enured to them in respect of the deserting husband, could lose it by the husband failing to reside in the parish for the next five years in terms of section 76 of the Poor-Law Act, or whether the settlement was not incapable of being destroyed by their having received parochial relief during that time.

It has been decided that in a question as to parochial relief of the wife and family the desertion of the husband is equivalent to his death. That result was not arrived at without a difference of opinion, but I must now consider it to be a fixed rule. That rule, applied here, ends the question. If, instead of deserting his wife and family, he had died in 1868 and left a residential settlement, there has been nothing since then to deprive the wife and family of their right to the residential settlement.

But it is contended that the rule only applies to the case where the deserting husband and father has no birth settlement in this country. It is no doubt true that the case has never been decided in exactly the same circumstances as the present. But the rule admits of no qualification except in this respect, that desertion only remains equivalent to death so long as the desertion lasts. The deserting husband may return, and then a new rule may come in to fix the parish, which is bound to maintain him or his wife and family. He may revive a settlement which during his desertion cannot be gone against for the support of the wife and family, or he may put an end to a settlement which has enured to the wife and family. But, with that exception, the rule laid down is of universal application, and I should be sorry to see it disturbed.

I have no doubt about the soundness of the judgment of the Sheriffs.

Lord Deas.—When the husband deserted his wife and family in 1868 he had a residential settlement in the parish of St Cuthbert's, and there cannot be a doubt that that parish was then the settlement of the wife and family. If he had died instead of deserting, his settlement would have enured to the wife and family. If he had been transported for a crime his settlement would, in like manner, have enured to the wife and family until they acquired a new one, or until the husband returned. As long as the husband remains away the settlement enures to the wife and family just as if he was dead. The only difference is that, in the one case he may return, and in the other he cannot. But this does not affect the rule. If it did there would be constant changes which would be very inconvenient.

It is said that the husband must be presumed to be alive. I do not know that in cases of parochial relief we are called upon to presume that a husband who has deserted, or who is a transported felon, is alive. Without going into

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that speculation I come to the conclusion that the residential settlement of the wife and children here is that of the deserting husband.

LORD ARDMILLAN.—I think that it is of the very greatest importance that in the administration of the poor-law there should be uniformity of decision, uniformity of legal right and legal practice. When once a principle has been well considered and decided it is eminently undesirable that it should be disturbed. I was very slow to accept the principle that the husband's desertion of his wife and family was equivalent to his death. I was much impressed by the views of the late Lord Moncreiff and the minority of the Judges in the case of Hay v. Skene, June 13, 1850, 12 D. 1019, 31st May 1850, 22 Scot. Jur. 420. But as the question has been deliberately considered and decided, I hold that the law on the point is now fixed. There is nothing to be gained by reviving the question. We must therefore hold that desertion by the husband is equivalent to his death at the date of the desertion, and during the period of desertion. If the husband were to return that would lead to a totally new question. In the meantime, his desertion is continued, and as regards this question he must be viewed as dead.

Wilful desertion is the same in effect as transportation so far as concerns the poor-law administration, and the question has been settled in regard to a husband under sentence of transportation.

As regards the birth settlement of the husband, I do not think that a man can have both a birth settlement and a residential settlement available to him at the same time. The birth settlement is not lost but suspended. It revives when the other fails. But the man who has a residential settlement, has, while he retains it, no claim on the parish of his birth. The death of a man necessarily puts an end to the acquisition of a settlement, and so the desertion of the wife and family by a husband being equivalent to his death fixes at its date the settlement of the deserted wife and family.

LORD MURE.—It must now be held as settled in the administration of the poor-law that the desertion of the husband is equivalent to his death, because, whatever difference of opinion there may have been as to the policy of the rule, there is distinct authority for it, and while the desertion lasts the wife's settlement is regulated by the settlement which the husband had before desertion. I therefore concur with your Lordship.

THE COURT pronounced this interlocutor:—"Refuse the appeal, and decern: Find the appellant liable in expenses," &c.

DAVID CURROR, S.S.C.—J. C. IRONS, S.S.C.—EBENEZER MILL, S.S.C.—Agents.

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WILLIAM M'DONALD AND OTHERS, Pursuers.—*Scott—Strachan.*
JAMES ROBERTSON AND OTHERS, Defenders.—*Balfour—R. V. Campbell.*

Police and Improvement Acts, 1850 *and* 1868, 13 *and* 14 *Vict. c.* 33, 31 *and* 32 *Vict. c.* 102—*Police Commissioners.*—The Police and Improvement Act, 1850, enacts that "any householder" of the burgh shall be eligible to be elected a commissioner. The Police Act, 1868, defines the word "householder" to be "a male occupier of lands or premises of the yearly value of £4 and upwards as appearing on the valuation-roll." The valuation-roll of a burgh contained an

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entry of "David Swan junior and Company" as occupiers of premises of the annual value of £220. At 31st December 1874 a change took place in the partnership, the new firm taking the name of David Swan and Sons. At an election of police commissioners in June 1875, a person, who was a partner of the new firm, and held a written authority from the new firm to vote, was elected a commissioner. In an action brought by a defeated candidate to reduce the election, on the ground that the defender had not the qualification, as neither his name, nor the name of his firm, appeared in the valuation-roll, *held* (1) that the Court had jurisdiction to entertain the objection; but (2) that the objection was not valid, as the candidate had a substantial qualification.

Jurisdiction—13 *and* 14 *Vict. c.* 33, *sec.* 31, *Police and Improvement Act*, 1850—*Election—Scrutiny.*—An objection by a candidate, claiming to have been elected at an election of police commissioners, that a number of persons had voted who had not paid their assessments, and were therefore, under section 34 of 13 and 14 Vict. c. 33, not entitled to vote, can only be inquired into by a committee of the commissioners upon a complaint brought under section 31 of 13 and 14 Vict. c. 33.

Election of Police Commissioners—Treating.—*Held* that treating of voters by candidates at an election of police commissioners was not a relevant ground for setting aside the election.

1st Division.
Lord Young.
B.

THE burgh of Maryhill was constituted a police burgh under the Act 13 and 14 Vict. c. 33. In June 1875 the election of two commissioners was held, when four candidates were proposed,—James Robertson, John Morrison Swan, Dr William M'Donald, and John Wilson. A poll having been taken on 7th June, James Shaw, the senior magistrate, who acted as returning officer, after counting the votes, declared that James Robertson and John Morrison Swan had a majority of votes. Accordingly, at a meeting of the commissioners on 17th July, these two gentlemen accepted the office of commissioners. The defeated candidates, Dr William M'Donald and John Wilson, along with George Robertson Murray, a householder of Maryhill, raised an action against the two successful candidates, and Joseph M'Intyre Taylor, clerk to the commissioners, concluding for reduction of the whole proceedings in the election. The grounds of reduction were—

1. That J. M. Swan was not eligible for election as a commissioner, because he was not a householder in the sense of the undernoted Acts.* Mr Swan was not a member of the firm of David Swan junior and Company, which appeared on the valuation-roll as occupiers of premises of the yearly value of £220. That firm had been dissolved on 31st December 1874,

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* 13 and 14 Vict. c. 33, sec. 30—"Any householder of the burgh shall be eligible to be elected a commissioner."

Sec. 2. The word "householder" shall mean a male occupier of a dwelling-house, or other heritable subjects, of the yearly value of £10 and upwards.

31 and 32 Vict. cap. 102, sec. 3.—The word "householder" shall mean a male occupier of lands or premises of the yearly value of £4 and upwards as appearing on the valuation-roll.

13 and 14 Vict. c. 33, sec. 12—"At all meetings and elections under this Act all householders shall be entitled to vote, and companies or copartnerships occupying houses or other heritable subjects of the yearly value of £10, or of greater value, so as to afford more than one qualification of £10, shall be entitled to grant authority in writing, to any one or more of the partners of such company or copartnership to vote, and which partner or partners shall be deemed to be a householder within the meaning of this Act, and have vote accordingly, provided always that such company or copartnership shall not so authorise or have right to vote by more than one partner in respect of each qualification of

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and a new firm of David Swan and Sons was constituted, of which Mr J. M. Swan was a partner. The name of this new firm did not appear on the valuation-roll, which was made up before the change of partnership.

2. That certain persons named who had not paid their taxes, in terms of sec. 34 of 13 and 14 Vict. c. 33, had been allowed to vote.

3. That the voters had been treated. The pursuers' allegation was:—(Cond. 12) "The said defenders, in contravention of the said Acts, by themselves or others acting on their behalf, treated the voters, with the view of influencing their votes, at the public-house kept by the defender James Robertson or his son, in Main Street, Maryhill, and other hotels and public-houses in Maryhill, and kept a free table therein, and also in the Black Bull Inn, Maryhill, for the treating of said voters during the whole of the said polling day. A large number of voters who were so treated and unduly influenced voted at the said election in favour of the defenders."

The pursuers farther alleged;—"Before the commencement of the poll they objected to the defender, John Morrison Swan, standing as a candidate, on the ground that he was not eligible to be elected to the office of commissioner, and immediately after the election they lodged a protest with the commissioners of the burgh, in which they protested against the declaration and election of the defenders as commissioners of the said burgh, and reserved right to take such steps as might be necessary to try the matter in the Courts of law."

The defenders stated that the premises were duly entered in the valuation-roll at £220, and that J. M. Swan had a written authority from the new firm to vote, and so was a householder in the sense of the Act. Further, the objection had been repelled by the returning officer, whose decision was final by sec. 12 of the Police Act of 1850.

The defenders denied the pursuers' averments of treating.

The defenders pleaded;—(1) The pursuers' averments are irrelevant and insufficient, and fail in due specification. (2) The pursuers' only procedure for trying their objections to the election and return being provided by section 31* of the Police Act, 1850, and they having declined to take such procedure, this action is excluded. (3) The jurisdiction for trying the merits of the disputed election being vested exclusively in the commissioners, or their committee, this action is in any event excluded. (4) The objections to the qualification of Mr Swan are specially excluded by the decision of the returning officer disallowing the same. (5) The proceedings for the election are protected by the terms of section 31 of the Police Act, and section 13 of the Ballot Act, and the pursuers are personally excluded from any challenge by their acquiescence in the whole proceedings, and adoption thereof as in all respects regular. (6) There

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the powers afforded by such premises; provided also, that in case of any difficulty arising as to the qualification or identity of any householder, the same shall be decided by such magistrate or Sheriff, whose determination shall be final."

* "Every person who may consider that he ought to have been returned as a commissioner may lodge a complaint, in writing, signed by him, or by some person duly authorised on his behalf, with the commissioners assembled at such meeting, who shall thereupon remit to a committee of three or five of their number to inquire into the merits of such disputed election, and to report thereon to a subsequent meeting of the commissioners, and such report shall be final. Further, no election or appointment under this Act shall be quashed or set aside on account of any misnomer, omission, or other informality."

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being no power to order a new election, the commissioners had and have the power, under section 37 of the Police Act, to receive the defenders, Robertson and Swan, as commissioners.

The Lord Ordinary pronounced this interlocutor:—"Sustains the defences, and assoilzies the defenders from the conclusions of the action, and decerns: Finds the pursuers liable in expenses," &c.*

The pursuers reclaimed.[1]

The defenders' counsel were not called on.

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* "OPINION.—This action, brought to set aside the election of the defenders as commissioners of the burgh of Maryhill, and to declare that the pursuers were duly elected, is rested on three grounds:

"1. The first ground is, that the defender Swan was ineligible, not being a householder. The objection, which appears to depend on the validity of his qualification as a member of a partnership owning and occupying premises in the burgh, was stated in writing to the returning officer at the time of the election and repelled by him after hearing parties. The senior magistrate was, as such, returning officer, and being of opinion that the objection regarded Mr Swan's qualification as a householder, I must hold that the decision of the magistrate is final by section 12 of the Police Act. It is plainly undesirable that such an objection should be the subject of litigation in this Court, and I think the Legislature meant that any such, if meant to be taken, should be stated to the magistrate at the time, and be by him finally disposed of. I do not at all found on the provision of the Ballot Act, that the decision of the returning officer disallowing an 'objection made to a nomination paper' shall be final, for this implies no power to decide objections to the eligibility of a candidate, which may be very various, and have no relation whatever to the nomination paper.

"2. The second ground of action is, that in contravention of section 34 of the Act 13 and 14 Vict., c. 33, and of section 5 of the Act 31 and 32 Vict., c. 102, 'voters to the number of from 300 to 400 voted at the election' who had not paid their rates. It is not alleged that this objection was stated against any voter at the time of tendering his vote, and the proposal of the pursuers is, that the ballot papers shall be ordered to be transmitted with a view to a scrutiny in this Court, on the general allegation now made. Such a scrutiny in a common law action of reduction and declarator would certainly be inconvenient and costly, and, I think, contrary to the spirit and meaning of the statutes regulating police burgh elections. It is provided, no doubt, that the votes of persons in arrear of their rates shall be null and void, but this does not affect the validity and finality of an election which is not questioned in terms of the Acts. Now, in order to promote general public convenience by excluding such a litigation as the pursuers propose, regarding a matter so temporary, and of such limited interest as the election of a commissioner under the Police Acts, it is, in my opinion, allowable to construe the Acts as meaning and intending, and in effect providing, that any election which is not challenged in the summary and commodious manner provided by section 31 of 13 and 14 Vict., c. 33, shall be deemed to be valid and final, to the exclusion of such objection to votes as I am now considering. The procedure there provided applies only when the seat is claimed (as it is here) by a disappointed candidate, but I am disposed to think it is according to the true meaning of the Act that when no such claim is made the objection shall be final, as against such an objection as that here presented. I so limit the proposition because there may be objections of a character to warrant action in this Court. I can have no doubt of the power of a committee of commissioners to recover the ballot papers.

"3. The third ground of action is upon treating, but for it as it is here stated (condescendence 12) I know of no authority, and the pursuers' counsel could refer me to none."

[1] Hamilton v. Police Commissioners of Dunoon, Jan. 15, 1875, *ante*, vol. ii. p. 299.

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LORD PRESIDENT.—There are three objections stated by the pursuers of this reduction to the validity of the election, and the Lord Ordinary, by the interlocutor under review, has repelled all these objections. I agree with him in his judgment, and think that none of the objections are well founded.

The first objection is to the qualification of Mr Swan. It is objected that he is not a householder, and therefore not eligible for election as a police commissioner. The first point is whether it is competent for us to entertain the objection at all. The Lord Ordinary holds that the objection to Mr Swan's qualification cannot be maintained in this Court. I confess that I am not disposed to agree in that, because the statute provides no mode of disposing of the objection by reference to the returning officer or other official. There is a mode of disposing of objections to voters, and there are many other things which the returning officer may do, and in some of them his jurisdiction is not subject to review. But it is not one of these to adjudicate on the qualification of a candidate, much less is his judgment declared to be final. In fact, I do not think that the returning officer did adjudicate upon the candidate's qualification. Perhaps, if the objection had been very simple, as, for example, that the candidate was not an inhabitant of the burgh, but was a shopkeeper in Edinburgh, he might perhaps have interposed. But the objection was that, although connected with Maryhill, he was not a householder within the meaning of the Act. If the objection was to be taken, it should have been stated at the opening of the election before the poll began, so that every elector might have notice, and those who voted for the candidate might know that, in the event of the objection being sustained, their votes would be thrown away. The allegation of the pursuers amounts to this, that the objection was stated verbally before the opening of the poll. I am aware that this is disputed by the defenders, who say that the poll had been twenty-five minutes open before the objection was stated. In giving judgment I assume that the pursuers' statement is correct. But I think that the objection is bad on its merits. The qualification prescribed by the Police Act of 1850 is that of a "householder" within the burgh, which is explained by the Police Act of 1868 to be "a male occupier of lands or premises of the yearly value of £4 and upwards as appearing on the valuation-roll." It must appear that the premises are of the yearly value of £4. What is the position of the candidate? He was the partner of a firm who were occupiers of premises of the yearly value of £220 in the valuation-roll, and he was deputed by his partners to represent them. He had more than the necessary qualification. But it is said that he acquired the qualification only shortly before by becoming a partner of David Swan and Sons, and that no such firm appears on the valuation-roll. But the firm of David Swan junior and Co. does appear on the register. The proper firm does not appear on the roll, but that is a mere accident, there being no opportunity to change the name since the new firm was constituted. The condition of the roll for the time is that there is a mere misnomer, not arising from any fault or neglect of the candidate, but *ex necessitate rei*. Assuming that the objection was taken in good time, I think we have jurisdiction to entertain it, but I think it is bad on its merits.

The second objection is that a number of the votes which were admitted were bad because the electors who tendered them had not paid their taxes. This would involve an inquiry as to which electors voted for each of the candidates, or, in other words, a scrutiny of votes. If there is to be any scrutiny of votes the only competent mode of having it done is by a committee of the

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commissioners under section 31 of 13 and 14 Vict., c. 33, and their decision is final.

The third and last objection rests on the allegation of treating voters. It is the first time I ever heard of such an objection to a municipal election or elections of that class. We are familiar with the objection in Parliamentary elections, but there it is dealt with by statutory enactment. But I cannot find anything of the kind in regard to municipal elections. The 25th section of the Ballot Act is confined to Parliamentary elections. I do not say that an election of this kind could not be set aside on the ground of bribery. Bribery is a crime at common law. Treating is a statutory and constructive bribery not known to common law, and we have no authority for extending the law as to treating in Parliamentary elections to Municipal elections.

I am therefore for adhering to the Lord Ordinary's judgment.

LORD DEAS.—The first objection is that Mr Swan had not the qualification necessary for being elected a commissioner. I agree with your Lordship that such an objection may competently be brought before us. But on the face of the argument it is not well founded It is not necessary that the candidate's name should appear on the valuation-roll, and apart from this there is nothing to shew that he had not the necessary qualification.

The second objection is that a number of electors voted who had not paid their assessments, and it is contended that there ought to be a scrutiny of votes in this Court. Upon that point I concur in holding that there can be no scrutiny except under sec. 31 of 13 and 14 Vict., c. 33, and that the inquiry can only take place before a committee of the commissioners, whose decision is final.

The third objection is that the defenders treated the voters. I entirely agree with your Lordship on this point. If there had been a relevant allegation of bribery we might have inquired into it. Bribery is a crime at common law. Treating is not. Treating to food is not a crime at all. As to drink it is not said that the electors were made drunk, or even that they were treated to drink. It is out of the question that the election should be set aside on such lame allegations.

I think all the three objections are unavailing.

LORD ARDMILLAN.—I concur. I assume that the objection to Mr Swan's qualification was taken before the poll began, as the pursuers have stated. I agree with your Lordship that we have power to dispose of the objection. But I think it is as feeble an objection as I ever heard stated. A change was made in the name of the firm of which Mr Swan was a partner, and the time had not come for altering the valuation-roll. It is not said that there had been any blunder or delay on the part of the candidate whereby the qualification flew off.

As to the second objection, I concur that we have no jurisdiction to entertain it.

I do not think that we could have a proof of the pursuers' allegations of treating. Bribery would have been a different matter. Here there are no special and definite averments. There is no allegation of any particular person or persons having been treated. The charge is made at random, and is altogether indefinite. If it were seriously alleged that any persons were treated or unlawfully influenced their names ought to have been given.

I think that the Lord Ordinary is right.

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LORD MURE.—I concur with your Lordships.

I think the first objection must be treated on its merits. I am satisfied on the averments in the condescendence that this gentleman had the qualifications.

I do not think that the pursuers were entitled to come here for a scrutiny. I therefore concur on this point, and also on the question of treating.

THE COURT adhered.

MORTON, NEILSON, & SMART, W.S.—MAITLAND & LYON, W.S.—Agents.

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Clippens Shale Oil Co. v. Scott.

CLIPPENS SHALE OIL COMPANY, Pursuers.—*Asher—Young.*
JAMES SCOTT, Defender.—*D.-F. Watson—Mackintosh.*
THOMAS INGLIS SCOTT, Defender.—*Lorimer.*

Partnership—Summons—Relevancy—Contract—Proof.—Two parties to a written contract of copartnery brought an action against the father of the third party, and the third party, for declarator that the father was a partner, alleging that immediately after the contract was signed they had discovered that the father was really the partner, and that he had been then accepted by them, and had acted as partner. *Held* that the action was not relevant.

1st DIVISION. Lord Young. B.

IN August 1870 Robert Binning and John Binning formed the Clippens Shale Oil Company, to carry on the business of oil manufacturers at Clippens, in Renfrewshire. On 22d July 1871 they entered into a written contract of copartnery with Thomas Inglis Scott, a minor, about twenty years of age. The minor's father, James Scott, signed the contract along with him as his curator.

In October 1875 an action was raised in name of the company, and of Robert and John Binning, two of the partners, against James Scott and Thomas Inglis Scott, concluding for declarator "that the defender James Scott is at present, and has been since 22d July 1871, a partner along with the pursuers in the business" under the said contract bearing to be between the pursuers and Thomas Inglis Scott. The only conclusion directed against Thomas Inglis Scott was for payment of expenses in the event of his opposition.

The pursuers averred on record, as amended in the Inner-House,—"At the time when the contract was signed the pursuers believed that Thomas Inglis Scott was to be their partner, but immediately thereafter they discovered that, although Thomas Inglis Scott was the ostensible partner of the company, the defender James Scott was really the party who became the partner, and implemented the obligations nominally undertaken by Thomas Inglis Scott. As soon as the contract was entered into Thomas Inglis Scott left for the Continent, and did not enter on the duties which devolved upon him under the contract, or proceed to qualify himself for assuming and taking charge of the works, as he was by the express terms of the contract bound to do. James Scott thereupon at once took up the position of being a partner in lieu of his son, and he was accepted as such by Robert Binning and John Binning, and they, along with him as copartners, have all along carried on the business of the Clippens Shale Oil Company upon the footing (as was the fact) that he was a partner of the company under the contract."

Separate defences were lodged for each defender. Both defenders pleaded that the averments were not relevant to support the conclusions.

The Lord Ordinary sustained this plea, and dismissed the action.

The pursuers reclaimed.

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The Court allowed the pursuers to amend the record as quoted above, and after hearing the pursuers' counsel,[1] without calling for a reply, sustained the plea in law stated for the defenders, dismissed the action, and decerned, holding that although the facts alleged by the pursuers might make the defender James Scott liable as a partner to third parties, they could not make him a partner *inter socios*.

CAMPBELL & SMITH, S.S.C.—WEBSTER & WILL, S.S.C.—HAMILTON, KINNEAR, & BEATSON, W.S.—Agents.

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May 17, 1876. Robertson v. Brown.

DAVID ROBERTSON, Pursuer.—*Fraser—Millie.*
JOHN BROWN, Defender.—*Mackintosh—M'Kechnie.*

Master and Servant—Reparation.—When a master orders a labourer to do a piece of work, out of the line of his ordinary employment, which could with safety be done only by a skilled workman, the master is responsible should any accident happen to the workman.

1st DIVISION. Sheriff of Stirlingshire. M.

DAVID ROBERTSON, a labourer, raised this action in the Sheriff Court of Stirling against his employer, John Brown, contractor, Kilsyth, for damages for injuries sustained while working in the defender's employment. A proof was led before answer, in which the following facts were proved:—

The defender was contractor for working certain coal and ironstone pits near Kilsyth, including Craigens pit, at which the pursuer was employed. He entered the defender's service as an unskilled labourer in November 1873. His duties were to push and empty hutches, to char iron and break stones. He was twenty-eight years of age and able-bodied, and was receiving a wage of 24s. a-week, but had no experience of any work except that of a labourer, and particularly had no knowledge or experience in machinery. The traffic of the Craigens pit was carried on by means of an incline railway running for about a quarter of a mile down hill from the pit to a junction. The incline was worked by means of an endless wire rope, driven by a stationary steam-engine at the pit, and revolving round a horizontal wheel under the surface at the junction. The horizontal wheel measured 4 feet or thereby in diameter, and was an open wheel with four spokes, and was covered over by a number of iron plates, the plate immediately over the centre being about 24 inches in length by 20 inches in breadth, and from 70 to 80 lbs. in weight, and having a hole, 5 inches square, left for the purpose of oiling the wheel, about the centre. The wheel was usually left constantly revolving by the wire rope in connection with the steam-engine, which was about a quarter of a mile distant, and not visible from the place where the wheel was situated; and on 22d April 1874 there was no system of communication, by bell or otherwise, between that point and the engine-house. On 22d April, the pursuer being at one of the hutches near where the horizontal wheel was revolving underneath the plates above mentioned, was ordered by the defender to fetch a new plate which had been got for the purpose of being put in place of the plate over the centre of the wheel, and to remove the centre plate and substitute the new plate for it. While he was engaged in doing this his foot slipped, and was caught in the revolving wheel, and was so much injured that his leg required to be amputated above the knee.

[1] Wark v. Bargaddie Coal Co., March 6, 1856, 18 D. 772, 28 Scot. Jur. 319, H. of L. 15th March 1859, 21 D., H. of L. 1, 31 Scot. Jur. 325; Sutherland v. Montrose Shipping Co., Feb. 3, 1860, 22 D. 665, 32 Scot. Jur. 262.

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The defender denied liability, and, *inter alia*, pleaded;—(3) The pursuer having caused or contributed to his own injury, the defender is not responsible therefor.

The Sheriff-substitute (Sconce) found . . . . "(6) That the mere lifting or removal of the plate, although the wheel was revolving, was attended with no real danger or hazard, and was often done, without injury to themselves, by common labourers, like the pursuer, about the works; any risk attending the removal was apparent, and might have been avoided with ordinary care: (7) Finds in law that, in the circumstances foresaid, there was no culpable negligence or gross carelessness, or indeed any negligence or carelessness, in the defender giving the pursuer the order foresaid; and therefore assoilzies the defender from the conclusions of the summons, and decerns: Finds the defender entitled to expenses; allows an account," &c.

On appeal, the Sheriff (Lee) found . . . . "(8) That the said operation of removing the one plate and substituting another while the wire rope was in motion upon the horizontal wheel was a work of a dangerous character, especially if performed by a common labourer, such as the pursuer was, without assistance or direction; and that the risk attending it was not an ordinary risk incident to the kind of employment in which the pursuer was engaged, and was not apparent to the pursuer; (9) that the defender, in giving the said order, took no steps to have the wheel stopped, and left the pursuer to carry it out without assistance or directions, and without using any precautions against the risk involved in lifting such a weight with the wheel revolving underneath; (10) that the pursuer being unaware of any danger, proceeded, without objection or demur, to carry out said order, fetched the new plate to the place, and began to lift off the old one (the wheel still revolving), and was in the act of lifting it when his right foot having slipped, his leg got entangled in the wheel, whereby the said leg was so much injured that it was necessary to have it amputated at the middle of the thigh; (11) that in consequence of said injury the pursuer was seven weeks in the Glasgow Infirmary, was rendered unfit for any work for a period of twelve months, and was permanently disabled for the kind of work to which he was accustomed; (12) that the defender has failed to prove that the said injury was caused or contributed to by negligence or carelessness on the part of the pursuer; (13) that the said injury was caused by the defender employing the pursuer in a work of the dangerous character aforesaid, and culpably neglecting to take precautions for his safety: And finds in point of law that the defender is liable to the pursuer in damages, assesses the damages at the sum of £100 sterling, and decerns against the defender for payment to the pursuer of the said sum, in terms of the conclusions of the summons: Finds the pursuer entitled to expenses; allows an account," &c.*

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* "NOTE.— . . . . The difference between the Sheriff and the Sheriff-substitute arises upon the facts, and not upon the law. It consists mainly in this,—that the Sheriff considers it proved that the work which the pursuer was ordered on the occasion in question to perform was of a dangerous character; that the risk involved in it was not a risk arising in the ordinary course of the pursuer's employment, and was not apparent to the pursuer, as it was or should have been to the defender; and that the defender was to blame in not taking any precaution to enable the pursuer to do the work in safety.

"If this be a true view of the facts, the Sheriff cannot doubt as to the law applicable to the case. For the defender's allegation of contributory negligence is entirely unsupported by evidence; and his plea that the danger was equally

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The defender appealed, and argued;—The danger was apparent as much to the pursuer as the defender. The accident happened as much from the carelessness of the pursuer as from the fault of the defender. A master was not responsible for an accident which happened through the carelessness of the workman, or to which the workman contributed. The master had provided all the necessary appliances for doing the work, and it was the servant's duty to look to his own safety.[1]

The pursuer's counsel were not called on.

LORD PRESIDENT.—We are not concerned here with the common case of a workman injured in the course of his ordinary employment. The removal of this plate was no part of the pursuer's ordinary work, and it ought to have occurred to the master that there was very great risk that a man of this class, an ordinary unskilled workman, with boots so constructed that they were very apt to slip in lifting a plate weighing three-quarters of a cwt., might slip, and so become entangled with the engine. This is, therefore, undoubtedly one of those cases where there is a duty on the one side on the part of the master to take precautions to protect his servant against risk, and no duty on the other side on the part of the servant to take any precautions for his own safety. The labourer could not have foreseen the danger in the same way as the master must have foreseen it, and to obviate all risk the master had only to order the engines to be stopped. A person of ordinary sense, with the slightest foresight, would have taken this precaution; and, besides, the servant, even if he had foreseen the danger, as I think he clearly did not, had no power to stop the engine. I think the Sheriff's judgment should be affirmed.

LORD DEAS.—I am of the same opinion. The case belongs to a class of cases in which it is very necessary to distinguish the circumstances carefully. The pursuer, as your Lordship has pointed out, is an unskilled workman. His proper employment was to bring forward hutches from the engine-house to the top of the incline, up and down which they were sent by an endless rope. It was no part of the pursuer's duty to do anything on the incline. Therefore, we are not dealing with a case such as those mentioned in Mr Fraser's book, where an accident happened in the course of the workman's ordinary employment. To order such a man as the pursuer, while the engine was in motion and the hutch was descending, to take off one plate and put on another was, I think, a very dangerous order. It might have been possible for a man of great skill to do it without any harm happening, but it was a very dangerous operation. In order to have had the object safely accomplished

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manifest to the servant and to the master, and that the pursuer should have refused to obey the order if he had considered the work to be out of the ordinary course of his employment, is entirely displaced if the pursuer has succeeded in making out his case, viz., that he was employed as a common labourer, entirely inexperienced in the dangers of machinery in motion; and that the risk attending the removal of a heavy plate having a revolving wheel of 4 feet diameter immediately underneath was not an ordinary risk occurring in the course of his employment, and was not apparent to him." . . .

[1] Paterson v. Wallace, July 6, 1854, H. L. 17 D. 16, 26 Scot. Jur. 550; Cook v. Bell, Nov. 28, 1857, 20 D. 137, 30 Scot. Jur. 75; Crichton v. Keir, Feb. 14, 1863, 1 Macph. 407, 35 Scot. Jur. 247; Pollock v. Cassidy, Feb. 26, 1870, 8 Macph. 615, 42 Scot. Jur. 303; Traill v. Small and Boase, July 4, 1873, 11 Macph. 888, 45 Scot. Jur. 540.

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all that the master had to do was to have ordered the engine to be stopped. His fault lay in ordering an unskilled man to do this sort of work while the engine was in motion. The more ignorant the workman was the less likely was he to refuse. He was entitled all the more to protection from the master. I think the whole case is distinctly and clearly put by the Sheriff in his note when he says—"The difference between him and the Sheriff-substitute arises upon the facts. It consists mainly in this,—that the Sheriff considers it proved that the work which the pursuer was ordered on the occasion in question to perform was of a dangerous character; that the risk involved in it was not a risk arising in the ordinary course of the pursuer's employment, and was not apparent to the pursuer, as it was or should have been to the defender; and that the defender was to blame in not taking any precaution to enable the pursuer to do the work in safety." I think that is a correct statement, and that the Sheriff has come to a correct conclusion.

LORD ARDMILLAN.—I am entirely of the same opinion. The operation which the pursuer was performing was one which might either be safe or dangerous. The question whether it was safe or dangerous depended on whether the machinery was in motion or standing still. It was not necessary for the operation, and it increased greatly the danger, that the machinery should be in motion. The master's failure to give the order to stop the machinery made the operation peculiarly dangerous. I think the Sheriff has rightly decided, and I have nothing further to add.

LORD MURE concurred.

THE COURT pronounced an interlocutor repeating the findings in the Sheriff's judgment, and refused the appeal, finding the appellant liable in expenses.

THOMAS LAWSON, S.S.C.—THOMAS CARMICHAEL, S.S.C.—Agents.

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EDINBURGH STREET TRAMWAYS COMPANY, Pursuers and Reclaimers.—*Macdonald—Balfour—Mansfield.*
ALEXANDER TORBAIN, Defender and Respondent.—*Kinnear—Harper.*

Statute—Edinburgh Street Tramways Acts, 1871 *and* 1874, 34 *and* 35 *Vict. cap. lxxix., sec.* 44, *and* 37 *and* 38 *Vict. cap. lxviii., sec.* 4.—A tramway company was bound by an agreement, embodied in its Act of incorporation, not to charge passengers more than 1d. per mile or fraction of a mile (the minimum charge for each passenger being 2d.) They afterwards obtained an Act by which they were relieved of their obligation to lay certain lines, and were allowed instead to run omnibuses over these routes. This Act allowed them to charge "a sum not exceeding 2d. per mile for first-class passengers on omnibus routes and any tramway routes worked in connection therewith." *Held* that the second Act did not alter the rates chargeable for tramway passengers who did not use the omnibus routes.

2D DIVISION.
Lord Shand.
I.

THE EDINBURGH STREET TRAMWAYS COMPANY was incorporated by Act of Parliament, 34 and 35 Victoria, cap. lxxxix., which authorised them to construct various lines in Edinburgh and Leith. Section 44 of the Act embodied by reference to schedules, *inter alia*, an agreement between the promoters of the company and the magistrates of Edinburgh, dated 29th March 1871, which contained the conditions upon which the magistrates,

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as representing the public, refrained from opposing the company's bill. One of the stipulations inserted in that agreement was, "in no case shall the company demand or take from any passenger travelling upon any or either of the tramways, or any part or parts thereof respectively, tolls or charges exceeding in whole one penny for each mile" (the minimum charge for any distance less than two miles being fixed at 2d.)

The company constructed a great portion of the works authorised by the Act of 1871, but being desirous to abandon certain portions of the lines which they had undertaken to lay, on account of the great expense which would be incurred in working them from the hilly nature of the ground, viz., the lines from Princes Street to Stockbridge and Trinity, they, in 1874,[1] obtained an Act of Parliament entituled "An Act to extend the time for the widening and improvement of the North Bridge by the Corporation of Edinburgh, under an agreement confirmed by the Edinburgh Tramways Acts, 1871, and to authorise the Edinburgh Street Tramways Company to relinquish the construction of certain of their authorised tramways, and for other purposes." By section 4 of this Act it was provided that the company, when called upon by the local authority of Edinburgh, should provide omnibuses on the routes to Stockbridge and Trinity, to be run at the sight of the local authority, and at certain times therein set forth; and it was also enacted that the company might "demand and take, in respect of passengers and parcels carried in or by such omnibuses, such tolls and charges as they think fit, not exceeding the charges which by the Act of 1871 the company are entitled to charge in the event of the construction of the tramways to Stockbridge and Trinity, and the company may charge a sum not exceeding 2d. per mile for first-class passengers on those routes and any tramway routes worked in connection therewith."

These omnibuses were accordingly started by the tramways company, and, as they averred, "run in connection with the various systems of the tramways." The omnibuses on the Stockbridge route started from the General Post Office at the east end of Princes Street, and those on the Trinity route from the Royal Institution, Princes Street.

The tramways company up to 13th December 1874 (the day before they commenced running their omnibuses), charged 2d. for both inside and outside passengers on the section of their lines from Leith to the General Post Office in Edinburgh. On the 14th December, however, in accordance with previous intimation by placards exposed in their cars, they increased the charges for inside passengers on that route from 2d. to 3d. On that day Alexander Torbain travelled inside a car from Leith to the General Post Office, Edinburgh, and was charged 3d. but refused to pay it.

The tramways company then raised an action against Mr Torbain in which they sought to have it declared that in virtue of the provision in section 4 of the Act 37 and 38 Vict. cap. 68, above quoted, they were "entitled to demand and take, in respect of passengers carried in or by the pursuers' cars between Leith and the General Post Office, Edinburgh, and *vice versa*, a sum not exceeding 2d. per mile for first-class passengers." There was also a conclusion for decree against Torbain for 1d.

Torbain lodged defences, in which he maintained that the increased charges authorised by the 4th section of the Act of 1874 were only intended to be exacted from passengers travelling on the omnibus routes.

Pleaded for the defender;—(1) The pursuers not being entitled, under

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the foresaid Acts of 1871 and 1874, to charge more than 1d. a mile for first-class passengers travelling between Leith and the General Post Office, Edinburgh, except in the case of passengers travelling also on the omnibus route to Stockbridge or Trinity, they are not entitled to decree of declarator in the terms concluded for. (2) The defender not having travelled on the occasion libelled on the route between Princes Street and Stockbridge, or between Royal Institution and Trinity, the pursuers were not entitled to demand or take from him the increased fare authorised by section 4 of the Act of 1874.

On 18th November 1875 the Lord Ordinary assoilzied the defender, with expenses.*

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* "OPINION.—This action has been raised to try the question what sum the pursuers are entitled to charge as a maximum fare to passengers travelling in the tramway cars between Leith and Edinburgh. The pursuers claim right under their statute of last session of Parliament to make a charge of twopence for each mile or part of a mile, while the defender maintains they are not entitled to charge more than one penny a mile or part of a mile. The question is of importance to the pursuers, and to those who are in use to travel by the pursuers' tramway cars; for although the case relates immediately to the route between Edinburgh and Leith, the decision will apparently apply to all the routes on the pursuers' system, excepting only the journey between Stockbridge and Newington.

"The judgment, whether for or against the pursuers, depends on the construction to be given to the words occurring in section 4th of the pursuers' last statute, immediately after mention of the routes to Stockbridge and Trinity,—viz., 'and the company may charge a sum not exceeding twopence per mile for first-class passengers on those routes, and any tramway routes worked in connection therewith.' The pursuers state that all their tramway routes are now worked, as the statute provided they should be, in connection with the routes to Stockbridge and Trinity, for which a service of omnibuses, not tramway cars, is provided; and they maintain that the copulative word 'and' occurring in the sentence 'those routes and any tramway routes worked in connection therewith,' is to be interpretated disjunctively, as having the force of the word 'or,' thus meaning that the company, by force of the statute, may charge a sum of twopence a mile for first-class passengers travelling either on the routes to Stockbridge or Trinity or on any of the tramway routes used in connection with these routes, and practically this includes the whole of the company's system. The defender, while not disputing that the copulative 'and' admits in certain circumstances, and according to the context, of being construed as having the effect disjunctively of the word 'or,' denies that it has this exceptional effect here, and maintains that the power given to the company of charging twopence per mile for what are called first-class passengers is given in the particular case, and limited to the particular case of persons travelling as through passengers partly by omnibus and partly by tramway car on the Stockbridge or Trinity routes, and any tramway route in connection with these.

"I am of opinion that the defender is right in this construction of the statute. The same question was raised in a case before Sheriff Hallard, sitting in the Small Debt Court, and was the subject of a carefully considered judgment by him; and I concur in the reasons given by him for adopting the view of the statute maintained by the defender.

"Before the last Act obtained by the company, it is clear that the highest rate which the pursuers could charge on any part of their extensive system of tramways was 1d. per mile—a fraction of a mile beyond a complete mile being regarded as equivalent to a mile. This rate of charge was not only fixed by the statute giving the company the important concessions they obtained in regard to their occupation and use of the public streets, but was so fixed as having been expressly agreed to in two contracts entered into between them and the magistrates of Edinburgh and Leith respectively. These bodies refrained from opposing the powers asked by the company in respect, *inter alia*, of the agree-

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Argued for them;—The whole of their lines were in connection in the

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ment that 'in no case shall the company demand or take from any passenger travelling upon any or either of the tramways, or any part or parts thereof respectively, tolls or charges exceeding in whole one penny for each mile,' or fraction of a mile, as before explained. These agreements were confirmed as part of the Act by section 44th, and the maximum rates chargeable applied to the tramway lines which the company undertook to lay down leading to Stockbridge and Trinity in the same way as to all the other routes.

"During the last session the company applied to Parliament to be relieved of their obligations to lay down these particular lines of tramway, and they obtained an Act giving them that relief, but imposing on them an obligation, on the requisition of the local authority, to keep up a service of omnibuses to be run frequently to and from Stockbridge and Trinity respectively 'in connection with their various systems of tramways.' It is in the clause imposing this obligation that the words occur which have given rise to the question in dispute.

"It is worthy of notice that there is nothing in the preamble of the statute indicative of any intention to give the pursuers power to raise the maximum charges for passengers throughout their system, and thus to abrogate the clauses in the agreements with the magistrates of Edinburgh and Leith respectively, already referred to, and nothing to suggest that any reason existed for allowing the charges to be increased. The providing of omnibuses for the more immediate benefit of two particular districts in lieu of the more serious obligation to lay down lines of tramways which was discharged by the Legislature, does not suggest any good reason for raising the charges to passengers who still continue to use the tramway cars alone, as they did formerly. And in the construction of section 4th of the Act it appears to me to be clear that it is incumbent on the pursuers in these circumstances to shew that the language used unambiguously, and beyond all reasonable doubt, gives them the power they ask. There is the strongest presumption against the repeal by mere implication of the distinct stipulation as to the charges for passengers contained in the agreements already referred to; and the statute, in so far as its language may be described as ambiguous, is to be construed rather against than in favour of the imposition of higher rates of charge, and against rather than in favour of the company who obtained it for their own benefit.

"Turning to the clause itself, the first thing enacted after imposing on the pursuers the obligation to run omnibuses to Stockbridge and Trinity, is, that the company may demand and take, 'in respect of passengers and parcels carried in or by such omnibuses, such tolls and charges as they think fit, not exceeding the charges which by the Act of 1871 the company are entitled to charge in the event of the construction of the tramways to Stockbridge and Trinity.' This clause and the Act of 1871 together fix two things—(1) that the charges for tramway passengers in any part of the whole system shall not exceed 1d. a mile; and (2) that the charges against passengers using the omnibuses alone shall not exceed the same rate. It would be surprising if the very next sentence of the Act undid all this, as the pursuers maintain. The only case which remains unprovided for is that of a through passenger using the combined service of omnibus and car, or car and omnibus, and who may on the whole journey travel a distance not exceeding a mile, and naturally enough the case of through passengers which was now to occur for the first time might be the subject of special enactment. The words are, 'and the company may charge a sum not exceeding 2d. per mile for first-class passengers on those routes, and any tramway routes worked in connection therewith.' The words 'those routes' plainly refer to the routes on which omnibuses are to run, and the provision appears to me to apply, and to apply only, to passengers using those routes in conjunction with the tramway cars. The word 'and' is to be taken in its ordinary sense as used conjunctively. Provision is thus made for rates for through passengers, the only class not already provided for. The reading contended for by the pursuers directly contradicts the words which immediately go before, and practically

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sense of the 4th section of the Act of 1874, and they were therefore entitled to levy an increased rate upon every portion.

Counsel for the defender were not called upon.

LORD JUSTICE-CLERK.—I think this a most important case in any view.

The pursuers are the promoters of a certain system of travelling by tramway cars, which run in Edinburgh and its vicinity, and I am far from saying anything against the facilities they afford to the inhabitants.

Before obtaining Parliamentary sanction to the laying down of their rails they entered into an agreement with the municipal authorities of the city, one of the provisions in which, and a most stringent one, was to limit the maximum fares to be charged. It runs as follows:—"In no case shall the company demand or take from any passenger travelling upon any or either of the tramways, or any part or parts thereof respectively, tolls or charges exceeding in

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requires the substitution of the word 'or' for 'and.' If the section did necessarily involve a contradiction, which on the pursuers' view it does, I should still say I could not give effect to that construction of a contradictory clause which practically destroys the stipulations of the agreements entered into by the pursuers. But there is no such contradiction if the other view, which I hold to be the sound one, be adopted. This view is also borne out by the concluding words of the section, which also deal with through passengers 'by omnibus and car' in the special case of the journey between Stockbridge and Newington.

"It was argued that the reference to 'first-class passengers,' made for the first time, aided the pursuers' construction of the Act, but I do not think there is any force in the argument. The use of the words 'first-class' cannot take away the effect of the previous enactments, that no passengers, either by tramway cars or by omnibus, shall be charged more than 1d. a mile. It is not said that any distinction between a first and second class existed in the use of the tramway cars, —and looking to the place in which the words occur in the statute, referring, as I think they do, to through passengers in the sense I have explained, it appears to me they must have been used with reference to the difference of charges which commonly exist for outside and inside passengers travelling by omnibus, and which the pursuers say did exist in the omnibuses formerly on the Stockbridge and Trinity routes.

"Again it is said there was no use in the Legislature giving a somewhat higher rate as against a through passenger, for the charge would be avoided by the passenger paying separately—first on his journey by car, and afterwards on the remainder of his journey by omnibus. There may be some truth in this observation, though I do not know how the matter may work where the car rate and the omnibus route each embrace a fraction of a mile. But, however this may be, it cannot affect the construction of the Act. If the company really intended to obtain the very important change on their power of charging for the use of their cars, of which they now claim the benefit, and the Legislature meant to give this, it could only be done by distinct and precise language to that effect, and there certainly is not such language in this statute.

"Considerable doubt occurred to me as to the jurisdiction of this Court to entertain the action, which contains a pecuniary conclusion for one penny, and all the more that the parties have been unable to refer to any reported case of the kind. But the action really is one of declarator to have an important question of legal right tried, and such actions are competent only in this Court. It plainly involves an issue of large pecuniary interest to the pursuers, and, it may be, also to the defender. In its substance it truly involves a question between the company and the public, which might properly have been directed against a number of defenders in use to travel by the company's cars, but which may be conveniently tried in a case against one; and such questions—as, for instance, in regard to rights of way and the like—are proper subjects of trial and decision in this Court."

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whole one penny for each mile." That was a part of the agreement ratified by the original statute, and scheduled in the Act, and is one of the inherent conditions on which the company's very great privileges were sanctioned. It seems that three years afterwards the company desired to be relieved from the obligation to make lines to Stockbridge and Trinity, imposed on them in the original Act. An Act was passed for this purpose, the main provisions being to extend the time for the widening and improvement of the North Bridge by the corporation of Edinburgh, and to authorise the tramways company to relinquish the construction of the Stockbridge and Trinity lines, which were only a portion of their system. Such is the title of the Act; but neither in the title nor in the Act itself is there a single word which directly or expressly relates to the general powers of charging fares, or the general obligation to carry the public at the specified rate. No one could have discovered, from either the object or the words of the statute, that the promoters had any intention of obtaining power to increase their general rates. The 4th section applies to an entirely different subject, namely, the conditions on which the company were to be relieved of their obligation to make the tramway to Stockbridge and Trinity. It deals with no other topic, and its provisions must be read in relation to that matter. So far is the statute from appearing to deal with the general powers of the former statute, that the 8th section specially provides that, "saving as in this Act is expressly provided, nothing in this Act shall prejudice or affect the three several agreements scheduled to the Act of 1871, but these agreements, subject to the provisions of the Act of 1871 and this Act, shall remain in full force and effect."

Now, the 4th section, which relates to the terms on which the company are to be liberated, provides that they shall substitute an omnibus service for tramways for these two routes; and in regard to this omnibus service it is provided that the company were, on the requisition of the town-council, to supply omnibuses on both routes, and the local authority of Edinburgh were, to some extent, to be judges of the sufficiency of the supply; and then come the words, "and the company may charge a sum not exceeding 2d. a mile for first-class passengers on those routes, and any tramway routes worked in connection therewith." We are told that the tramways company, when they went to Parliament to get these powers, intended to get leave to double the fares over their whole system for what they call first-class, that is, inside passengers, and that the town-council and the Legislature meant that also. This proposition, I can only say, seems to me a most audacious one.

I am inclined to think the words mean that the company were to be entitled to charge 2d. per mile for first-class passengers by their omnibuses, even although a piece of the tramway lines was included in any one mile. We do not, however, need to lay down what the precise case is to which these words will apply. The question before us is whether the defender, who has made no use of any portion of the omnibus service, nor of any part of the line directly in connection therewith, is to be charged extra fare when using other parts of the company's lines. I am clearly of opinion that no one who does not use the omnibus service is bound to pay more than the old rate. If the real intention of the words founded on was to give the company leave to increase the fares all over their system, it ought to have been, and it would have been, expressly stated. I am of opinion that no legal construction of these words will support the pursuers' contention.

I am for adhering substantially to the Lord Ordinary's interlocutor.

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LORD NEAVES.—I am of the same opinion. I agree with your Lordship in thinking that the question raised is one of importance with respect to the rights of parties, and as to the mode in which such Acts of Parliament are to be construed.

The primary object of this Act of 1874 was to liberate the tramways company from the obligation to make lines to Stockbridge and Trinity, and instead of these to substitute omnibuses to run to these places for the convenience of the inhabitants, at "such tolls and charges as they think fit, not exceeding the charges which by the Act of 1871 the company are entitled to charge in the event of the construction of the tramways to Stockbridge and Trinity, and the company may charge a sum not exceeding 2d. per mile for first-class passengers on those routes, and any tramway routes worked in connection therewith." It is not an immaterial circumstance that this mention of first-class passengers is accompanied with no explanation; but we all know that first-class passengers do generally exist in omnibuses, and the mention of first-class passengers, assuming them as an existing class of passengers, is solely applicable to omnibuses, as there are no first-class passengers in connection with tramway cars. It is now said that the right to lay an additional tax upon tramway passengers was purchased by the undertaking to supply omnibuses on the Stockbridge and Trinity routes. But what is the fair construction of this clause? I think the 2d. is to be a tax on those persons who get the direct benefit of the omnibus routes. To say that those passengers who come from Leith, having no earthly connection with the omnibuses, are to be taxed double, is highly improbable. Is it likely that in order to enable the tramway company to get rid of their original obligation they are to be allowed to tax all passengers using their lines—even those having no connection with the omnibuses—double what they had a right to under their original Act? If that was intended it could easily have been clearly expressed. But the words used are ambiguous at the best,—not, it is true, as I read them, but still they may be said to be ambiguous. It is most improbable that the Leith people were intended to be taxed double. The natural interpretation of the words is that only those who make joint use of both omnibuses and cars are to be so charged.

The public are under no obligation, either natural or legal, when they take no advantage or use of the omnibuses, to pay part of the expense of these omnibuses. That would be a violent supposition, and it is strongly negatived by the clause of the Act quoted by your Lordship in the chair.

Whether, in their anxiety to snatch what they were not entitled to, they let go what they might have got, I have no sympathy with the tramway company, for they ought to have expressed their object and privileges clearly, if they meant the Legislature and the public to understand them in the sense for which they now contend.

LORD ORMIDALE.—I have come to the same conclusion. It must be kept in view that we are dealing with a statutory contract between the tramways company and the public—a contract whereby the company, in consideration of a relief from some burden previously incumbent on them, undertakes certain obligations in favour of the public. The company applied to Parliament for the Act necessary to accomplish these objects, and they alone were the promoters of the measure, for their own benefit and purposes. Any ambiguity, therefore, in the terms of the Act, must be attributable to themselves. Keeping this in

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view, the question arises, what is the meaning of that part of the Act which provides that "the company may charge a sum not exceeding 2d. per mile for first-class passengers on those routes" (the omnibus routes), "and any tramway routes worked in connection therewith?" There may be some ambiguity in that provision. It might be argued, as it was, that it meant that the company are entitled to make the charge referred to either on the separate routes, or only on both in combination. But when we keep in view the circumstances in which the Act was obtained, and the change intended to be effected on the previous state of matters as between them and the public, all of which have been sufficiently gone into by both your Lordships, I cannot entertain any doubt as to what was meant, viz. that the charge of 2d. was only to apply to through passengers by tramway and omnibus in combination, as explained by the Lord Ordinary in his opinion.

That difficulty may be experienced by the company in working their undertaking in conformity with this view is not unlikely, and they possibly may have difficulty in exacting in every instance their just charges, and preventing evasion; but if this should happen the company must blame themselves in not providing against it by better expressed clauses in their Act.

On the whole, I have no serious difficulty in concurring with your Lordships and the Lord Ordinary.

Lord Gifford.—The only conclusion for declarator in this case, and the only conclusion which we are asked to affirm, relates solely to the tramway route between Edinburgh and Leith. The conclusion is that "the pursuers are entitled to demand and take, in respect of passengers carried in or by the pursuers' cars between Leith and the General Post Office, Edinburgh, and *vice versa*, a sum not exceeding 2d. per mile for first-class passengers." There is no reference here to omnibuses, and no mention of other parts of the tramway line. The Court is asked absolutely to declare that the tramways company are entitled to charge at the rate of 2d. per mile for first-class passengers on their line between Edinburgh and Leith. If the tramways company are right in this demand, it must equally apply to all the other parts of their tramway system, and the result would be that over the whole tramway system first-class passengers will be charged 2d. a mile or each fraction of a mile, and that although they do not use, and do not require to use, the omnibuses at all. Now, I find myself quite unable to affirm this right, for I think it is directly in the teeth of the pursuers' first statute, and of the solemn statutory agreement which is part thereof. By that agreement, confirmed by statute, it is expressly provided that the company shall "in no case" take "tolls or charges exceeding in whole one penny for each mile." The pursuers are bound to shew that that provision is no longer in existence. They must satisfy the Court that this provision is repealed. They have, I think, failed in so doing. They say that it is superseded by the statute of 1874, and so that instead of the original maximum fare of 1d. per mile, the maximum fare all over the system is now double, that is, 2d. per mile. I cannot possibly so read the statute of 1874. That statute was passed to relieve the company of very onerous obligations to lay tramway lines to Stockbridge and Trinity, which are very steep routes, and would have been very expensive to work, and the chief purpose of the statute was to allow the company, instead of tramway lines and tramway cars, to put on omnibuses upon these routes if they should be required to do so. There is no trace of any intention to get a general revision of

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the fares, far less to obtain leave to charge exactly double the fares for the same conveniences as they supplied before. The statute of 1874 goes no farther than that they may charge 2d. for first-class passengers in the omnibuses to Stockbridge and Trinity. No doubt it is provided in certain cases that they may charge 2d. per mile on the omnibus routes, "and any tramway routes worked in connection therewith," and this may possibly warrant a charge of 2d. a mile for first-class through passengers using the omnibuses. It can go no farther than this. But the company take the general ground that all their routes are in connection with these omnibus routes, and that therefore they are entitled to raise their fares over all their lines, even over parts of the tramway most distant from the omnibus routes, and to all passengers, even those who never use or require to use the omnibuses. This contention is quite inadmissible. If this had been intended, it would have required an express enactment revoking or repealing the previous statutory provision, and instead thereof doubling the fares. The public would have very great reason to complain if by mere implication the company were entitled to raise their fares all over their lines. I am therefore very clearly of opinion that whatever may be the case with passengers using the omnibus routes, all other passengers, that is, all passengers using merely the tramway, or any part thereof, are entitled to do so, and are liable only in the fare of 1d. per mile or fraction of a mile, whether they travel inside or outside the tramway cars, and therefore I am for affirming the Lord Ordinary's interlocutor.

THE COURT adhered.

LINDSAY, PATERSON, & Co., W.S.—W. H. COUPER, L.A.—Agents.

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Magistrates of Edinburgh v. Whitehead, &c.

THE LORD PROVOST AND MAGISTRATES OF THE CITY OF EDINBURGH, AND WILLIAM SKINNER, Town-Clerk, First Parties.—*M'Laren.*
MISS SARAH SHAW WHITEHEAD, &c., Second Parties.—*Begg.*

Superior and Vassal—Agent and Client—Statute 37 *and* 38 *Vict. c.* 94 (*Conveyancing Scotland Act*, 1874), *sec.* 4.—When a casualty becomes due the superior's agent is not entitled to record at the vassal's expense in the superior's chartulary the disposition by the recording of which the vassal obtained an entry.

1ST DIVISION. M.

ON 18th December 1860 the Lord Provost and Magistrates of the city of Edinburgh granted a feu-charter of certain subjects in favour of the late Humphrey Graham, W.S., who completed his title.

On 13th May 1871 Mr Graham, by disposition with alternative holding, conveyed part of the subjects to Misses S. S., A. R., and H. M. Whitehead, who recorded the disposition in the Register of Sasines for the county of Edinburgh on 15th May 1871.

By the operation of sec. 4 of the Conveyancing (Scotland) Act, 1874 (37 and 38 Vict. c. 94), the disponees became duly entered vassals of the city. Subsequently, on the death of Mr Graham, a casualty became due to the superiors, and the vassals were called upon by the town-clerk to produce their disposition with a view to the settlement of the composition.

The town-clerk, without the consent of the vassals, copied the disposition into the city chartulary, and claimed for behoof of the city the fees in use to be paid for recording charters in the city chartulary.

The present special case was presented by the town-clerk and the

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superiors, first parties, and by the Misses Whitehead, second parties, for the purpose of having the question determined for the guidance of the first parties in similar cases.

The special case set forth that the town-clerk was paid by salary, and was accountable to the corporation for the fees. That prior to the alterations in the forms of conveyancing incorporated in the Titles to Land Consolidation Act, 1868, it was the practice of superiors, in granting charters or other writs renewing the vassal's rights, to record every such charter or grant in the superior's chartulary, and to charge the expense of recording to the vassal. The charters granted to vassals of the city of Edinburgh were recorded in the chartulary of the city, and the costs of recording were charged by the city clerks to the vassals in accordance with the professional rule above referred to. It was admitted that the town-clerk's fees for so recording charters by progress formed a good charge against the vassals.

After the passing of the Titles to Land Act, 1858 (21 and 22 Vict. cap. 76), now incorporated in the Titles to Land Consolidation (Scotland) Act, 1868, by which abridged forms of entry, termed writs of confirmation, resignation, &c., were allowed to be substituted for charters of the like denomination, it was the practice of superiors to record the writs so granted, together with the disposition or other deed upon which the writ was indorsed, in their chartularies, and to charge the expense of recording such deed and indorsed writ in their account with the agent for the vassal. The practice was continued until the abolition of charters and writs by progress, and was followed, as matter of professional rule, by the first party, Mr Skinner, and his predecessor in office. Further, the table of fees of the Society of Writers to the Signet applicable to transactions prior to 1st January 1875 contained, under the heading of "charters and writs by progress, and precepts, and writs of *clare constat*," a charge payable by the vassal for "engrossing in chartulary, both the charter or writ, and such part of the deed on which it is written as is necessary;" while the revised table applicable to transactions entered into on or after that date contains, under the heading "charters of novodamus, and precepts, and writs of *clare constat*," a charge payable by the vassal for "engrossings in chartulary."

The following question was submitted:—"Have the first parties, or either of them, a legal right to record the disposition constituting the second parties' title, in the chartulary of the city of Edinburgh, at the expense of the second parties, on the occasion of a casualty being exigible from the second parties?"

At advising,—

LORD PRESIDENT.—There can be no doubt that before the recent changes in the law it was the practice of superiors when they granted charters, or any other writs renewing their vassals' rights, to record the writ in their chartularies, and to charge the expense of recording against the vassal, and it was the practice of the vassal to submit to the charge. This had grown up to be a common law right which no one disputed. Through the changes which arose in 1858 a difficulty arose, because writs, which were shorter than charters and were engrossed on the disposition instead of being separate deeds, were substituted for charters. The writ of the superior thus came to be not a separate writing, but was engrossed on the disposition. The practice was then modified so far that the superior's agent entered in the chartulary the writ with so much of the conveyance as was necessary to make the rights of the superior appear on the chartulary, and the

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practice of charging the vassal with the expense continued. But now, by the statute of 1874, a still more radical change has been introduced, and there is now no such thing as an express entry by progress. When a feu is conveyed, the conveyance, by being recorded, operates an entry with the superior under the 2d sub-section of section 4 of the Act of 1874. There is not even a necessity to intimate what has been done. If no intimation is made the original feuar is liable, but there is no obligation to make the intimation. The entry is made by the completion of the conveyance and the recording in the Register of Sasines. The superior's rights might have been prejudiced by this provision if there had not been introduced another provision. The 3d sub-section provides that "such implied entry shall not prejudice or affect the right or title of any superior to any casualties, feu-duties, or arrears of feu-duties which may be due or exigible in respect of the lands at or prior to the date of such entry; and all rights and remedies competent to a superior under the existing law and practice, or under the conditions of any feu-right, for recovering, securing, and making effectual such casualties, feu-duties, and arrears, or for irritating the feu *ob non solutum canonem*, and all the obligations and conditions in the feu-rights prestable to or exigible by the superior, in so far as the same may not have ceased to be operative in consequence of the provisions of this Act or otherwise, shall continue to be available to such superior in time coming; but provided always, that such implied entry shall not entitle any superior to demand any casualty sooner than he could by the law prior to this Act, or by the conditions of the feu-right, have required the vassal to enter, or to pay such casualty irrespective of his entering." Now, I think the effect of the 3d sub-section is to leave the rights of the superior and vassal precisely as they stood before the statute. The superior is entitled to enforce all the provisions except in so far as they are interfered with by the statute. He has all the common law remedies to enforce payment of his feu-duties. He is not to be entitled to any casualty to which he was not entitled before, or at any other time.

It is quite clear that the superior was not entitled to a casualty when the sale to the second parties took place. Humphrey Graham, who was entered in 1860, was the last entered vassal, and was then alive, and he died some time after May 1871. It was only on his death that the casualty became due. The effect of the entry operated by recording the disposition by Graham was to leave the superior and the vassal exactly in the same position as they would have been in under the old law, except that the superior could not require the vassal to come to him and take out an entry. When the superior and vassal come together, which they do not do until a casualty becomes payable, the question comes to be whether the superior is entitled to say to the vassal "you must allow me to record your conveyance from the former vassal in order that I may see what your title is, and as that comes in place of a charter I must be entitled to charge you the expenses of recording it." Now, it appears to me that, in the first place, the disposition is not to any effect the deed of the superior. The superior is not bound by that deed, and I do not think that though he has taken payment of a casualty under the deed he would be bound by anything inconsistent with the feu-right. Therefore I do not see the interest of the superior in the deed. It is not the deed of the superior at all, and I do not see that he has any right or interest to retain a copy. The statute requires that the rights of the superior and vassal shall be regulated by the original grant, and that transmissions shall not affect them.

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The superior has therefore, as I have said, no right or interest to require that this disposition should be recorded in his chartulary, still less to require that it shall be done at the vassal's expense.

LORD DEAS, LORD ARDMILLAN, and LORD MURE concurred.

THE COURT pronounced this interlocutor:—"Find and declare that the first parties have no legal right to record the disposition constituting the second parties' title in the chartulary of the city of Edinburgh at the expense of the second parties on the occasion of a casualty being exigible from the second parties, and decern."

WILLIAM WHITE MILLAR, S.S.C.—MORTON, NEILSON, & SMART, W.S.—Agents.

No. 116. May 19, 1876. Cadzow v. Lockhart.

WILLIAM CADZOW, Pursuer.—*Fraser—Balfour—Mackintosh.*
SIR SIMON MACDONALD LOCKHART, Bart., Defender.—*Adam—Mackay.*

Landlord and Tenant—Lease—Reparation—Damages—Game—Rabbits.—The lease of a farm reserved to the landlord the whole game and rabbits, and bound the tenant to preserve the game of all kinds, including rabbits, "to the utmost of his power." It also contained a stipulation that "the tenant shall have no claim whatever for any damage he may sustain from game, hares, and rabbits during the lease, this being held to have been calculated upon and allowed for by him in offering for the farm." In an action of damages by the tenant for injury alleged to have been done to his crops by an excessive increase of rabbits, *held* (*diss.* Lord Ardmillan) (1) that the tenant's claim was not excluded by the clause in the lease above quoted; but (2) that, having regard to the terms of the lease, the tenant had not proved such an increase of rabbits as to entitle him to damages.

1ST DIVISION. Lord Shand. B.

(SEE *ante*, vol. ii. p. 928.)

William Cadzow was tenant of the farms of East Nemphlar and West Nemphlar, of which Sir Simon Macdonald Lockhart was proprietor, having succeeded to his brother, Sir Norman Lockhart, in May 1870.

In 1857 Mr Cadzow entered upon a nineteen years' lease of East Nemphlar, which consisted of from fifty to fifty-two Scotch acres, at the rent of £155. In 1862 he entered into a lease of seventeen years of the farm of West Nemphlar, consisting of eighteen Scotch acres, at the rent of £54. The clauses in the two leases with regard to game were almost identical. The clause in the lease of West Nemphlar was,—"Reserving also to the proprietor and his foresaids the sole right to the whole game, including hares and rabbits, of every kind, and to all the fish in the rivers and burns within the lands hereby let, with full power to himself and to those having his permission to hunt, shoot, or fish and sport on the farm, without liability in damages; and the tenant shall be bound to preserve the game of all kinds, including hares and rabbits, to the utmost of his power, to interrupt poachers and unqualified persons, and to give information of them to the proprietor and his foresaids, or those acting for him or them; and it is hereby expressly declared and agreed that the tenant shall have no claim whatever for any damage he may sustain from game, hares, and rabbits during the lease, this being held to have been calculated upon and allowed for by him in offering for the farm."

Mr Cadzow brought this action against Sir Simon M. Lockhart, concluding for £600 of damages. He averred (Cond. 5),—"The said two

farms of East Nemphlar and West Nemphlar are adjacent to each other, and extend for a considerable distance along the river Clyde. They are not, however, bounded by the river, there being interposed between them and the river a strip of ground belonging to and in the natural possession of the defender, and covered with copse and brushwood. The said strip of ground has belonged to the defender and his predecessors and has been in their actual possession since before the pursuer's entry to his said farms." (Cond. 6) "At the dates of the leases foresaid there were few or no rabbits on the said farms or in the said strip of ground mentioned in the last article. For a number of years back, however, and, in particular, since the succession of the present defender in the year 1870, the said strip of ground has been turned into a rabbit preserve; and, in consequence, the pursuer's farm has been so infested with rabbits as to make the profitable occupation of his land impossible. The stock of rabbits in said strip of ground and in the pursuer's farms has been unduly and unreasonably increased year by year by the defender's predecessor and by the defender; and the said increase has been permitted and fostered for purposes of profit, the proprietor having for many years derived, and still deriving, a large annual revenue from the rabbits on his estate, and in particular from the rabbits on and adjacent to the pursuer's farms." (Cond. 7) "From the date of the defender's succession to the present time the pursuer has suffered loss, injury, and damage from the foresaid undue increase of rabbits on his said farms to the extent of not less than £120 per annum, or in all £600, as concluded for in the summons."

The defender denied that he had allowed the rabbits to increase for the purposes of profit. He alleged that they had been trapped in the ordinary way.

He pleaded, *inter alia*;—(2) The defender is entitled to be assoilzied, in respect that all claims of damages are excluded by the pursuer's leases.

A proof before answer was allowed.

The views of the facts taken by the Lord Ordinary and by the Court respectively sufficiently appear from the opinions.

The Lord Ordinary pronounced this interlocutor:—"Finds that by the leases under which the pursuer holds his farms there was reserved to the proprietor the sole right to the whole game, including hares and rabbits, within the lands thereby let, with full power to himself, and those having his permission, to hunt, shoot, and sport on the farms 'without liability in damages,' and the pursuer became bound to preserve the game of all kinds, including hares and rabbits, to the utmost of his power, and that it was thereby 'expressly declared and agreed that the tenant shall have no claim whatever for any damage he may sustain through game, hares, and rabbits during the lease, this being held to have been calculated upon and allowed for by him in offering for the farm:' Finds it proved that during the years from 1870 to 1874, both inclusive, there was a great increase of rabbits on the pursuer's farms beyond the number which had formerly existed, or might reasonably have been expected, assuming that ordinary measures for keeping down the rabbits had been adopted: Finds that this increase arose in consequence of the failure of the defender, the landlord, by shooting, trapping, or otherwise, to keep down the number, and that the pursuer's crops suffered considerable damage in consequence; but finds that the pursuer is not entitled to payment of the sum claimed, or any part thereof, on account of damage so caused, in respect of the stipulations contained in his leases above set forth, and especially of the stipulation that he should have no claim whatever for any damage he might sustain from rabbits during the lease; assoilzies the defender from the

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conclusions of the action, and decerns: Finds him entitled to expenses, and remits," &c.*

* "NOTE.—. . . . . At the debate at the close of the proof the defender renewed the discussion which had taken place in the procedure roll, when a proof was ordered, founded on his second plea, to the effect that all claims of damages for injury done by rabbits to the pursuer's crops are excluded by the terms of the leases; and with the facts now fully disclosed in the evidence I have come to the conclusion that this plea is well founded. When the argument was originally maintained, before any proof had been allowed, it appeared to me that the legal question involved could not be satisfactorily disposed of on the pursuer's averments as contained in the record. The terms of article 6th of the condescendence seemed to make it necessary that evidence should be allowed; for the statement there made is that the defender from 1870 onwards had made use of a strip of property belonging to him, adjoining the pursuer's farms, and which did not appear to be connected with them, in a manner which the pursuer could not have anticipated when he entered into his leases, by having turned this ground into a rabbit preserve, in which he had gradually increased the stock of rabbits by carefully fostering them for purposes of profit. If this averment were proved it appeared to me a special case might be established to which the clause excluding claims of damage would not, or at least might not, apply. I do not think, however, that a case of this special character has been established.

"Without going in detail into the evidence, which has been adduced at considerable length, I may shortly state what appears to me to be its result.

"1. It has not been established that a rabbit preserve or warren was created by the defender on his property adjoining the pursuer's farms, nor that during the period for which damages are claimed rabbits were designedly preserved and fostered by the defender on the pursuer's farms, or the plantations within them, or which formed the boundaries, with the view of making profit.

"2. On the other hand, I think it is equally clear that, owing to neglect on the part of the defender's servants, viz. his gamekeepers and trappers, or from the insufficient number of these servants at times when trapping was required, there was during at least the four years from 1870 to 1874, both inclusive, a great increase of rabbits, and that a serious amount of damage consequently resulted to the pursuer's crops. . . . The extent of the increase, and consequent injury to the pursuer's crops, has been proved to have been in my opinion much beyond what the pursuer could reasonably have contemplated when he entered on the farms; and, indeed, the injury has been so great during several years as to render it impossible for the pursuer to pay the stipulated rent from the produce of the farms. If I were of opinion that the pursuer was entitled, under his leases, to damages for the injury to his crops arising from an excessive increase of the stock of rabbits beyond the stock on the farms when he entered into possession, and the number which might naturally be expected to arise from the plantations or the farms, assuming that fair and ordinary measures were taken to keep them down, I should hold that the pursuer had made out a claim for the years from 1870 to 1873 inclusive, and would have estimated the damage for each of these years at from £50 to £60, which, it will be observed, is about a fourth of each year's rent. By the year 1874 such measures had been taken to reduce the numbers that I am not prepared to say there was then an excessive stock in the sense now explained. . . . The amount of damage, as estimated by the pursuer and his witnesses, is excessive in any view, because it has been stated on the principle of including the whole damage, without allowing for any stock of rabbits on the ground. But allowing for such a number as might naturally be expected, assuming ordinary measures to have been used to keep them down, deducting from the estimates of the witnesses a certain amount for exaggeration, and disallowing the greater part of the damage claimed on account of injury to pasture as not being satisfactorily proved, there remains the sum of between £50 and £60 per annum already mentioned, to which, if the

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The pursuer reclaimed, and argued;—The clause of the lease meant that a calculation of the existing stock of rabbits had been made at the pursuer were right in his view of the law, I should hold he was entitled for four years. There is a conflict of evidence as to the complaints and notice of claims given by the tenant to Mr M'Lean, the defender's factor, and the proof is certainly not so satisfactory on this subject as could be desired. At the same time, I think as a whole it shews that several complaints were made, in writing as well as verbally, from time to time, accompanied by claims for abatement of rent. . . .

"I am, however, of opinion that all claims of damage at the pursuer's instance, on account of injury which might be caused to his crops from any increase of rabbits, arising from the defender's failure to keep down the stock on the lands and adjoining plantations, were excluded by the terms of the leases. In no case which has hitherto occurred for decision have claims of damage been the subject of a clause so stringent in its nature against the tenant as the present. In the case of Morton v. Graham, 30th November 1869, 6 Macph. 71, the lease reserved to the landlord all game and rabbits, with the exclusive liberty of shooting and sporting, 'without being liable to compensate the tenant in respect of the reservation and liberty herein expressed.' And it was remarked by the Court that the clause was one of the most stringent against the tenant that had occurred. In the present case the clause is fuller in expression, and contains stipulations more clearly excluding claims than were found in the lease in the case of Morton. It is in the following terms:—'Reserving,' &c. (quoted p. 666).

"There is thus (1) a reservation to the landlord of the rabbits, with power to himself and those having his permission, to shoot and sport on the farm without liability in damages. (2) An obligation on the tenant to preserve rabbits to the utmost of his power, and to prevent poaching on the lands. (3) There is nothing in the clause which can be read as imposing on the landlord, either expressly or by implication, an obligation to keep down the rabbits, so as to prevent an excessive increase in their numbers; and lastly, it is agreed 'that the tenant shall have no claim whatever for any damage he may sustain from rabbits during the lease, this being held to have been calculated upon and allowed for by him in offering for the farm.' The question for decision is one of construction of this clause, and it appears to me that, giving to the language used the ordinary effect which it must receive, the result is that the tenant agrees to leave himself entirely in the hands of the landlord so far as regards the keeping down of hares and rabbits. The damage which might result from game or rabbits was plainly in the view of the parties, and was the subject of a careful and distinct provision. The tenant agreed that he should have no claim whatever for such damage. He now asks that this provision should be read as if it were of a limited kind, excluding claims of damage generally, but not such claims as might arise from an excessive stock of game or rabbits being allowed to grow up, either from active measures on the part of the landlord, or the landlord's failure to keep down the burden. I see no room for this construction in the language which the parties have used. If such a limitation had been intended it would have been expressed by some words controlling the effect of the general terms employed. In the absence of such words it is not for the Court, in construing the clause, to add a limitation which the parties have not themselves made. Both parties found on the concluding words of the clause,—'this being held to have been calculated and allowed for by him in offering for the farm,'—as being in favour of their respective views. Taking the clause as a whole, I think the relative 'this,' with which this part of the clause begins, must be read as referring to any damage which the tenant might sustain, and that such damage, whatever might be its amount, was a matter on which he calculated, and for which he allowed in offering for the farm; at least he agrees that this shall be accepted as the footing on which he entered into the lease, however far this may be from the fact, for it appears that the farms were let at their full value as agricultural subjects. It was maintained on his behalf that this expression must be taken to refer to a calculation and allowance for damage from

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commencement of the lease, and that that was intended to be the amount of damage to which the tenant was bound to submit. He was not bound to submit to his crops being so injured that he could not pay his rent. The landlord having reserved the game, &c., was bound to keep the rabbits down to a reasonable amount.[1] The tenant was prevented from killing

a certain quantity of game and rabbits, roughly estimated with reference to the stock on the lands at the time of entry, and to what could fairly be expected to arise from the plantations on the farms, assuming that ordinary measures had been used to keep the stock down, and that claims of damage by game and rabbits in excess of this were left open. I cannot, however, adopt this view; the words 'calculated upon and allowed for' appear to me to refer to damage not from a certain limited quantity of game and rabbits so roughly estimated, but to any damage which might occur,—the effect of the clause practically being that the tenant took his risk of the landlord keeping down the game and rabbits within reasonable bounds, and calculated on the damage he might suffer, running that risk, which he may have thought very small.

The pursuer strongly argued that it could not be readily supposed that a tenant would enter into a lease which left him so much at the mercy of the landlord, and that the Court should control or construe the expressions in the lease, so as to give to them the effect only of excluding claims of damage other than those arising from an excessive stock of game. It appears to me, however, that the terms used do not admit of this construction, and I come to that conclusion, although I think at the same time that the clause gives expression to an arrangement which I should characterise as extremely improvident on the part of the tenant. It may be assumed that the pursuer thought he might trust that the landlord would not exact his full rent, and at the same time, either of design or from neglect, keep up such a stock of rabbits as would so seriously injure the crops as to render it impossible that the rent could be paid from the produce of the farms; but that being the agreement, the pursuer is left with an appeal to his landlord only. The Court has no power to modify the terms of the agreement, and the pursuer cannot maintain a right to damages of a kind for which his lease provides he shall have no claim whatever. The case in its general aspect is not unlike that of Buchanan and Henderson and Dimmack v. Andrew, decided in the House of Lords on 10th March 1873, Law Reports, volume ii., Scotch Appeals, p. 286, in which the respondent in the appeal, on the ground that his house would be thrown down by the operations of the mineral owner and his tenant, endeavoured to stop their operations. His feu-contract contained an obligation to erect and maintain a house of some value, and of a specified character, but at the same time authorised the mineral owner to work out the minerals, 'and that free of all or any damage which may be thereby occasioned to the feuar.' The House of Lords, reversing the decision of this Court, held that the operations could not be prevented even though they should result in the house being brought down, and the opinions distinctly affirmed that the feuar had no claim of damages for injury which might arise from the removal of the minerals. All of the Judges expressed the view that the agreement to which the pursuer had been a party was improvident, but the question being one of construction, they were of opinion that the general words used gave the power which the mineral owner asserted, and that all claims of damage were renounced by the feuar. So, in this case, I think the lease gave the power of preserving game and rabbits, which the landlord asserted and used, and that the tenant renounced all claims of damage which might arise to him from the exercise of this right. . . ."

[1] Moncrieff v. Arnott, Feb. 13, 1828, 6 S. 530; Wemyss v. Wilson, Dec. 2, 1847, 10 D. 194, 20 Scot. Jur. 51; Drysdale v. Jameson, Nov. 30, 1832, 11 S. 147, 5 Scot. Jur. 134; Wemyss v. Gulland, Dec. 2, 1847, 10 D. 204, 20 Scot. Jur. 55; Morton v. Graham, Nov. 30, 1867, 6 Macph. 71, 40 Scot. Jur. 37; Syme v. Lord Moray, Jan. 14, 1868, 6 Macph. 217, 40 Scot. Jur. 133; Kidd v. Byrne, Dec. 16, 1875, *supra*, p. 255; Inglis v. Moir's Tutors, Dec. 7, 1871, 10 Macph. 204, 44 Scot. Jur. 123.

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the rabbits, and so it was the duty of the landlord to keep them down. The evidence shewed that here there was a culpable neglect of the landlord in refraining from keeping down the rabbits.

The defender argued;—The landlord had done all in his power to keep down the rabbits. The lease excluded all damages for injury by game or rabbits except to an extent which would imply a fraud on the landlord's part. The tenant should have calculated on the rabbits injuring his crops when he entered upon the lease. He was taken bound to preserve the rabbits, and ought to have known that the result of his preserving them would be that they would increase and injure his crops. His having been mistaken in the amount of injury they would do was no ground for finding the landlord liable in damages.

At advising,—

LORD PRESIDENT.—Before we come to consider the facts of this case it is desirable to have a distinct understanding of the clause in the leases upon which the defender relies. It is substantially the same in the two leases, but I quote from that which applies to West Nemphlar. In the first place, there is a reservation "to the proprietor and his foresaids of the sole right to the whole game, including hares and rabbits, of every kind, . . . with full power to himself and to those having his permission to hunt, shoot, &c., without liability in damages." In the second place, there is an obligation on the tenant "to preserve the game of all kinds, including hares and rabbits, to the utmost of his power." And in the third place, there is this express declaration and agreement, "that the tenant shall have no claim whatever for any damage he may sustain from game, hares, and rabbits, during the lease, this being held to have been calculated upon and allowed for by him in offering for the farm."

The reservation to the proprietor is of the entire game of every description, including rabbits, and it is made on the face of it for the purpose of sport. In the second place, the obligation on the tenant to preserve is strongly expressed, and I need hardly say that that necessarily implies that the landlord is to co-operate with the tenant in promoting the strict preservation of the game during the currency of the lease. And then follows the clause which is specially important here, and which is undoubtedly a very stringent, and not a very usual one. The game is to be so preserved that it is perfectly obvious that damage to some extent will ensue. It was impossible that the game should be preserved as contemplated without some damage resulting to the crops, and so the question comes to be, whether it was within the contract of parties that there should be no claim for reparation however great the injury.

It was argued that the clause in the leases seemed to shew that a calculation had been made as between the landlord and tenant as to what the damage was to be, and so, in so far as the damage had not been calculated on, it was claimed here. That was an ingenious suggestion, but it is not within the terms of this clause. According to these, the tenant is to have no claim for any damage, and they are quite unqualified. The words which follow are not restrictive of the first part, but are only superadded to shew how completely the stipulation was carried out. That was not by making a calculation by pounds, shillings, and pence, of how much damage was to be suffered, but it simply meant this, that the damage had been taken into consideration, and had been given effect to when the lease was entered into. Now, it would be very difficult, in the face of a clause of this kind, for the tenant of this farm to maintain a claim under

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anything like ordinary circumstances. If there were an increase of rabbits beyond the quantity on the farm at the commencement of the lease that would not be sufficient ground for getting the better of this clause, the tenant having obviously calculated upon the damage in such a case.

But, on the other hand, I can quite understand that damage may have been sustained by the tenant to such an extent that a claim for reparation would not be barred. If, for instance, the landlord had deliberately proceeded to convert the farm, or a part of it, into a rabbit warren, so as to make the land barren altogether, and to leave no green thing remaining, I cannot have any doubt that the tenant would have then had a remedy. I go further than that, because I think that if the landlord systematically, and not by mere oversight and partial neglect, had omitted the ordinary precaution necessary for keeping down vermin, it would be difficult to say that a tenant, after warning him of it and bringing it under his notice, would not have a claim against him. Mere inaction in the case of rabbits is a most dangerous principle on which to proceed; they are a class of animals, as everybody knows, of a very fecund nature, and, in the absence of repressive measures, increase at a most rapid rate. If a case of that kind were to occur, where the landlord had permitted the rabbits to multiply without check, the claim of the tenant would not be barred, nor would the landlord be protected by such a clause as this.

What is the case before us? As it stands on record it might have got the better of the clause in the lease. If the averments made in the 6th article of the pursuer's condescendence (quoted *supra*) had been established, I should have given judgment in favour of the pursuer, but when I come to look at the evidence I cannot find that the facts amount to anything like the allegations there made. The case made out upon the proof is in effect this, that in the course of the years of the lease which have already run there has been an increase in the number of rabbits, the amount of which has varied considerably—in some years it has been more, in others less. The landlord has employed trappers to keep them down, and in some years they have been more successful in doing so than in others. In such a case as that, it being clear that the amount of the rabbits had been materially increased, I should have been of opinion that, but for the clause founded on, there was a case for reparation upon the ordinary rule of law. But I do not think that a mere increase beyond the amount existing at the time the lease was entered into, although harm resulted to the tenant, would be sufficient to warrant a claim of reparation. There must be more than that.

From the proof I find that the exertions of the landlord and the keepers have not been always and uniformly the same. For instance, there has not been the same keeper, and one keeper will do more than another in trapping and killing vermin, and one season is more favourable than another for that purpose. The way in which that is managed is by killing the rabbits during the time when they are not breeding, and at a time when the invasion of the covers for that purpose is not prejudicial to other game. I cannot see that measures were not taken to keep down the rabbits. I cannot impute that to the landlord as a fault or as a failing of his undertaking under the lease. There has been an honest intention on his part to keep them down, and if the keepers have not seconded him it has not been the purpose of the landlord to fail in taking measures for their suppression.

In these circumstances, I concur with the result at which the Lord Ordinary

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has arrived, but not with his view of the evidence. He represents that as more favourable to the pursuer than I think it is. The case which he has found in point of fact is one that does not to my mind appear from the evidence. I do not think "there was a great increase of rabbits on the pursuer's farms beyond the number which had formerly existed, or might reasonably have been expected, assuming that ordinary measures for keeping down the rabbits had been adopted." Neither do I think that the "increase arose in consequence of the failure of the landlord . . . to keep down the number." I understand that by failure there is meant to impute a want of duty, and if that were established I should have thought it more difficult for the landlord to avoid this claim. I think there has been an increase of rabbits, but not a very large increase, and by the clause in the lease the tenant has renounced his claim for damage from such a cause.

LORD DEAS.—I do not concur with the Lord Ordinary in the construction he puts on this clause of the lease. His Lordship says,—"I am, however, of opinion that all claims of damage at the pursuer's instance on account of injury which might be caused to his crops from any increase of rabbits arising from the defender's failure to keep down the stock on the lands and adjoining plantations were excluded by the terms of the leases." He afterwards refers to the case of Buchanan. That was a very difficult case, and I do not wonder that there was a difference of opinion upon it. But nothing which the landlord there could have done would have prevented the damage except allowing the minerals to remain unworked. The workings were perfectly regular. The present case is different, because the landlord can prevent the tenant's crops from being destroyed by keeping down the rabbits. I cannot hold that this lease so binds the tenant that in no circumstances could he claim damages for injury done by the rabbits. If the rabbits were allowed so to increase that they ate up every green thing it could not surely be held that the tenant undertook not to claim damages for his crops being so destroyed. Even if the damage were short of absolute destruction he might still, I think, have a good claim.

The landlord founded strongly on the provision that the tenant was taken bound to protect the game. The lease says,—"With full power to himself, and those having his permission, to hunt, shoot, or fish and sport on the farm without liability in damages, and the tenant shall be bound to preserve the game of all kinds, including hares and rabbits, to the utmost of his power, to interrupt poachers and unqualified persons, and to give information of them to the proprietor." The leading object was certainly to preserve the game and rabbits for sport. It is not said that the tenant was to preserve the rabbits for sale so as to admit of the largest profit being got from them in the market. Now, under what circumstances is this clause to protect the landlord? The Lord Ordinary says under all circumstances. He thinks that there is no implication that the landlord is to keep down the rabbits at all. I cannot go that length. I think that this is implied from the fact that the tenant is not to be allowed to keep them down. The rabbits are vermin, and but for the clause in the lease the tenant could have kept them down himself. If the lease is to be construed according to the view of the Lord Ordinary I doubt if it could be enforced. It seems to me that it would be very like a contract *contra bonos mores*. It must be construed so as not to be intolerable to the tenant, and my construction of it is that the landlord is bound, fairly and reasonably, to keep down the rabbits.

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But while I thus differ from the Lord Ordinary as to the construction of the lease I also differ from him in his view of the facts. If the facts had been as he states them, that £60 a-year of damage was done to the crops, and that this was done in spite of remonstrances by the tenant, I should hold that the tenant had a claim. The clause must receive a fair construction, although it is a more stringent one than has hitherto come before the Court. The question is, whether there is such an unreasonable increase as entitles the tenant to damages? It was peculiarly the duty of the tenant to have made serious and strong remonstrances against the increase of the rabbits. It has not been proved here that the tenant did make strong and serious remonstrances. However, I do not think it is proved that damage was done by the rabbits to the extent alleged. But supposing that in any particular year there was a considerable increase of rabbits, that is not necessarily to be taken as a measure of the damage. The lease is for nineteen years, and you must look to the average of years. One year may be and often is more favourable for increase than another, and a landlord cannot always anticipate the result of particular seasons.

I am therefore, upon the whole, of opinion that looking to the terms of the lease, in connection with the facts proved, there has been no such excessive damage proved to have been done by rabbits, in the face of remonstrances by the tenant, as to entitle him to damages.

Lord Ardmillan.—I concur generally in the result of the decision of the Lord Ordinary, and also in the result of the opinion of your Lordship now given. I would not add anything were it not that, while concurring, and, I may say, compelled to concur, in the result, my view of the case is slightly different. In an action by a tenant against the landlord for damages in respect of injury to the crop on the farm caused by rabbits it is of the utmost importance to consider the terms of the lease. The action is substantially for breach of contract. As your Lordship in the chair explained in the case of Morton v. Graham, the claim of the tenant rests on this principle—that nothing should be done contrary to the faith of the contract; the breach of contract by the landlord is a wrong, and for that wrong, when instructed, the law recognises the tenant's right to redress in the form of damages. The lease is a mutual contract, and the rights and obligations of the parties must be ascertained by reference to the terms of the contract. Construction may be necessary, and construction of dubious or obscure language must be conducted with due regard to the principles of equity applicable to mutual contract. But, with the exception of stipulations contrary to law or *contra bonos mores*, whatever is clearly expressed in the contract must receive effect. This Court cannot make for the parties a contract different from what they have made for themselves, and cannot exclude or ignore a clearly expressed stipulation if it be not illegal or immoral.

Let us first look at this case apart from the special and peculiar clause in the lease to which your Lordship has adverted, and which forms the foundation of the legal defence pleaded by the landlord.

The injury of which the tenant complains was caused by rabbits. It is of great importance to see what were under this contract the relative positions of the landlord and the tenant in regard to rabbits on this farm. The tenant was not permitted to kill rabbits. Nay, he was taken bound to preserve them. If he could have killed them he might have protected himself. Rabbits are marvellously prolific. They multiply so rapidly that, unless kept down by steady

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killing, they must soon become excessive, and most injurious. Now, when the tenant is not permitted to kill, but is taken bound to preserve rabbits, and when the landlord reserves to himself the sole power to kill, then the landlord, having deprived the tenant of the power to protect himself, must either keep down the rabbits or be liable in damages for injury arising from their material excess. Unless there be a special clause in the lease protecting the landlord from liability the law in this respect is, in my opinion, well and conclusively settled. There are several decisions. I take the law to be as it is laid down by Lord Fullerton in the case of Wemyss v. Wilson, 2d December 1847, and by your Lordship in the chair in the case of Morton v. Graham, 30th November 1867.

If, therefore, there has in point of fact been an unreasonable and excessive increase of rabbits on this farm, that must be attributable to the landlord, because he has prohibited the tenant from protecting himself, and he has even bound him to preserve the rabbits.

On the question of increase, in point of fact, I cannot say that I have any doubt. On the one hand, I agree with your Lordship that the statements in the sixth article of the pursuer's condescendence, to the effect that the landlord turned part of the ground into a rabbit preserve or warren for purposes of profit, have not been instructed by proof. I think that statement is unfounded. On the other hand, I am quite satisfied that the rabbits have not been kept down as vigorously as they ought to have been, but that there has been a considerable and unreasonable increase of rabbits, and consequently a considerable injury to the pursuer's crop. Though this has not been effected designedly by the formation of a rabbit warren for profit, still it has been caused by the landlord's act or neglect, by his failure to keep down sufficiently the rabbits on a farm where preservation of rabbits was his purpose, and where he had deprived the tenant of the power of protecting himself.

The rent of the farm is, I think, £3 an acre, a rent by no means low, certainly not so low as might fairly have been expected if the rabbits were to be preserved by the tenant and left to be insufficiently kept down by the landlord.

Accordingly I am of opinion that, but for the clause in the lease to which I shall now advert, the tenant would have had a claim for damages in respect of injury caused by unreasonable increase of the rabbits on his farm. The law, if this clause were absent, would recognise his right. The law would in that case afford him protection. If the landlord deprives the tenant of the power to protect himself, then the landlord must be responsible, and liable in damages for injury caused by excess or unreasonable increase in the stock of rabbits. I adhere to what I stated in the case of Morton v. Graham. Apart from the special stipulation, the increase of rabbits on a farm by the act or by the failure of the landlord, where the tenant cannot protect himself, is a wrong to the tenant for which the law affords redress in the form of damages. Such increase has, I think, been here proved.

I come now to the clause in the lease. But for that clause the claim of the tenant could not, in my opinion, be altogether resisted. The facts support it to some extent, and the law recognises it to the extent instructed.

But the defender declines to make compensation in respect of this clause, on the ground that "all claims of damages are excluded by the lease." These are the words of his statement and of his plea in law.

The clause is in the following terms:—"It is hereby expressly declared and agreed that the tenant shall have no claim whatever for any damage he may

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sustain from game—hares and rabbits—during the lease, this being held to have been calculated upon and allowed for by him in offering for the farm." This clause follows upon a reservation to the landlord of the exclusive right to kill all kinds of game and rabbits, and follows an obligation laid on the tenant to preserve the rabbits; and is indeed the most stringent clause for protecting the landlord from liability which I have seen. It was, as I see from the principal lease, prepared by the landlord or his agent, and it is founded on by the landlord in this action to its full extent, as in point of fact applicable to all claims of damages for injury from rabbits, and as in point of law operating to the entire exclusion of all such claims.

Now, this clause, so prepared and proposed, was accepted by the tenant. It was intended to exclude, and is pleaded as excluding, all such claims, and the words are wide enough and strong enough to have that effect. The lease has been very dexterously and carefully prepared to secure preservation of rabbits and immunity from damages, and I cannot doubt that it was intended by the landlord to meet such a case as this. The words at the end of the clause have in argument been founded on by the tenant, but they are not introduced in favour of the tenant, and do not derogate from the force and the generality of the preceding words. On the contrary, they seem to suggest a reason for the stringency and comprehensiveness of the clause. I rather think that the clause is strengthened by the added words. The word "this" in the closing sentence means, in my view, this exclusion of the claim for damage, such exclusion, or, in other words, such risk to the tenant, being held to have been calculated upon and allowed for by him in offering for the farm. It means that the tenant in making his offer is held as having taken into his calculation the fact that the rabbits were to be preserved, and that his claim for damages was excluded, and the tenant is held as having offered for the farm on the footing and in the view of that exclusion. Whether, in point of fact, that was so calculated upon or not, the lease bears that it was "held" as done.

So reading the clause, I come to the conclusion that it was framed to shut out this claim, and that it must be held as accepted by the tenant on the same footing. As I have already explained, I think that the tenant would be entitled to damages to a considerable amount, though not to the full amount concluded for, were it not for this clause. He has, in my opinion, certainly been to that extent wronged, and for the wrong, and to the extent of the wrong, the law would have afforded him redress had he not accepted the peculiar provisions of this lease, and particularly this clause. But he has signed the lease with this clause in it. He has accepted the clause. He has surrendered his claim. He has contracted himself out of the right which the law recognises, out of the protection which the law affords, and out of the remedy which the law provides. Either in most exuberant and confiding trust, or in most egregious folly, this tenant has by his own deed cast from him the protection by which the law surrounded him, and placed himself as regards this matter at the mercy of his landlord. To that effect the landlord has pleaded this clause. On this record the plea for the landlord is that "all claims," not some claims, but "all claims of damages are excluded by the lease."

The Lord Ordinary's reading of the clause is severe on the tenant's claim. The landlord's own reading and pleading of the clause is precisely to the same effect. The Lord Ordinary has read it just as the landlord reads it, and just as the landlord has pleaded it.

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On the whole case I feel that I have no alternative but to reject this claim of damages. The contract of lease, and this clause in the contract of lease, is clear in its import, and in its effect is conclusive; and in the face of the lease, with that clause in it, this action cannot be sustained.

LORD MURE.—I concur, and have little to add to what has already been said. I think that this is one of the most stringent clauses which has come before the Court in cases of this description; but my opinion is that it would not necessarily bar the tenant's claim in all circumstances. When this case came before us on the question of proof I formed the opinion that if, as alleged in the 6th article of the condescendence, the farm had been turned into a rabbit warren, and the rabbits preserved with a view to profit, and so as to render the profitable occupation of the land impossible, the landlord could not have got rid of the pursuer's claim under this clause of the lease. And I should even be disposed to hold that if a landlord were to abstain altogether from shooting rabbits and from employing keepers to trap them, and they were on that account to increase to such an extent as to do serious injury to the crops, this clause would not protect him. But I am of opinion, on the other hand, that the clause is so worded that it is sufficient to protect the landlord, even when there has been a considerable increase, if that has not arisen from fault or design on his part.

Under an ordinary lease the law holds that the tenant is entitled to claim damages when there has been a material increase of game. But a clause like the present must, I conceive, be held to have been inserted, and is, I think, sufficient to provide against the contingency that in some years there may be a material increase from causes not directly attributable to the landlord. It is well known that some seasons are more favourable to the increase of rabbits than others, and that some keepers are more skilful than others in keeping them down, and it must, I think, have been in order to meet a sudden increase arising from such causes that this clause was inserted.

Now, the pursuer has, in my opinion, entirely failed to instruct the statements in the 6th article of his condescendence; and although it appears from the evidence that the rabbits considerably increased in some of the years between 1870 and 1874, I think that this arose from want of skill on the part of some of the keepers employed during some of those years. It is distinctly proved, moreover, that orders were given to keep the rabbits down, and that extra keepers were employed for that purpose. Fair, the gamekeeper, who was examined on the part of the pursuer, says that they were trapped with a view to keep them down, both in summer and winter, and it is further proved that this is never done in summer unless with that intention. In these circumstances, I am of opinion that as this increase is not proved to have arisen from any fault or neglect of the defender, or from any design on his part to keep up an extraordinary stock of rabbits, the clause of the lease is sufficient to protect him from the pursuer's claim.

THE COURT pronounced this interlocutor:—"Recall the said interlocutor: Find that, having regard to the clauses of the leases libelled excluding all claims of damages by the tenant for injury done by game or rabbits, the pursuer has not proved such an increase in the amount of game and rabbits on the farms during

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the years libelled as to entitle him to any decree in terms of the conclusions of the action: Therefore assoilzie the defender from the conclusions of the action, and decern: Find the defender entitled to expenses, and remit," &c.

J. & R. D. Ross, W.S.—Hector F. M'Lean, W.S.—Agents.

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May 20, 1876. Sloane v. Finlayson.

Robert Cameron Cowan (Judicial Factor on the Trust-Estate of the deceased John Craig), Pursuer and Real Raiser.—*Asher.*

Mrs Margaret Finlayson or Finlay now Sloane, and Husband, and Others, Claimants.—*Balfour—Jameson.*

Thomas Miles Riddell Finlayson and Others, Claimants.—*Kinnear—Mackintosh.*

Succession—Vesting.—A testator, after directing payment of two annuities, and providing a liferent of the remainder of his estate to his wife, if she survived him, directed his trustees that the residue of his estate should, upon the death of his wife, or upon the death of the longest liver of the two annuitants, "whichever of these events shall last happen, but not earlier, be divided equally, share and share alike, among the children of my said two sisters, and if any child or children shall have died, either before the date of these presents or before the said period of division, then their issue shall, equally among them, succeed to their parent's share: Declaring that in the case of females, whether children or the issue of children, the provision in their favour shall be exclusive of the *jus mariti* or right of administration of any husbands whom they may have married or may marry, and as well in that case as in that of any of the other beneficiaries of the fee, even males, their provision shall be either paid to themselves upon their own receipt, or secured for their behoof by my said trustees and their aforesaids in such way as they in their sole discretion may think most fit for the interest of the beneficiaries." The testator's wife predeceased him. *Held* that the residue did not vest till the death of the last survivor of the annuitants.

2d Division. Ld. Craighill. I.

This was a multiplepoinding brought for the distribution of the estate of the late John Craig, clothier in Edinburgh, who died in 1857, leaving a trust-disposition and settlement dated September 1855.

By this deed the truster conveyed his whole estate to trustees, who were directed to pay an annuity of £100 to each of the truster's two sisters, and to allow his wife, if she survived him, the liferent use and enjoyment of the rest of the trust-estate. The deed then proceeded:—"The free residue and remainder of my said subjects, means, and estate shall, upon the death of my said spouse, or upon the death of the longest liver of the said two annuitants, whichever of these events shall last happen, but not earlier, be divided equally, share and share alike, among the children of my said two sisters, and if any child or children shall have died, either before the date of these presents or before the said period of division, then their issue shall, equally among them, succeed to their parent's share: Declaring that in the case of females, whether children or the issue of children, the provision in their favour shall be exclusive of the *jus mariti* or right of administration of any husbands whom they may have married or may marry, and as well in that case as in that of any of the other beneficiaries of the fee, even males, their provision shall be either paid to themselves upon their own receipt, or secured for their behoof by my said trustees and their aforesaids in such way as they in their sole discretion may think most fit for the interest of the beneficiaries."

The truster's wife predeceased him. The survivor of the two annuitants died in 1873.

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A question as to whether the residue vested at the death of the testator, or not until the death of the surviving annuitant, was, at the request of parties, first taken up.

Mr and Mrs Sloane, and other claimants, maintained that the residuary bequest vested at the testator's death.

Finlayson and others maintained that vesting did not take place till the death of the last annuitant.

The Lord Ordinary pronounced the following interlocutor:—"Finds that the said residuary bequest did not become vested in all or any of the residuary legatees till the death of the last survivor of the annuitants, which occurred on 12th October 1873; and further, that as the testator's widow had predeceased that event, the same then became vested: Appoints the cause to be enrolled that this finding may be applied to the claims of parties." Mr and Mrs Sloane and others were found liable in the expense of the discussion, which was modified to nine guineas.*

The claimants, Mr and Mrs Sloane, reclaimed and argued;—The case could not be distinguished from that of Maxwell v. Wylie.[1] Each of the elements which were founded on in the present case against vesting *a morte testatoris* were found in that case,—the postponement of payment till the death of the longest liver of the annuitants, and the calling of the issue of predeceasing beneficiaries. The cases of Provan,[2] and Johnston,[3] decided in the Second Division in 1840 (in both of which Lord Moncreiff took the

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* "NOTE.— . . . . The clause of the truster's settlement upon which the decision of this question depends is that in which the fifth purpose of the deed is set forth. The meaning of this clause appears to the Lord Ordinary to be plain. That meaning is not controlled, as the Lord Ordinary thinks, by any words, expressions, or provisions to be found elsewhere in the deed, and consequently he has, without difficulty, adopted the conclusion to which effect has been given by the foregoing interlocutor.

"Were it necessary, several considerations could be mentioned for the opinion on the question in dispute which the Lord Ordinary has formed. But as there is one which appears to him to be sufficient, that alone will be particularised. The clause in question directs that 'the free residue and remainder of my said subjects, means, and estate shall upon the death of my said spouse, or upon the death of the longest liver of the said two annuitants, whichever of these events shall last happen, but not earlier, be divided equally, share and share alike, among the children of my said sisters; and if any child or children shall have died either before the date of these presents or before the said period of division, then their issue shall, equally among them, succeed to their parent's share.' Thus, sisters' children alive at the appointed period of division, and the issue, if any, of such children as predeceased that period, form the component parts of the class of residuary legatees. There are no other members of that class nominated by the truster; and certainly there is nothing which suggests that issue of predeceasing children are to be excluded that other parties deriving right from the parents of such issue may be introduced. And yet such would be the effect of so reading the clause as to hold that there was vesting *a morte testatoris*. Every sister's child would by that interpretation become at the death of the testator a residuary legatee, and, as a consequence, though she might die before the period of division, leaving issue, such issue could take nothing under the conditional institution provided in the clause of bequest. A reading which leads to such a result cannot, the Lord Ordinary thinks, be the true reading, because it operates as a defeasance of a provision plainly expressed, and forming an integral part of the scheme of the truster's settlement." . . . .

[1] Maxwell v. Wylie, May 25, 1837, 15 S. 1005, 9 Scot. Jur. 460.

[2] Provan v. Provan, Jan. 14, 1840, 2 D. 298, 12 Scot. Jur. 257.

[3] Johnston v. Johnston, June 9, 1840, 2 D. 1038, 12 Scot. Jur. 502.

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opposite view), could not be reconciled with the current either of previous or subsequent decisions.[1]

Finlayson and others argued;—Questions of vesting in testaments did not depend on any technical rules of conveyancing. The natural meaning was to be put on each word. The testator could not more clearly have expressed his intention that children of predeceasing beneficiaries should take in preference to their creditors or other assignees.[2]

At advising,—

LORD ORMIDALE.—The question for decision in this case relates to the vesting of the residue of the trust-estate of the deceased John Craig; and it depends upon the construction and effect of the fifth purpose of his trust-disposition and settlement, which in some respects is peculiarly expressed.

It was contended, on the one hand, that the residue vested *a morte testatoris*, and, on the other, that it did not vest till the period of division, that is, till the death of the liferentrix and the two annuitants.

The mere circumstance of there being a liferent and annuities, and consequent delay in paying or distributing the residue, could not have the effect of postponing the vesting. But it appears to me there are specialties in the present case sufficient to shew that it was not the will or intention of the testator that the residue of his estate should vest till the period of division, that is, till the death of his widow and the longest liver of the two annuitants.

(1) It is expressly declared by the testator that payment or division of the residue should then take place, "and not sooner." In this respect there is a marked distinction between the present case and that of Foulis (3d February 1857, 19 D. 362), cited in argument for the reclaimers. In consequence of this distinguishing feature, it cannot, I think, be held that the widow and annuitants in the present case could, by executing a renunciation of their interests, accelerate the period of distribution, as was done in the case of Foulis.

(2) The next, and I think a very important peculiarity in the present case, is that the testator not only provides that the issue of his sisters' children dying before the period of division shall succeed to their parents' share,—a provision which, it might be argued, as it was at the debate, is nothing more than what the law would supply independently of express declaration,—but also that the issue of children dying before the date of "these presents," that is, before the date of the trust-disposition and settlement, should succeed to their parents' share. This is a peculiarity of the present case not to be found in any other, so far as I am aware; and it unmistakeably indicates, I think, so far at least as concerns the issue of children dying before the date of his deed of settlement,

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[1] For an examination of the earlier cases see Lord Moncreiff's notes in Provan v. Provan and Johnston v. Johnston, *supra;* Forbes v. Luckie, Jan. 26, 1838, 16 S. 374, 10 Scot. Jur. 227; Foulis v. Foulis, Feb. 3, 1857, 19 D. 362, 29 Scot. Jur. 266; Carleton v. Thomson, July 30, 1867, 5 Macph. H. L. 151, 39 Scot. Jur. 640, L. R. 1 Sc. App. 232 (see Lord Colonsay's opinion); Elliot v. Bowhill, June 21, 1873, 11 Macph. 735, 45 Scot. Jur. 446; Miller v. Finlay's Trustees, Feb. 25, 1875, *ante*, vol. ii. H. L. p. 1; Henderson v. Henderson's Trustees, Jan. 8, 1876, *supra*, p. 320.

[2] Provan v. Provan, and Johnston v. Johnston, *supra;* Pearson v. Casamaijor, July 18, 1839, M'L. and R. App. 685; Laing v. Barclay, July 20, 1865, 3 Macph. 1143, 38 Scot. Jur. 95.

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that the testator had not his own death in view as the period of vesting, and neither, of course, could he have proceeded on the footing of vesting taking place previous to his own death. The only intelligible explanation is, that the testator by the language he employs intended that there should be no vesting till the period of division. On any other footing the manifest object of the testator in providing that the issue of such of the children as might die before the date of his deed, or before the period of division, should come into the place of their parents, and be entitled to their parents' share, might be entirely defeated by the creditors or other assignees of such parents.

And (3) in support of the same view, there is also the peculiarity that in dividing and paying over the residue the testator declares that in the case of females, whether children or the issue of children, the provision in their favour shall be "exclusive of the *jus mariti* or right of administration of any husbands whom they may have married or may marry, and as well in that case as in that of any other of the beneficiaries of the fee, even males, their provision shall be either paid to themselves upon their own receipt, or secured for their behoof by my said trustees and their aforesaids, in such a way as they, in their sole discretion, think fit for the interest of the beneficiaries." I cannot think that an anxious provision such as this would have been made by the testator if he had intended that the residue of his estate should vest on his own death, or contemplated the possibility of its vesting prior to the period of division. It is plain, however, that supposing vesting to have taken place *a morte testatoris*, it might happen that the trustees would find when the period of division arrived that they had to pay it over and divide it, not amongst the children or the issue of the children of the testator's sisters, but to others to whom it had been transferred by them, strangers to the testator, and in regard to whom it can scarcely be supposed the anxious provision which has just been referred to was ever intended to apply.

Having regard to these considerations, I am of opinion the Lord Ordinary is right in holding that the residuary bequest in question did not vest till the death of the liferentrix and annuitants, that is, till the period of division. I am unable, in any other view, to see how what appears to me to be the manifest intention of the testator, which must in the present, as in all cases of its class, be the paramount and guiding rule of construction, could be given effect to.

In accordance with the opinion I have now expressed, I am for adhering to the Lord Ordinary's interlocutor.

LORD GIFFORD.—I am of the same opinion. I think that the case is special, and turns on the peculiar words of the settlement.

The LORD JUSTICE-CLERK concurred.

LORD NEAVES was absent.

THE COURT pronounced this interlocutor:—"Adhere to the said interlocutor, except as regards the finding of expenses: Recall that finding, and allow the expenses incurred by the respondents, both in the Outer and Inner-House, to be paid out of the fund *in medio*."

DALMAHOY & COWAN, W.S.—SCOTT MONCRIEFF & WOOD, W.S.—FRASERS, STODART, & MACKENZIE, W.S.—D. J. MACBRAIR, S.S.C.—Agents.

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WILLIAM HUTCHINSON AND COMPANY, Pursuers.—*D.-F. Watson—Trayner—Darling.*

THE ABERDEEN SEA INSURANCE COMPANY AND OTHERS, Defenders.—*Balfour—J. P. B. Robertson.*

Insurance—Ship—Concealment—Change of Ship's Nationality—Merchant Shipping Act, 1873—*Board of Trade Inspection.*—A vessel was transferred by means of a fictitious sale from the British to the Belgian flag, for the purpose of avoiding the inspection provided by the "Merchant Shipping Act, 1873." The vessel was subsequently insured. In an action upon the policy, the vessel having been lost, *held* that failure to mention the change of nationality to the underwriters, some of whom had a year before insured the vessel as a British ship, was a concealment of a material fact which would have influenced a prudent underwriter in determining whether to accept or decline the risk, and therefore voided the policy, although the defenders did not maintain that the vessel was unseaworthy when she sailed upon the voyage for which she was insured.

Observed, per cur., that the fictitious sale was fraudulent.

2D DIVISION. Ld. Curriehill. I.

THIS was an action raised at the instance of William Hutchinson and Company, merchants, Newcastle-on-Tyne, against the Aberdeen Sea Insurance Company and others, to recover the amounts alleged to be severally due by the defenders under a policy of insurance underwritten by them on the ship "John George," dated 3d September 1874, the ship having been wrecked on 9th December 1874.

The defenders resisted payment on the plea that there had been concealment by the pursuers of facts material to the risk.

The pursuers averred that the vessel was perfectly seaworthy when she sailed on the voyage for which she was insured. The defenders averred that she was then unseaworthy, but afterwards lodged a minute withdrawing the averment.

The facts of the case, and the contentions of the parties, are stated in the following interlocutor of the Lord Ordinary, pronounced after a proof:—"Finds in point of fact, *Primo*, That by policy of insurance, dated 3d September 1874, the pursuers, Messrs William Hutchinson and Company, who were part owners of the vessel 'John George,' in name of themselves and the other owners, effected, through Messrs John and Robert Catto, shipbrokers, Aberdeen, an insurance against the loss of the said vessel at and from the Tyne to Cronstadt or Wyburg, while there, and thence back to the east coast of Great Britain, and that the said vessel was underwritten by the defenders in various sums, making up in all the sum of £725: *Secundo*, That thereafter the 'John George' proceeded to Cronstadt, and thence sailed for Leith; that during the voyage a severe gale arose, in consequence of which the 'John George' was, on the 9th of December 1874, driven ashore on the coast of Northumberland, and became a total wreck: *Tertio*, That the pursuers then claimed from the defenders, as underwriters, the sum of £701, 16s. as the amount due under said policy, but that the defenders have declined to make any payment under the policy, in respect that material facts were concealed from them by the pursuers at the time the insurance was effected: *Quarto*, That in April 1873 the pursuers, through said John and Robert Catto, had effected in Aberdeen a previous insurance on the 'John George,' and that the pursuers on that occasion, through the said Messrs Catto, informed the underwriters that the said vessel was registered at South Shields, and referred them to the French Bureau Veritas, which corresponds to the Lloyds' registry in England, in which the 'John George' was entered as an English ship, registered at South Shields as having been built at Sunderland in 1837, and as standing in April 1873 as having been classed in 1872 of the second

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class for two years: *Quinto*, That in the French Bureau Veritas, current at the date of the policy sued on, the 'John George' still stood as a British ship, and of the same class as at the date of the former policy in April 1873; and that the defenders—nine of whom had been underwriters in the previous policy in 1873—all became underwriters in the policy sued on, in the belief that the 'John George' was a registered British ship, and that no information to the contrary was ever communicated by the pursuers to Messrs Catto, or reached any of the underwriters: *Sexto*, That prior to the 28th July 1874 the 'John George' had been transferred to a Belgian owner by a fictitious sale and mortgage, effected by James Primrose Lindsay, then the managing owner, and principal part owner of said vessel, and that said vessel was, on said date, registered in Belgium as a Belgian vessel, and continued so registered at the date of the wreck, and that the British registry of said vessel was closed on 25th August 1874: *Septimo*, That the said transfer of ownership and change of registry were effected for the purpose of excluding the 'John George' from the operation of the Merchant Shipping Act of 1873, which empowered the Board of Trade to inspect and detain British vessels which were believed to be unseaworthy: *Octavo*, That such inspection by the officers of the Board of Trade is calculated to afford, and does afford, protection to underwriters in policies of insurance on British vessels for a single voyage effected without any special survey on behalf of the underwriters: *Nono*, That the facts of the transfer of the ownership of the vessel and change of registry were or ought to have been within the knowledge of the pursuers at the date of their effecting the policy of insurance sued on, and were not made known by them to the defenders: *Decimo*, That the said transfer of the vessel and change of flag were material facts, the knowledge of which would have materially influenced the underwriters in determining whether to accept or decline the insurance when proposed, and the amount of premium to be charged if the risk were accepted, and that it would have been reasonable in them to have been so influenced: Therefore, and in point of law, finds that the policy sued on is void in respect of the foresaid concealment of material facts, and that the pursuers are not entitled to recover the sums insured by the policy; but finds, in respect of the minute for the defenders, No. 86 of process, that the defenders are willing to repay the pursuers the premium paid by them on said policy, which amounts to £38, 16s. 6d.: Decerns against the defenders for payment of the said sum accordingly: *Quoad ultra* assoilzies the defenders, and decerns: Finds the pursuers liable to the defenders in expenses," &c.*

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* "NOTE.— . . . . The law applicable to such cases is stated thus by Arnould, vol. i., p. 511,—'It is the duty of the assured to communicate to the underwriters all the intelligence he has that may affect the mind of the underwriter as to either of the two following points:—(1) Whether he will take the risk at all; (2) At what premium he will take it. This is a duty attaching at the time of effecting the insurance, and not at all dependent on subsequent events, for the effect of a concealment on the policy is determined, not by its eventual relation to the risk, but with reference to its immediate influence on the judgment of the underwriter. For so is the law, that were the intelligence concealed to turn out to be wholly unfounded, or the loss to arise from a cause totally unconnected with the fact concealed, the policy is nevertheless void.'

"And on the same point Parson says, vol. i., p. 469,—'If it is proved that material facts are not disclosed, it is not always necessary to constitute a concealment that these facts were actually known to the assured. It is enough if he might have known them, and ought to have known them; for it is certainly

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Argued for the pursuers;—The question was, whether non-disclosure

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his duty to use all customary and reasonable means to acquire all the information which it is his duty to impart. And this means all the information which the insurer ought to have in making his bargain, and which he may reasonably believe the insured possesses.'

"In dealing with cases like the present, the questions whether there was concealment from the underwriters, and whether the facts concealed were material, that is to say, whether everything was disclosed which would affect the judgment of a rational underwriter, governing himself by the principles and calculations on which underwriters do in practice act, are proper jury questions to be decided on the evidence adduced. See Parson on Insurance, vol. i., p. 495, as referred to in the judgment of the Court of Queen's Bench in Ionides v. Pender, May 27, 1874, Law Reports, 9 Q. B., p. 539. It appears to me to be in this case clearly proved that the underwriters believed, and entered into the policy of September 1874 in the belief that the 'John George' was then a British registered ship, which she undoubtedly was at the date of a former policy effected through the same brokers, and with substantially the same underwriters, in April 1873. It is also proved that James Primrose Lindsay, who was in July, August, and September 1874 the principal owner of the vessel, by means of a nominal sale to a person in Belgium of the name of Watson, and by a mortgage granted by Watson in his favour, so arranged matters that the 'John George' became ostensibly the property of a Belgian owner, and was registered in the Belgian registry as a Belgian ship. All this was done by the 28th of July 1874. It is also proved that the change of ownership and flag was made expressly for the purpose of exempting the vessel from inspection by Board of Trade surveyors, under the powers of the Merchant Shipping Act of 1873. The result of such inspection has been that very many ships have been prevented from sailing, on the ground of being unseaworthy, and until they were not merely made barely seaworthy, but received such additional fittings and repairs as greatly to conduce to their safety on the voyage.

"The pursuer, William Hutchinson, who is the sole partner of the firm of William Hutchinson and Company, and who effected the insurance, was a part owner of the vessel, and although he said in his examination that, at the time he effected the insurance, he was not aware that the flag had been changed, he yet admitted, 'I heard it mentioned by Mr J. P. Lindsay that he had some idea of putting her under the Belgian flag, but I never knew positively that it had been done. I took no interest in the matter, but left it entirely in Mr Lindsay's hands.' Now, it appears to me that if the change of flag was a material circumstance in the case, the pursuers were bound to have made themselves aware of it before effecting the insurance. Although Lindsay was the managing owner, and managed the vessel on behalf of himself and the other owners, the pursuers were entrusted with the duty of effecting the insurance of the vessel for behoof of all the owners, and it was clearly their duty to ascertain definitely, before effecting it, whether the managing owner's previously expressed intention of placing the vessel under the Belgian flag had been carried out, and to communicate the change to the underwriters.

"This being so, the next question is, Was the change of ownership and flag material? Several underwriters were examined by the pursuers for the purpose of shewing that, according to the practice of underwriters, change of flag made no difference in the risk. But most of these witnesses concurred in saying that vessels under the foreign flag were very rarely insured in this country, and that most of the risks which they were in the habit of underwriting on British ships were on yearly policies, running from February to February, and that, in taking the risk, they were not guided by the vessel's class in Lloyd's registry, or any foreign registry, but by an actual survey of each ship, made on behalf of the underwriters previous to effecting or renewing each insurance. Indeed one of the pursuers' witnesses, Dugald M'Dugald, an insurance broker in Greenock, and agent there for the Union Marine Insurance Company of Liverpool, says

of the change of flag was material to the underwriters' risk. The insured was only bound to disclose facts relating to the risk which the under-

that, while in the general case he does not consider the change of flag material, even if made just before the commencement of an insurance, he thinks it is a circumstance which ought to be communicated to the underwriter. He is asked, 'Would the knowledge of the change of flag having taken place shortly prior to September 1874 have suggested to your mind any reason for making inquiry? (A.) I would certainly have made more stringent inquiries, because the change of flag would have led me to understand that it had been made to escape the action of the Board of Trade. There was a great deal of change of flag about that time among vessels of all classes, but chiefly among low classed vessels. (Q.) You would have thought it reasonable in an underwriter, who had got information of the change of flag, to have made those more stringent inquiries to which you have alluded? (A.) I think it reasonable that the underwriter should have made inquiry. We rarely insure vessels sailing under a foreign flag, because we are rarely asked to do so; it is not generally done in Scotland. There is no other reason. The nationality of a vessel is not a material matter to be communicated to the underwriter. It is better to be communicated, but is not material. (Q.) What do you mean when you say it is better to be communicated? (A.) The underwriter prefers to have all the circumstances of risk set before him. (Q.) Do you mean that the underwriter's mind would be affected by the knowledge of that fact? (A.) It might or it might not. (Q.) And it would be reasonable to think his mind might be affected? (A.) It might be affected.'

"It is intelligible, therefore, that while the Board of Trade inspection is a protection to underwriters insuring British vessels without making an actual survey of the vessel, such inspection may be of less advantage to underwriters, who, like most of the pursuers' witnesses, grant time policies after actual survey for themselves. Now, the evidence for the defenders very clearly shews that in Aberdeen, and particularly in the case of policies for single voyages, the underwriters are not in use to accept foreign risks, and that they depend almost entirely upon the information as to the vessel communicated to them by the assured, or disclosed in the lists of Lloyd's registry, or in the French or other foreign lists. In such cases underwriters insuring vessels after the passing of the Merchant Shipping Act of 1873 considered, and were well entitled to consider, that the risk of insuring a vessel under the British flag without making a special survey was materially lessened, especially in the case of old vessels like the 'John George,' by the powers of inspection and detention given to the Board of Trade.

"I think that the whole evidence leads to this result, that the circumstance of the flag being changed on the eve of the vessel sailing, and avowedly for the purpose of escaping the Board of Trade inspection, was a circumstance so material that it ought to have been disclosed to the underwriters before the policy was effected, and that the failure to disclose vitiates the policy.

"It may be true, as the pursuers allege, that the Board of Trade inspection does not necessarily secure more than that the ship when she sails is seaworthy, and that as the defenders do not maintain that the 'John George' was unseaworthy when she sailed, and as positive proof of her seaworthiness has been adduced by the pursuers, the non-communication of the change of flag is not material. But I think that this argument ignores the principle laid down in the passage from Arnould already quoted, and which is also very clearly stated in Marshall on Marine Insurance, p. 359 (ed. 1861), viz., that 'concealment so vitiates the policy that it will afford the insured no remedy, even from a loss arising from a cause unconnected with the fact or circumstance concealed; for a concealment is to be considered not with reference to the event, but to its effect at the time of making the contract.' It may therefore be quite true that even if the registry had not been changed, and if the vessel had been inspected by the Board of Trade, she would have been found seaworthy and allowed to sail, so that in point of fact the loss may not have been attributable to the want of inspection. But the question to be decided is, whether or not the removal of this

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writers assumed. They undertook no risk in regard to the seaworthiness of the vessel. If the vessel was seaworthy they were bound to pay, and if it was not seaworthy they were not bound to pay. The Board of Trade inspection could give the underwriters no more than a guarantee of the ship's seaworthiness, and this was secured to them by the warranty contained in the policy. The vessel was not made less seaworthy by carrying the Belgian instead of the British flag. No question as to the materiality of the non-disclosure could arise unless the seaworthiness of the vessel was disputed, which it was not.

LORD JUSTICE-CLERK.—I do not think it necessary in this case to call for any reply, and for my own part, notwithstanding Mr Trayner's very able and ingenious argument, I am quite satisfied with the views expressed in the Lord Ordinary's interlocutor, and indeed have very little to add to what he has there said. The state of the matter of fact seems to me beyond dispute, and is shortly this:—This vessel had been insured by the defenders, the Aberdeen Sea Insurance Company, in April 1873, and at that time the information which the insurance company received from the shipowner was, that she was registered at South Shields; and they referred the underwriters to the French Bureau Veritas, from which it appeared that the "John George" was registered at South Shields, that she had been built at Sunderland in 1837, and stood in April 1873 as classed in 1872 of the second class for two years,—not a very high class vessel,—but that was the information which the insurance company received at that time. In 1874 the pursuers wrote to the insurance company to know at what rate a new insurance could be effected on a voyage from the Tyne to Cronstadt; and this proposal was submitted to the underwriters along with the information which had been previously received as to registration and class of the vessel, and the result was that this policy was issued. The policy contains nothing in its terms, it seems to me, material as to the general question which we are now considering. The memorandum in regard to capture, and the other matters put on the back of it, probably had reference to the fact, not disclosed at the time, that the vessel had a foreign register. But, apart from that, there seems to be nothing important in the specific terms of the policy.

Now, the vessel sailed, was caught in a storm, and was wrecked at Bamborough, on the coast of Northumberland; and the question now is, whether the pursuers, the owners, can recover under this insurance. The answer made by the defenders is, she was represented to us as a British vessel, whereas, in

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old and low class vessel from the control of the Board of the Trade on the eve of her leaving Great Britain, and shortly before the insurance was effected, would, if communicated, have influenced the mind of a rational underwriter in entering into the transaction? The import of the evidence is, in my opinion, that the facts, if disclosed, would have influenced the defenders, and have led them either to decline the risk altogether, or to undertake it, if at all, at a higher rate than that to which they agreed; and I think it would have been reasonable in them to be so influenced.

"On these grounds, I think the pursuers cannot recover under the policy sued on, which I hold to be vitiated by the concealment or non-disclosure of material facts, which were or ought to have been within the knowledge of the pursuers when they effected the policy. As, however, the defenders offer to return the premium paid by the pursuers, decree will be given in their favour for that sum. But as I do not think the pursuers are legally entitled to such return, the defenders will be assoilzied from the conclusions of the action *quoad ultra*, with expenses."

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point of fact, she had been registered at Antwerp as the property of a Belgian owner, and consequently was sailing under the Belgian flag; that was a matter which was concealed from us when the policy was effected; and if it had been disclosed to us we should never have entered into the contract at all. The question now is, whether, assuming that such is the fact, the contention of the defenders is well founded.

Now, it turns out, and indeed is somewhat ostentatiously averred on the part of the witnesses for the pursuers, that the registration under the Belgian flag was not the result of any *bona fide* transaction, nor done for any *bona fide* purpose. The Legislature, by the Act of 1873, empowered the Board of Trade to inspect vessels leaving the different British ports, with a view of ascertaining their seaworthiness and the state of their equipment and loading. It seems that it has become the practice, for the purpose of evading that statute, to make false declarations in foreign ports for the purpose of obtaining a foreign registry for British vessels, in order to exempt them from the inspection of the Board of Trade; and this was the reason which induced the pursuers to procure the Belgian registry which subsisted at the date of the insurance. I can only say that I can conceive no greater fraud, or one more unworthy of the position of a British merchant. The witnesses say that the Board of Trade inspection is oppressive. But when statutes are passed for the good of the commonwealth, for the praiseworthy object of preserving the lives of the sailors on board our ships, I am sorry to find that it is considered anything but a disgraceful fraud to endeavour to evade these provisions by false oaths in a foreign port; and I greatly regret the attempt which has been made to defend such a course. We start, therefore, in this inquiry with the fact that the Belgian character of the vessel was a fraud on the public policy of this country; and the question is, what is the effect of that undisclosed fraud on this contract of insurance? It may be true that the Board of Trade inspection, and the statute under which it proceeds, are not provided directly for the protection of underwriters, but for the general benefit of those engaged in navigation. But it does not follow that if there be part of the machinery of this statute which might be material to the underwriters if the vessel were a British ship, the withdrawal of this advantage, without notice to the underwriters, may not be material to the risk. This vessel was represented to be a British vessel, and this was clearly implied in the contract, which was a reinsurance of a ship already registered as a British ship. The only account which the insurers had of her register or her class was derived from the registry at South Shields, which was furnished on the occasion of the former insurance. Therefore, while the underwriters were induced to believe that they were insuring a British ship, they were in point of fact insuring a Belgian ship. I am not sure that, apart from the Board of Trade inspection, that might not amount to a misrepresentation material to the risk. There may be many things incident to a foreign ship in the way of capture, of adjustment of claims, or other results of the contract of marine insurance, the law in regard to which varies, or may vary, in the different countries in Europe. Underwriters are certainly entitled to know that they are asked to insure a foreign ship, and persons wishing to insure are bound to give them notice of the character of the vessel. It is no answer that various underwriters say that they do not think the risk materially greater in the one case than in the other. That is not the question. The question, as I regard it, is, whether the contract to insure a British ship is the same thing as to insure a Belgian ship. I think that

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admits of doubt, apart from the fraudulent object of the Belgian registry, and that the owner ought to have disclosed the nationality of the vessel. But it is enough for the present case to say that the false representation which was made, and the fact which was not disclosed, were matters which related to the security for the seaworthiness of the vessel. The object of taking the Belgian flag was to avoid the Board of Trade inquiry, to which, in its character of a British vessel, the underwriters were entitled to assume that this ship would be subject.

It is in vain to say that the vessel, in point of fact, was seaworthy. That may be so; but the question is, whether the misrepresentation or concealment had the effect of leading the underwriters to believe that there were means of ascertaining the seaworthiness of the vessel which were neutralised by the registry under the Belgian flag? On that matter I entertain no doubt. The means of proving that a vessel which has been wrecked was unseaworthy when she sailed are sufficiently limited; and we know also that, in the system of underwriting which prevails in this country, there is but little inducement to underwriters to undergo the expense and annoyance of such inquiries. They are quite entitled to rely on the provisions of the statute, and to assume that before a British vessel sails on an intended voyage she will undergo the inspection as to her seaworthiness for which the Legislature has provided. I should be very sorry in such a case as this to give any countenance to the systematic evasion of so salutary an enactment by false and fraudulent assumptions of foreign nationality. On the whole case, I am very clearly of opinion that the policy is void, because the ship was falsely represented to be a British ship, because its change of nationality was concealed from the underwriters, and ought to have been communicated to them; and that these things were material to the risk undertaken by the contract of insurance.

Lord Neaves.—I am of the same opinion. I think this is an important case. I think it important that such practices as have been here disclosed should, if possible, be put a stop to; and the only way in which we can do that is by preventing the parties who resort to them from reaping the fruits of their fraud. I have no difficulty in holding that a proceeding of this kind is a fraud,—a fraud upon the law, a fraud upon the country, a fraud upon all those interested in the safety of ships. I need not go over the same ground with your Lordship as to the matters of fact; but I would observe that the warranty of seaworthiness, founded upon so strongly here, is the very thing which gives importance to the impropriety on the part of the pursuers. There is a difference of opinion among jurists as to where the *onus probandi* lies in a warranty of seaworthiness. I am myself inclined to think that where there is such a warranty the proof of non-seaworthiness is laid on the underwriters. The presumption when dealing with honest men is that the ship was seaworthy as warranted; and therefore the underwriter with such a warranty is laid under the burden of proving non-seaworthiness. He may do so. Warranty does not prevent the proof that the warranty was not observed. And here comes in the pre-eminent importance of no concealment, no disguise of facts, or failure to answer the necessary questions put to the parties proposing to insure, that shall prejudice the position of the underwriter if he is ultimately driven to resort to a proof of unseaworthiness. Now, then, a party comes and says, either expressly or by necessary implication, this vessel which I am asking you to insure, and which I am willing to guarantee

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as seaworthy, is subject to the inspection of the Board of Trade, and will undergo that inspection before it proceeds to sea; and therefore it will either be prevented from going to sea, or you will be secure as to its being seaworthy; and at any rate evidence will be preserved by that inspection which will be beneficial to you. I do not see how it can be said that the inspection of the Board of Trade, carried on in the strict manner in which it is carried on, is not a resulting benefit and security to the underwriters. It will secure that the ship be made seaworthy, or shall not go to sea unseaworthy; or at least a record will exist that it was unseaworthy, and the insurer may bring forward that evidence to prove that the warranty has not been complied with.

Now, the insured here, before effecting this insurance,—which was a continuation of a former one,—determined to change the register of the ship; and it is a fair presumption, I think, that they did so in order to avoid what they felt to be irksome, because it was a check upon unseaworthiness. The more irksome it was, the more efficient it would be for the benefit of all those interested in the fact of seaworthiness. The insured evaded that by resorting to a foreign country for a register that would save them the necessity of this inspection, and entitle them to put to sea without the Board of Trade interfering. While they did that, they did not inform the underwriters that they had so changed the position which they had previously occupied. And, indeed, the position they had taken was a simulate position, as is now admitted. The vessel had not become a Belgian vessel in strict truth, but had become apparently a Belgian vessel, so as to sail under false colours, and thereby—without its being communicated to the underwriters—escape that inspection which would either have kept her within harbour, or have preserved a record of her unseaworthy state, which would have been available if she was in that state.

Now, can an insurance entered into in these circumstances be held to have been entered into *bona fide*? It is said the Board of Trade is very oppressive, that they detain vessels, and give a great deal of trouble; but there are parties in the country who think they are not sufficiently stringent, though we have not before us the principal party who interests himself in this subject. It is said there is a guarantee of seaworthiness; but that does not at all signify in this case, because the question is, what were the disclosures made before the insurance policy was entered into. In the next place, the fact of a warranty does not prevent the underwriters from availing themselves, wherever it may be necessary, of the securities that exist for contradicting seaworthiness. Therefore, it appears to me that this insurance has been obtained by means of a false representation, for I think there was a virtual and plain representation that the vessel was still an English vessel; that she was liable to the inspection of the Board of Trade; that she would undergo that inspection; and that that would be a security; but when it turns out that, by a simulate transaction and a fraud, the owners evaded the inspection of the Board of Trade, I think the underwriters are entitled to say, You have withheld from us that which a reasonable and just man would have disclosed, and therefore our contract from the first is null and void.

LORD ORMIDALE.—It does not appear to me that your Lordships have characterised the conduct of the pursuers too strongly. I do not refer to all the pursuers before us, because I exculpate entirely, in consequence of his ignorance of what had occurred, one of these pursuers, who is resident in Edinburgh, although

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of course he is answerable in law equally with his partners for what they have done. The conduct of the managing partner in Newcastle, in entering into the transaction in question, was, it appears to me, a fraud of the very worst description; and I cannot help thinking that if, in the carrying out of that fraud, there was not actually subornation of perjury, there was something as close as possible to it. An individual was employed at Antwerp to register himself as the owner of this vessel under the Belgian flag, and he could not do so without taking an oath that he was the owner, knowing all the time, as did also his employers, that he was not to be the owner, and that the whole affair was a mere fiction. It was a fraud to evade in this way the law of the land in which the true owners lived, and to which the vessel belonged; and it was carried out by means of the most discreditable and disgraceful description. It appears to me that the whole case is pervaded by fraud from beginning to end; but, even if we could take up the question of the insurance in Aberdeen separate and apart from the fraud as to the change of flag what would be the result? The issue is, in the words of the Lord Ordinary, whether everything was disclosed which would affect the judgment of a rational underwriter governing himself by the principles and calculations on which underwriters act, and is a proper jury question to be decided on the evidence adduced. Now, the Lord Ordinary has, sitting as a jury in this case, heard the whole evidence, and come to the conclusion that the verdict on that issue should be given in favour of the defenders. I must say that I entirely concur with him, and I shall state the considerations which have influenced me in coming to this result in a very few words. Mr Trayner stated, as the foundation of his argument, that there was a great distinction between direct misrepresentation and a failure to disclose; and that if there had been here a positive averment that this vessel had continued under the British flag when the insurance in question was effected, that would have been a direct misrepresentation, which would have vitiated the contract, although after all it did not in the least degree affect the loss of the vessel, for she was just as seaworthy on that assumption as she was on the assumption on which he presented his argument, viz., that there was no misrepresentation, but merely a failure to disclose the fact that there had been a change of flag. But it appears to me that the foundation of the whole of that argument is unsound; for I concur with the Lord Ordinary in holding that there was a virtual representation by the pursuers that the ship had not changed her flag. The majority of the insurers knew that within two years they had effected an insurance on this very ship as a British ship; and some of them state on oath that, in this case, they acted in the belief that she was still a British ship, sailing under a British flag; so that, when asked to insure her again for a different voyage, I think there was a virtual representation to them to that effect. Now, in order to test whether it was material for the underwriters to know that she had changed her flag, supposing it had been stated to them that the vessel which they had insured two years before as a British ship sailing under a British flag was now a Belgian ship sailing under the Belgian flag, would they not have asked the meaning of the change? Would they not have declined to take a single step till they knew the reason of it? And what would have been the result? Either the truth would have been told them, or it would have been concealed, and a fraudulent statement made. In the former case, would it not have most materially affected their calculations? I think, on that hypothesis, it may be very fairly assumed that they would not have undertaken the risk at all, for it is hardly possible to suppose that they would,

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as rational and intelligent men, have undertaken the risk of a vessel in such circumstances, belonging to such men. Mr Wawn, one of their own witnesses, says,—"My underwriters do not think the change of flag a matter of additional risk or premium. If the owner is respectable, and the ship sound, the flag makes no difference in the risk." We need hardly be told that the owner must be respectable. A disreputable, dishonest individual would hardly get any underwriter to take a risk for him; but if all the circumstances of the present case had been disclosed to the underwriters I think it is impossible to suppose that they would have undertaken the risk at all. Now, I think that is a very good test, and it satifies my mind, in disposing of the question whether the change of flag, in the circumstances in which it took place, was a matter material to a rational insurer to know when he undertook the risk. We have a number of respectable persons engaged in underwriting who say that it would have materially affected their minds; and if that be so, I concur with the Lord Ordinary, sitting as a jury in the case, that the evidence is sufficient to entitle us to pronounce a verdict in favour of the defenders; and I agree with your Lordships in pronouncing that verdict.

LORD GIFFORD.—I am of the same opinion. I abstain from characterising farther than your Lordships have done—and in that characterisation I concur—the nature of the fraud which was here perpetrated against the Legislature and against the country. I prefer to look at the case simply as a case of a contract of insurance, which is said to be voided by false representation or by concealment of material circumstances. I take the law to be very well stated by Mr Arnould, in the passage quoted by the Lord Ordinary, that it is the duty of the assured to communicate to the underwriters all the intelligence he has that may affect the mind of the underwriter as to either of the two following points:—1st, Whether he will take the risk at all; and, 2d, At what premium he will take it. In this view the real question is whether the fact that the ship was sailing, not under a British registry, but under a Belgian registry, is or is not material to the risk of the underwriter. Now, I rather think, with Lord Ormidale, and, if I mistake not, with both your Lordships, that there was here something very like actual direct misrepresentation. No doubt it was not said in so many words, "this is a British ship sailing under the British flag;" but it had been previously insured as such, and this was a reinsurance, which, I take it, very strongly implies, when no statement is made to the contrary, that the circumstances connected with its ownership are the same. Now, if it was a direct misrepresentation, a direct statement of what was false, it seemed to be conceded at the bar, and I understand it is the law in relation to this case, that that is very nearly of itself conclusive, and that the question of materiality of what is so expressly represented is not so important a matter of inquiry. But even supposing that this was just simple concealment of the change, I am prepared to affirm the Lord Ordinary's judgment, that it was a concealment of a fact material to the risk, and which every rational and reasonable underwriter would wish to know as affecting the questions, 1st, whether he would take the risk at all, and, 2d, at what premium he would accept it. The effect of a ship sailing under the British flag, and being a British registered ship, is, since 1873, among other things, that it is subject to certain inspection by the Board of Trade,—inspection intended, no doubt, to secure the lives of the sailors, but that can only be secured by securing the safety of the ship, and the safety of the ship in this

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matter depends on its being seaworthy, both as to equipment and as to loading, when it leaves a British port. Now, I think it is impossible to doubt, and we do not need any proof on such a question, that a ship under such inspection is a safer ship to insure than a ship under no inspection whatever. The true meaning of the statute is to secure safety, and a ship, the safety of which is more or less secured by such precautions, is a safer ship to insure than a ship regarding which no such precautions are taken; for if a man of common sense, not at all connected with maritime matters, was asked, whether would you insure a ship that has no Government inspection attending its sailing, or its loading, or its condition, but merely the guarantee of the owner that it is seaworthy, or a ship as to which you have not only the guarantee of the owner that it is seaworthy, but in addition the interference and inspection of a Government official, can there be any doubt as to what the answer would be? The inspection affords an additional security that the ship will be seaworthy each time it sails. Now, that is the very thing that is material; and it is no answer to that to say, Oh! but the owners guarantee the seaworthiness, and if they do so, it is the same thing whether it is seaworthy or not. It is not the same thing. In the first place, if she is lost, and the question arises whether she was seaworthy or not, it imposes on the insurer, who objects to pay upon the ground that the ship was not seaworthy, a proof, or at least a litigation, about the question whether she was or was not seaworthy—a litigation which will be avoided, and a risk of loss which will be avoided, if, prior to each time she sails, there has been a Government inspection. Suppose there had been what there is not yet—a general load line fixed, that is, a load line fixed, not by the shipowner himself, but by the Government inspector, would that not be an additional security to an insurer? for he would then be assured that the Government inspector had fixed a line beyond which the ship was not to be loaded; and if a foreign ship is not subject to that law, then the underwriter has not the same security that when she sails from a British port she will be in a seaworthy condition. Now, that is enough for this case. I think it is a thing that every underwriter would reasonably look at, even in the limited aspect in which I am now regarding it, whether the ship has the additional security of the Government inspection, or whether he has merely to trust to the guarantee of the owners that it is seaworthy. I agree with your Lordships; but I would rather put my judgment upon this short ground, that a material circumstance has been concealed from, or, I would rather say, misrepresented to, the underwriters in this case, which, had it been disclosed, might have reasonably affected their decision. We have the express evidence of one of them that it would. I do not go on that, but still it might have affected their decision as to whether they would take the risk or not. I am therefore of opinion that the Lord Ordinary, in whose remarks I generally concur, has reached a right result in this case.

THE COURT adhered.

RHIND & LINDSAY, W.S.—MORTON, NEILSON, & SMART, W.S.—Agents.

J. C., Pursuer.—*Fraser—Mair.*
J. M., Defender.

No. 119.

May 24, 1876.
C. v. M.

Husband and Wife—Declarator of Nullity of Marriage—Impotence of Wife.—Circumstances in which the Court pronounced decree of nullity of marriage on the ground of impotence on the part of the woman, who was fifty-four years of age at the date of the marriage.

1ST DIVISION.
Ld. Craighill.
M.

J. C., engineman, Glasgow, was married to J. M. on 5th September 1873. The husband was then fifty-seven and the wife fifty-four years of age. The husband had been married before and had a family. The wife had never been married before. On 27th September 1875 the husband raised an action against his wife, concluding for a decree declaring "the pretended marriage betwixt the pursuer and defender to have been from the beginning, to be now, and in all time coming, null, and of no avail, force, strength, nor effect, with all that has followed thereupon: And our said Lords ought and should divorce and separate the defender from the pursuer's society, fellowship, and company, and find and declare the pursuer to be in such case and condition as he was before the said pretended marriage, or as if he had never been contracted or married to the defender: Further, . . . that the said J M , defender, has forfeited all her privileges as the pursuer's lawful wife, and all rights and interests, *jure mariti* or otherwise, legal or conventional."

The pursuer stated;—"Notwithstanding their cohabitation, and of the solemnisation of said marriage *de jure*, the same has never been consummated *de facto*, no carnal copulation having followed thereupon between the pursuer and defender, by reason that the defender is suffering from an unnatural narrowness of her genitals (vagina), which has existed all her lifetime, and by which consummation is rendered impossible. Prior to and at the date of said pretended marriage the defender was aware of her condition, and was and is impotent, and unable to do the duty of a lawful wife to her husband, as is required by marriage."

The defender did not appear.

The Lord Ordinary allowed the pursuer a proof. Both husband and wife were examined, and medical witnesses.

With regard to the import of the proof, it is sufficient to say that the Lord Ordinary and the First Division took different views of the evidence. That of the Lord Ordinary is given in his interlocutor. The First Division held that an irremediable physical obstruction to copulation had been proved to exist on the part of the woman.

The Lord Ordinary pronounced the following interlocutor:—"In the first place, finds as matters of fact (1) that the pursuer and the defender were married the one to the other in 1873, when the pursuer was fifty-seven and the defender was fifty-four years of age; (2) that the defender had never been married till she, as aforesaid, was married to the pursuer; (3) that the marriage of the pursuer and the defender has never been consummated, though the pursuer is perfectly capable and has frequently attempted to have carnal intercourse with the defender; and (4) that the impediment to consummation has not been proved to be an unnatural narrowness of the defender's genitals (vagina), which has existed all her lifetime as alleged in the libel, but, on the contrary, is, if not wholly, at anyrate partially, the consequence of impaired or diminished elasticity in these parts, produced by age—that is to say, by the operation of a natural cause in the case of an unmarried woman: In the second place, finds as matter of law that the ground of action libelled not having been estab-

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lished, the defender must be assoilzied: Therefore assoilzies the defender from the conclusions of the libel: Finds no expenses due to or by either the pursuer or the defender, and decerns."*

The pursuer reclaimed, and argued;—Impotency had been clearly established. There were precedents where the same organic defect in the woman had been held to be a relevant ground for declarator of nullity.[1] Further, it was impotency although there was no organic defect if there was such functional disability as to prevent copulation.[2] The fact that a woman was old at the date of the marriage did not exclude the action; it only raised a doubt as to the pursuer's good faith in bringing it.[3] Although an action of declarator of nullity of marriage on the ground of impotency was rare in Scotland yet it was a competent action.[4]

At advising,—

LORD PRESIDENT.—That marriage may be declared null by reason of the impotency of one of the spouses at the suit of the other cannot be doubted. To state the rule of law in the form of a definition of impotency would be dangerous, and is unnecessary.

But it may, I think, be safely affirmed as the result of all the authorities that inability to copulate arising from such a physical obstruction in the woman as cannot be removed or remedied without danger to her life or the infliction of bodily pain, *plus quam tolerabile*, constitutes impotency on her part.

Persons beyond the age when procreation of children may be expected may

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* "NOTE.—The foregoing interlocutor will probably be a disappointment to the pursuer, and certainly will be a cause of regret to the defender, who appears, from what she said when under examination as a witness, to be even more anxious than the pursuer that the tie between them should be dissolved. The wishes, however, even of both parties to the action, cannot, in such a case as the present, be taken into account in determining what is the judgment which ought to be pronounced.

"The ground on which the Lord Ordinary has proceeded in assoilzieing the defender is, that the case libelled has not been proved. This may be thought by some to be a narrow, because it has the appearance of being a technical, reason for his judgment; but it is necessary in such cases as the present to be influenced even by technical considerations. There is, however, something substantial as well as technical in the view of the case on which absolvitor has been pronounced. If the Lord Ordinary is right in holding that the impediment to consummation is not 'unnatural narrowness,' but is, if not entirely, at anyrate partially, the result of age—or, in other words, of the operation of a natural cause—he thinks that, even if the libel had been differently framed, decree could not in the circumstances have been pronounced. The case of G. v. G., 22d June 1871, Law Rep. 2 Prob. and Div. p. 287, cited by the counsel for the pursuer, is not analogous, and indeed, so far as the Lord Ordinary is aware, there is no reported case in which the point in question was presented for decision, or was decided. But it is unnecessary, and consequently would not be proper, to come at present to a conclusion upon this point, because, if the fact be, as has been found by the preceding interlocutor, that the impediment to consummation is not that which has been libelled, the pursuer cannot succeed in the present action."

[1] Melville v. Hepburn, Lib. Off. St. And. No. 13, p. 11; Myrton v. Forsyth, *ibid.* No. 137, p. 88.

[2] G. v. G., L. R. 2 Probate, p. 287; H. v. P., L. R. 3 Probate, p. 126.

[3] W. v. H., 30 L. J. Mat. Cas. p. 73.

[4] A B v. C D, July 18, 1863, 1 Macph. p. 1163, 35 Scot. Jur. 661.

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marry without hope of issue, but with the expectation of real *commixtio corporum*, which is the proper consummation of marriage, and the disappointment of that expectation by impotency arising from irremediable physical obstruction in the woman may entitle the man to a decree of declarator of nullity.

I am of opinion that such an irremediable physical obstruction to copulation has been proved to exist in the defender in this case, and that the pursuer is therefore entitled to judgment declaring the marriage null.

I cannot concur in the technical ground of judgment adopted by the Lord Ordinary, which, in my opinion, proceeds on too strict a reading of the summons.

LORD DEAS, LORD ARDMILLAN, and LORD MURE concurred.

LORD PRESIDENT.—If the marriage be null from the beginning there cannot be a forfeiture of the wife's interests as concluded for in the third conclusion of the summons.

The pursuer stated that the third conclusion in the summons was not the one applicable to an action for nullity of marriage, and ought to have been that the defender should be decerned to restore and deliver back to the pursuer all that she received from him on account of the marriage. He did not therefore insist on the third conclusion.

THE COURT pronounced this interlocutor:—"The Lords having heard counsel for the pursuer—no appearance being made for the defender—on the reclaiming note for the pursuer against Lord Craighill's interlocutor, dated 9th December 1875, Recall the said interlocutor: Find and declare the pretended marriage betwixt the pursuer and defender to have been from the beginning, to be now, and in all time coming, null, and of no avail, force, strength, nor effect, with all that has followed thereupon; and divorce and separate the defender from the pursuer's society, fellowship, and company; and find and declare the pursuer to be in such case and condition as he was before the said pretended marriage, or as if he had never been contracted or married to the defender, and decern."

WM. OFFICER, S.S.C.—Agent.

ROBERT GARDNER, Pursuer.—*Macdonald—Darling.*
MARY GARDNER, Defender.—*Trayner—Jameson.*

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Gardner v. Gardner.

Parent and Child—Legitimacy—Proof of Paternity—Præsumptio pater est quem nuptiæ demonstrant.—In an action of declarator and of putting to silence, at the instance of a man against a girl who claimed to be his legitimate daughter, the following facts were proved:—The pursuer had, after a somewhat prolonged courtship, married the mother of the defender when she was to his knowledge, and on her own confession, far advanced in pregnancy, but, according to her and the pursuer's statement, in consequence of intercourse with another man. When the child was born the husband and wife were living together as married people (in a hotel in Edinburgh, where they had gone for the occasion), and at the time neither of them said to any one that the pursuer was not its father. The child was removed within three days after her birth, and the pursuer paid aliment for her for sixteen years, but she saw neither her mother nor the pursuer till she was twenty-one; she then, in consequence of rumours which had reached her as to her parentage, demanded to be recognised as the daughter of the pur-

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suer and his wife, but this was refused; the pursuer, however, sent her to school at his own expense, and supplied her with money for dress, &c. It was then for the first time stated to the defender that another man was her father, and at the request of the mother this man wrote letters practically admitting that he might be the father—but he subsequently, when examined as a witness for the pursuer, denied that he ever had connection with the mother. There was some evidence to the effect that the pursuer had admitted attempting to have connection with his wife before marriage.

Held, (1) in point of law, that the *præsumptio pater est quem nuptiæ demonstrant* did not apply, the child not having been born *justo tempore;* but (2) in point of fact, that the pursuer had failed to make out his case, his own actings in marrying a woman whom he knew to be pregnant, and in not at once repudiating the child at birth, having raised a *præsumptio hominis et facti*, which the evidence he had adduced was insufficient to rebut.

2D DIVISION. Ld. Craighill. I.

ROBERT GARDNER raised this action against Mary Gardner, and concluded for declarator "that the defender is not the child of the pursuer, and farther, the defender ought and should be decerned and ordained to desist and cease in all time to come from asserting or otherwise representing directly or indirectly that she is the child of the pursuer, and she ought to be put to perpetual silence thereanent."

He averred that he married Eliza Brodie, now his wife, on 29th August 1850, that about a month previous to the marriage Miss Brodie had informed him that she feared she was with child to another man, whose name she did not disclose, and that these fears were afterwards confirmed by the late Dr Thatcher who examined her. That the marriage had nevertheless been gone on with, and that on 16th October 1850, about seven weeks after their marriage, Mrs Gardner was delivered of a female child—the defender. It was also stated that about a year after the birth of the defender Mrs Gardner, when seriously ill, mentioned to her husband for the first time that the father of the child was John Laidlaw, who at the time of the alleged conception was shepherd at her brother's farm of Cademuir where she resided prior to her marriage. Intercourse was alleged (Cond. 4) to have taken place on "two or more occasions," one of which was on Cademuir Hill near Peebles. The pursuer further alleged that in order to avoid scandal and to save his wife's reputation he had maintained the defender, though not in family with him, but that recently she had been giving out that she was his daughter, and had also been making such extravagant demands and claims upon him on the ground of their relationship as to render the action necessary.

The defender denied the statement as to John Laidlaw being her father, and adhered to her claim to be recognised as the daughter of the pursuer and his wife.

A proof was allowed to both parties, the result of which was shortly as follows:—The pursuer, who was at the date of the action seventy years of age, was the son and brother of ministers of the Church of Scotland, and had been himself an elder of that church since 1849. He had proposed for Miss Brodie's hand prior to 1839, but was rejected. He then went to Australia, whence he returned in 1846. After his return he renewed his acquaintanceship with Miss Brodie, who then resided at Cademuir farm with her brother. He became tenant of a farm called Traquair Knowe, about ten or twelve miles from Cademuir, in 1847, and lived there till some time after his marriage. Shortly after his return from Australia he had renewed his attentions to Miss Brodie, who was then between twenty-five and thirty years of age, and had eventually become engaged to her. Before the marriage day was fixed, however, she had told him that she feared she was with child to another man, who, she

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said, had forced her on Cademuir Hill,* but whose name she refused to tell. In consequence of this disclosure he induced her to go to the late Dr Thatcher senior, in Edinburgh, who examined her, and pronounced her far advanced in pregnancy. He himself then called upon Dr Thatcher, and was advised by him to marry her as soon as possible.† The marriage was accordingly solemnised within six weeks of the disclosure by Miss Brodie of her condition. The pursuer took his wife home, and after a stay of three weeks there she removed to the seaside for a month, and then came to Milne's Temperance Hotel, Edinburgh, where she was delivered of a female child on 16th October 1850, being attended at her confinement by Dr Thatcher, whom the pursuer called in, and to whom he paid a fee of £20. At the time of the child's birth no statement was made by the pursuer or his wife to the effect that she was not the daughter of the pursuer. The fact of his being the father was allowed to be assumed, and was so assumed by all the persons who came into contact with them.‡ Within two or three days of the birth of the child a

* The only evidence as to this interview and what passed at it was that of the pursuer and Mrs Gardner. The pursuer deponed in cross-examination,—"She did not at that time tell me who the father was. I asked her. (Q.) What answer did she make? (A.) That she had been waylaid by a blackguard on the hill, and abused." . . . "(Q.) Did you not press her for some further information than that she had merely been forced by a blackguard on the hill? (A.) Well, I pressed her, certainly, but I got no further information from her, excepting that she had been waylaid by a blackguard and abused." . . . . "(Q.) Did she not tell you that she expected to meet a man on the hill? (A.) No, she did not. (Q.) Did she lead you to understand it was a man she had never seen before, and whom she knew nothing about? (A.) She did."

He also deponed as regarded his motives for going on with the marriage,—"(Q.) When she made this communication to you were you afraid that if you broke off the marriage she might do herself an injury? (A.) I was under that impression. (Q.) Was she in a very agitated and despairing state? (A.) She was in a very excited and nervous state, and I was afraid she might do some rash act." . . . "We agreed that the marriage should take place, and that we should try to smother up the thing as much as possible."

Mrs Gardner deponed,—"I cannot tell exactly what my husband said when I told him that I was in the family way, but he was in a very distressed state. He said, however, that the marriage would still go on. (Q.) Do you mean to say that on that occasion Mr Gardner made no inquiry as to who was the father of the child? (A.) He made inquiry, but I did not tell him. (Q.) Why did you not tell him? (A.) Because I did not know what to do, I was in such a state myself. He did not press me to tell him."

† The only evidence on this point was the pursuer's on cross-examination,—"(Q.) The result of your talk with her was that you sent her to Dr Thatcher? (A.) She went in to him, and I also went in a day or two afterwards to call upon him. (Q.) Did Dr Thatcher say to you that if you were the man you ought to marry her at once? (A.) He advised the marriage to go on; at least I think he did. (Q.) Did he say that the girl was in the family way, and that if you were the man you should marry her at once? Don't take these words from me; but was anything of that kind said? (A.) He did not say if you are the man, but he recommended that the marriage should go on. (Q.) He recommended that somebody should marry her? (A.) He said that she was in that way certainly, but I led him to understand that I was not the father. I don't think that at the time when I went to see Dr Thatcher the time of our marriage had been fixed. (Q.) When you came from Dr Thatcher's you fixed the time of your marriage? (A.) The time was fixed. (Q.) Was it fixed immediately? (A.) Immediately. I cannot exactly state the time which elapsed between my visit to Dr Thatcher's and the fixing of our marriage-day, but it was a very short interval."

‡ The following passage occurred in a memorandum made by Dr Thatcher

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woman—then called Mrs Bennett, but afterwards married to a man named Hutchison—was employed to take the child away and rear her. The pursuer, through Dr Thatcher senior, until Dr Thatcher's death in 1853, paid £16 per annum for the board, &c., of the child, and after the death of Dr Thatcher senior, through his son, Dr Thatcher junior, he paid £14 per annum until 1866, when he ceased making these payments, having, as he said, thought that as the girl was then sixteen years old she ought to be earning her own living. The child had been taken to Loanhead by Mrs Hutchison, and was kept by her until she was old enough to work, when she commenced to work in a neighbouring paper mill. She had been called Mary Gardner by Mrs Hutchison, who so called her because she had heard her mother called Mrs Gardner in Milne's Hotel. When she was about sixteen she attracted the attention of the Rev. Mr Kay, the Free Church minister at Loanhead, whose church Mrs Hutchison and the defender attended. The Rev. Mr Kay discovered that she had never been baptised, and he baptised her as Mary.

In August 1872 the defender, who had heard through some friends of the existence and residence of the pursuer and Mrs Gardner, proceeded to Innerleithen, where they then resided, and asked to see Mrs Gardner, to whom she stated that she had heard she was her daughter. Nothing else occurred at that meeting, except that Mrs Gardner promised that Mr Gardner would write, and the defender returned to Loanhead. Subsequently the Rev. Mr Kay wrote to Mrs Gardner to the effect that he had discovered that she and her husband were the parents of the defender, and called upon them to acknowledge her. In consequence of this letter Mr Gardner went to Loanhead about the 30th of August 1872, and had one interview with Mr Kay alone, and another with him and the defender. At neither of these meetings did the pursuer admit that he was the defender's father, but instead, according to the statement of the Rev. Mr Kay in his evidence, gave an account of the manner in which his wife had been forced upon the hill by a man, in consequence of which she had become the mother of the defender.* As a result of these meetings, the

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senior at the time:—". . . Proper clothes to be furnished, and Dr T. will pay at present for the child's parents, but will not be responsible beyond the first year. Loanhead, Nov. 8th 1850."

* The Rev. Mr Kay's evidence on this point was as follows:—"There was a meeting held two days or so later, at which Mary was present. At that meeting, after reading some notes, he rose from his seat and turned to me, saying, 'As sure's death I'm no her father.' I caught him, and said, 'Then your wife's the mother, at least;' and he hesitated, and said, 'Y-y-yes.' That was the substance of the conversation. (Q.) Was anything said on that occasion about the meeting with Mrs Gardner and somebody else on the hill? (A.) Yes. He said that Mrs Gardner had been met by a man upon the moor, and that he was a poor working man, and that he had forced her, and that, having forced her, she was in this condition. I put the question to him, 'Where is that man?' He said he didn't know. I asked, 'Is he in the neighbourhood of your place, or in the neighbourhood just now?' He said, 'No, not just now.' 'Could he be found?' I asked. 'No,' he said. 'Where was he?' I asked. He said he thought he was not in the country at all, and that owing to his conduct with Mrs Gardner he had become a dissipated man. I have a distinct recollection of Mr Gardner telling me these things. I was anxious to trace out the matter if I could get any information about it."

The pursuer's evidence in cross-examination as to this was—"(Q.) Did you, on the 30th August 1872, which seems to have been your first meeting with Mr Kay after the girl appeared at Innerleithen, tell him that the person who met Mrs Gardner upon the hill was still living, but not in this part of the country? (A.) I can't say; but it is very likely that I would tell him that he was living.

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pursuer, at the suggestion of the Rev. Mr Kay, sent the defender to the Free Church Normal School in Edinburgh, with a view to getting her educated as a teacher, and undertook the expense thereby incurred. About this time the defender commenced writing letters to the pursuer, in which at first, according to his statement, she addressed him as "Mr Gardner," or "Dear Mr Gardner." No letters so beginning were preserved, but the pursuer admitted that his impression was that in all of them she made plain her claim to be recognised as his child. The letters produced in process all began "Dear Father," or "My dear Father." About 16th April 1873, some eight months after the meeting last mentioned, the pursuer and Mrs Gardner went to Loanhead, to the Rev. Mr Kay's house, and the defender also came there to meet them by appointment. The Rev. Mr Kay's account of this meeting was to the effect that Mrs Gardner had given an account of the interview on Cademuir Hill, to which she attributed her becoming the mother of the defender, which differed from that previously given by the pursuer, particularly in her description of the man whom she met, and that he had then interrupted her, and a discussion had followed.* Mrs Gardner deponed that at that meeting she had offered to put her hand on the Bible and swear before

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I don't remember, however, speaking about what part of the country he was in. (Q.) Did Mr Kay ask you if he could be found? (A.) It is very likely he did, but I can't say that I remember. (Q.) Did you answer to that that you did not think he could, and that you did not know where he was? (A.) I have no remembrance of having said so. (Q.) Do you think it is likely you said it, or unlikely? (A.) Unlikely, because I knew where he could be found; I knew where Laidlaw was. (Q.) Did Mr Kay ask you on that occasion when you heard last about the man? (A.) He may have done so, but I can't remember whether he did or not. (Q.) Did you not reply that he was at a great distance from the place, and that, as the result of his conduct with Mrs Gardner, he was a dissipated, broken-down, and wretched man, and had not been in this part of the country since? (A.) I think I told him that I understood he was inclined to dissipating, but as to the other part of what you have repeated I have no remembrance of it. I did not on that occasion tell Mr Kay who the man was nor where he was, but I can't say whether I told him what he was. I don't think I told him his business. (Q.) You gave no information on the matter at all? (A.) In fact, I wanted to give as little information as I could. I cannot say that I remember having said that the man who met Mrs Gardner at Cademuir Hill was a poor labouring man."

* The Rev. Mr Kay's evidence as to this was—"After we were all met, Mrs Gardner began to tell the story that she was met on the moor by a gentleman, gentlemanly dressed, and with a plaid about him; that this man muffled up in a plaid came up and forced her; that she had struggled; then rose and went away. That was the substance of what she told me. I at once said, 'There is a contradiction here between Mr Gardner and you, for he said he was a poor man not to be found in this part of the country, and you say he was a gentlemanly man.' She wished to back out of it, and I appealed to Mary by saying, 'Mary, were not these your mother's words?' Then she acquiesced in it. (Q.) Did Mr Gardner say anything about his having said he was a poor labouring man? (A.) He did. (Q.) Did he say anything about how he had said he was a poor labouring man, while Mrs Gardner represented him as in a different station of life? (A.) I remember distinctly; he was sitting on a chair, and he turned right round on it, and said, 'It is a mere war of words.' Nothing was said on these occasions about a man Laidlaw being Mary's father. His name was never mentioned. I cannot recall anything being said about the man's whereabouts on that second occasion."

This account was corroborated by the defender in her examination, but contradicted by the pursuer and Mrs Gardner.

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God that Mr Gardner was not the defender's father, but the Rev. Mr Kay would not allow her to do so.

The defender, in her account of this meeting, stated that while she was alone with her mother, before the Rev. Mr Kay and the pursuer joined them, her mother had admitted that the pursuer was the man she met on the hill, and that he was her father, and promised to write to her "and tell her something." This Mrs Gardner expressly denied, and there was no evidence in corroboration of the defender's statement, nor was any such letter produced; but the defender stated in cross-examination that she had received a letter, which she had burned. The Rev. Mr Kay also deponed that he had been shewn a copy of such a letter by the defender. The defender did not contradict her mother's statement to Mr Kay, but explained her conduct by saying, "she asked me not to tell."

About a year after this interview, as the defender still continued to write letters, and to assert her claim to be recognised, Mrs Gardner, without, as she said, the knowledge of her husband, again came to Loanhead, and offered the defender £500 if she would promise no longer to annoy her and her husband with letters and demands. This offer was, however, under the advice of the Rev. Mr Kay, refused, and the defender insisted upon being recognised as the daughter of Mr and Mrs Gardner.

The defender was after this removed by the pursuer to a boarding-school at St Andrews, where she remained, with a few intervals, for a year and some days, the pursuer paying for her board and education.

In March 1874 another meeting took place at Loanhead between the pursuer, his wife, the Rev. Mr Kay, and the defender. The Rev. Mr Kay's account of this meeting was—"Mr Gardner and I had a meeting in March 1874. Mrs Gardner and Mary were present. (Q.) Was anything said on that occasion by Mr Gardner as to anything taking place between him and Mrs Gardner prior to their marriage? (A.) Yes. By that time Mary told me her mother's story to her, and I told Mr Gardner what Mary had said, and amongst other things that Mrs Gardner had said that he had attempted to force her once, and also a second time. To which he returned answer, and said, 'Well, I confess having tried it once.' (Q.) That was, that he had endeavoured before marriage once to have connection? (A.) To force her. (Q.) To have connection? (A.) Yes. (Q.) What was it you understood that he had tried to do—to commit a rape, or to have connection with her? (A.) The position I put is this—'I am told that you had courted Mrs Gardner, and had frequent meetings with her, and that on one occasion you tried to force her, when she said she was unwell, and you didn't succeed. On a second occasion you had forced her, having trysted her to a different place, on the moor, and that you had succeeded only too well the second time.' He immediately added, 'Well, I confess to having tried it once.' He didn't confess to having been successful. It was at that meeting, immediately after the confession, that he made an offer of £1000. He just said, 'I am here to make a settlement.' Immediately after the confession he spoke of a settlement. He proposed to give Mary £40 a-year during his life, and £1000 at death, and as much clothing as she would take. (Q.) That offer was declined? (A.) No; but there was no written agreement about it; it was simply a promise. The promise was not carried out. Mr Gardner took dinner and tea with me that evening. At the beginning of the meeting he produced an affidavit* upon oath taken by Mrs Gardner, to the effect that

* This affidavit was as follows:—"I, Eliza Gardner, wife of Robert Gardner,

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John Laidlaw was the father. He also shewed me a letter of John Laidlaw's; and when he was going away he said, 'Now, this secret will go down with me to the grave.' I remember the words well."

The defender corroborated this statement, but the pursuer and Mrs Gardner denied that Mrs Gardner was present at this interview. The pursuer also denied that any such admission as is above given was made by him. He admitted, however, that he had made the money offer here spoken of, but added that it had been refused.

Although the name of Laidlaw was about this period for the first time mentioned to the Rev. Mr Kay and the defender as that of her father, both the pursuer and Mrs Gardner deponed that about a year after their marriage, on an occasion when Mrs Gardner supposed herself to be very dangerously ill, she had told the pursuer that John Laidlaw was the father of the defender. Laidlaw, it appeared, had been shepherd to Mrs Gardner's brother at Cademuir for some four years prior to the marriage of Mr and Mrs Gardner. Mrs Gardner deponed that Laidlaw never courted her, but that in the month of January or February 1850 she had met him on the hill by appointment, at a distance from assistance, and he had then forced her, and that the birth of the defender was the result of that intercourse.* It appeared that Mrs Gardner had, within the years 1874 and 1875, written to Laidlaw four or five letters as to their intercourse on Cademuir Hill, in consequence of the defender's claims. In March 1874 she wrote him, enclosing a threatening letter as to the defender's parentage addressed to Mr Gardner, and asked him to acknowledge himself to be her father.† To this letter he replied that if she swore that the child was his he would not deny it.‡ In April 1874 Mrs Gardner again wrote Laidlaw, urging

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Gattonside, maketh oath and saith that John Laidlaw, formerly shepherd at Cademuir, and now flesher in Peebles, is the father of my child, born on or about the seventeenth October one thousand eight hundred and fifty. This I declare to be truth, as I shall answer to God. ELIZA GARDNER.

"Sworn before me at Kelso this twentieth day of March one thousand eight hundred and seventy-four. JAMES JOHNSTON, J.P. for county of Roxburgh."

* As to this Mrs Gardner deponed—"That is the only occasion on which I had connection with Laidlaw. (Q.) Did he force you? (A.) I could not resist on the hill; there was no one near me. (Q.) Did you resist as much as you could? (A.) Of course I did, but he had power over me. (Q.) Did you mention that to anybody that day or at any time? (A.) No; I did not mention anything about it until after my marriage. I cannot say if I met John Laidlaw the same night in my brother's kitchen, but I would likely meet him afterwards frequently in my brother's employment. (Q.) Was there any difference between you and John Laidlaw after what had happened on Cademuir Hill from what had been between you before? (A.) I shewed no difference before people. . . . . There was no difference in my conduct towards Laidlaw after the occurrence which I have described."

† This letter was in the following terms:—"Gattonside, Friday night.—Dear Sir,—Mr Gardner has got a threatening letter to-day, and I send you a copy of what I think you should write out, and sign and send it by return of post. The sooner that things are settled for I think I cannot stand it much longer.—Yours truly, E. GARDNER. *P.S.*—By doing this, it will be the only thing that will bring it to a settlement soon."

Copy Letter referred to.

"Peebles, March /74.—Mrs Gardner,—I acknowledge myself to be the father of the child you had born in the year eighteen hundred and fifty."

‡ As follows:—"Peebles, March 12th, /74.—Mrs Gardner,—You desired me to write by return of post, but I got such an astonishment that I scarcely know what I am doing. But I would have thought if you were that way to me, you

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him to send a written acknowledgment of paternity.* To this letter she received an answer,† but not the acknowledgment asked for. These were the only letters which had been preserved.

Laidlaw, who was examined as a witness for the pursuer, while he admitted having met Mrs Gardner, when Miss Brodie, on Cademuir Hill, and also said that he had courted her, denied ever having had connection with her. He admitted also that on the occasion referred to they sat under the same plaid, and that he had kissed her several times. He was unable, however, to fix the date of that meeting at this distance of time.‡

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would have told me before you left Cademuir; at least you ought to have done so, for the truth saves one from much trouble afterwards. I cannot deny that we met that day on the hill; but I did not waylay you, for we met by appointment when you were going to Peebles. It was a cold day like this, and we sat down with the plaid about us, but we had better kept walking. So if you sware the child was mine, I will not deny it, tho' I mind neither the month nor year.—I am, your obt. st. J. L. *P.S.*—If my wife hears of it I may take the road; but I did not know, or I would never have had one."

* As follows:—"Gattonside, Thursday.—Mr Laidlaw,—I write you this to tell you your daughter is going to be married to Mr Key. When it is to take place I do not know. Little can you imagine the way Mr G. has been tried both by him and her. Indeed at times I am afraid of his reason. What misery I have endured for the last two years. I often wonder I am spared; but I try, with aid from on high, to cast my burden upon the Lord, and I believe it is him that sustains me; and I trust never to see either his or her face again, after the way we have been used. She told Mr G. that I had bribed you with money to say you was her father. I cannot believe you would be guilty of such a lie. You need not be afraid of Mr Key claiming you as his father-in-law; but I pray to God that you will send me a written acknowledgment that she is your daughter. I would like to have it to shew him a copy of it, for without that he will put in the papers at the marriage daughter of Mr G. No fear of him putting daughter of Mr J. Laidlaw. But in next day's paper there would be a contradiction of it, and daughter of Mr John Laidlaw in place of Mr G.'s. When we meet before the judgment throne of God you will then can not deny her as your daughter, but I hope the Lord will open your heart to send me an answer in peace. I hope you will read this.—I remain, E. G. *P.S.*—If you like, I could send you a copy of my oath. If you send me what I want, you shall never be troubled with them nor me again."

† As follows:—"Peebles, April 10, 1874.—Mrs Gardner,—I did not intend to write till I was in Edinburgh, but I will not win before Thursday next. So you may expect word from me on Saturday morning. I had a visit from Mr Kay about a fortnight ago. He put several questions to me, and told me some things that I knew nothing about, but I told him that she might be to me, though you had never told me till now; but he said it would be a serious job for all that was concerned.—I am, yours, &c., JOHN LAIDLAW. *P.S.*—I have wrote this because I thought you would be getting out of patience; but if I could be made sure, I would not delay one moment in writing what you want."

‡ The Rev. Mr Kay deponed as follows regarding an interview he had with Laidlaw:—"My conversation with Laidlaw took place in a bedroom in his own house. We had a good deal of conversation about the matter, and I remember distinctly that, after talking about a number of things, he looked me broadly in the face, and said, 'If he took the child home to Traquair Knowe at first, there would be nought of this now.' He also said he could not take with the paternity of it; that he could not say he was the father. (Q.) Did he admit having connection with her? (A.) No; he never admitted having carnal connection with her. That was the kind of way in which he put it. He said he

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He endeavoured to explain away the terms of his letter of 12th March 1874, by saying that he wrote it because he thought the defender and Mr Kay were being "too hard on" Mr and Mrs Gardner.

Mrs Hutchison, the woman who had nursed and brought up the defender, deponed that the monthly nurse, now dead, who attended Mrs Gardner at the defender's birth, told her that Mrs Gardner had said Mr Gardner was the father of the child. She also deponed, that when she got the child in Milne's Hotel, as there were no baby clothes ready, Mrs Gardner had said, "Give her her father's plaid," and that she had got a plaid marked with "R. Gardner," which had been afterwards returned through Dr Thatcher. This evidence as to the marking on the plaid was corroborated by a Mrs Grindlay, a friend of Mrs Hutchison's, who had seen the plaid in her possession. The pursuer and Mrs Gardner denied that he ever had had such a plaid.

It further appeared that the £40 annuity and the £1000 at his death, offered by the pursuer as mentioned above was a very liberal offer in his circumstances.

Mr and Mrs Gardner had two children of the marriage living in family with them.

On 15th November 1875 the Lord Ordinary pronounced this interlocutor:—"In the first place, finds, as matters of fact (1) that the pursuer was married to Mrs Eliza Brodie or Gardner in August 1850; that about six weeks after the marriage Mrs Gardner gave birth to a child, and that the child to which she then gave birth is the defender in the present action; and (2) that the defender never had carnal intercourse with his wife prior to their marriage, and, consequently, the defender is not and could not be the child of the pursuer: In the second place, finds as matter of law that, the facts being as above set forth, the defender is not entitled to assert or otherwise represent that she is the child of the pursuer: Therefore repels the defences, and finds, declares, and decerns in terms of the conclusions of the summons: Finds, in the circumstances, no expenses due, and decerns."*

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had had nothing more than 'toozling.' (Q.) Did he deny the paternity? (A.) Yes; I am perfectly certain of that. (Q.) In what way did he put the denial? (A.) I put the question to him, 'Do you take with this child, and say it is yours?' He said, 'No, he could not say that.' I then said, 'Do you repudiate the paternity?' He said he did repudiate the paternity. I think that is the substance of what was said and the words. (Q.) You don't bind yourself down to exact expressions? (A.) I am giving it as near as my memory can recall it. I remember using the word repudiate—'Do you repudiate the paternity?' He said, 'Yes.' (Q.) There is no doubt that what you have told us is the substance of what took place? (A.) It is, decidedly. (Q.) And there was no doubt left on your mind as to what he said, and the position he took up? (A.) None whatever; I was convinced that Laidlaw was not the father. (Q.) You were convinced that he said so? (A.) Exactly so."

* "NOTE.—This is a remarkable case, and affords a new illustration of the old saying that 'truth is sometimes stranger than fiction.'

"The pursuer here seeks for a decree finding and declaring 'that the defender is not the child of the pursuer,' and decerning and ordaining the defender 'to desist and cease in all time to come from asserting or otherwise representing, directly or indirectly, that she is the child of the pursuer.' The defender resists such a decree upon the ground that she is, or at least, in the circumstances, must be held to be, the child of the pursuer.

"In the outset it may be premised that there is no doubt whatever that the defender was born after the pursuer's marriage, and that she is the child of the wife of the pursuer. The defender was taken away the day, or the next day

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The defender reclaimed.

Argued for her;—Although the law of Scotland is not the same as the

but one, after her birth; and for more than twenty years the child was not seen by the mother, nor the mother by the defender. But the identity of the defender with the infant to which Mrs Gardner gave birth in the circumstances to be immediately explained is abundantly proved, and, indeed, has never been disputed. The question, and the only question on which issue has been joined is,—'Whether that child is not also the child of the pursuer, the husband of Mrs Gardner.'

"Similar questions have often been raised, and almost as often decided. There is authority touching such cases as old as any that can be adduced in any department of the law; and whatever may be said of individual decisions, or the *dicta* of individual Judges, it is the fact that the law upon this subject has remained unchanged. A child born in wedlock has always been presumed to be a lawful child; in other words, to be a child of the husband of the mother. But in Scotland there never was a time when this presumption might not be overcome, provided the proof was sufficient. Each case, therefore, as it arose, was a case of circumstances; and the result depended upon the strength or weakness of the facts which were established.

"The strength of the presumption, it may be added, is itself affected by circumstances. There are expressions in some of the authorities which seem to imply that the presumption of paternity resulting from marriage with the mother previous to the birth of the child arises only when the marriage existed at the date when the child must have been begotten. But this, the Lord Ordinary thinks, is an erroneous view of the matter. Presumption there is when the child is born in wedlock, however soon the birth may have supervened. And, obviously, there is reason in this rule. Take the present case by way of illustration. The pursuer was married in August 1850. The defender was born in the ensuing October; the pursuer knew, before his marriage, that his wife was pregnant; and the fact that he married the mother of the defender, knowing at the time that she was with child, seems, according to every reasonable consideration, to suggest a presumption almost, if not altogether, as strong as would have existed if the pursuer had happened to be the husband of the defender's mother at the time of the defender's conception. No doubt the reasons for the presumption are not the same in the two cases. In the present case a moral element is the source from which the presumption is elicited. Can it be otherwise than presumed that a man who marries a woman, knowing that she is pregnant, is the father of the child? We are so constituted that we cannot help concluding that he is, unless the contrary be indubitably established. In the other case the presumption results from that which is taken for granted, the intercourse following upon marriage. But it is really almost, if not altogether, as conceivable that the intercourse to which the conception it to be ascribed is not intercourse with the husband, as that a man who knew his wife was pregnant when he married her should not have had intercourse with her before the marriage. The Lord Ordinary, therefore, regards the present case as one within the operation of the ordinary rule, that a child born in wedlock is to be presumed the child of the husband of its mother. The defender was born in wedlock; and so she must be held to be the child of the pursuer unless the contrary shall be proved to the satisfaction of the Court. Has the contrary been so established?

"In dealing with this question, the Lord Ordinary observes, in the outset, that here there is the oath of the pursuer, and there is also the oath of his wife, the mother of the defender, that there never was sexual intercourse between them until after their marriage. Mrs Gardner further swears that a man named Laidlaw, who is now a flesher in Peebles, but who, at the time when the defender was begotten, was a shepherd in Cademuir on her brother's farm, where she resided, is the father of the defender; and she describes the place where and the date at which the one act of copulation which produced her pregnancy occurred. Laidlaw was called as a witness for the pursuer; and if he, upon

law of England, which provides that nothing can shake the absolute presumption in favour of the legitimacy of a child born even one hour after

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oath, had corroborated Mrs Gardner's testimony, there would have been, in the present case, all the proof which, even in the days when the rule *pater est*, &c. was most stringently applied, seemingly was required. But Laidlaw denied that there had been sexual intercourse between him and the mother of the defender; and consequently what has, in the circumstances, to be considered is, whether, without his evidence, or, to put the thing more strongly, despite of his evidence, the case of the pursuer has been established. Laidlaw's denial, the Lord Ordinary thinks, cannot be regarded as conclusive. Indeed, nothing said by Laidlaw can, in the opinion of the Lord Ordinary, be taken as true, because he so swears. His deposition abounds with contradictions as well as with palpable falsehoods, and is in most important particulars a flagrant example of wilful prevarication. His letters to Mrs Gardner, which were put before him, and upon which he was examined, are not of themselves evidence that the statements they contain, and the inevitable inferences these statements suggest, are true; but they prove, and in this way they are by the general tenor of his deposition amply corroborated, that he is a witness whose sworn testimony is not to be believed. The consequence is, as the Lord Ordinary conceives, that Laidlaw's evidence must in effect be disregarded. Corroboration of Mrs Gardner's testimony it certainly is not; and as a contradiction, which probably it was intended to be, it is self-condemned. All this, however, is subject to the observation that Laidlaw's conduct, when first informed of the defender's claim to be recognised as the child of the pursuer, and appealed to for an acknowledgment that he was the father, is something like real evidence of at least the probability of the story told by Mrs Gardner. She and Laidlaw had not met since her marriage to the pursuer in 1850; and there had, neither directly nor indirectly, been any communication between them till the first of Mrs Gardner's letters relative to the defender's pretensions was sent to him, less than two years ago. That the appeal which was then made should have been ventured upon if he could not have been the father of the defender is very unlikely; and it is far more unlikely that, on such a supposition, he could or would have answered that appeal in the way he did. He in effect admitted—for his letters will bear no other interpretation—that there had been intercourse; but he refused, without further assurance, to admit that the defender was his child. The position he took up was simply this,—'Intercourse there was, but it does not follow that the defender was my child. Satisfy me that she is, and the paternity will be admitted.' Strange it would be, very strange indeed, that a man should be selected, and a man, too, who, on his own shewing, had been in former days a lover, who, when asked to declare that the defender was his child, should meet in such a way such a request, if, at the time the defender must have been begotten that had not occurred between him and Mrs Gardner to which conception might be ascribed. Therefore, though the words of Laidlaw upon oath are not, the real evidence of his conduct is, the Lord Ordinary thinks, a corroboration, at least to some extent, of what has been sworn to by Mrs Gardner.

"Nevertheless, there is not his oath in corroboration; and so the consequence of the want of that must next be considered. The want is not necessarily a defect fatal to the case of the pursuer. Every such case, as has already been observed, is a case of circumstances; and if the evidence presented to the Court satisfactorily proves that the defender is not the child of the pursuer, judgment to that effect not only may, but must be pronounced. Bearing in mind, then, that there are the oaths of the pursuer and of Mrs Gardner, it remains to be seen whether, in addition to the element of corroboration afforded by Laidlaw's conduct which has already been mentioned, there is not something more, and that something of the most conclusive kind, by which the case of the pursuer is supported.

"The pursuer was married to Mrs Gardner in August 1850. His home was then at Traquair Knowe; but the defender, who was born six weeks after the

No. 120. marriage, still there is always a presumption in favour of legitimacy.[1] If the conception can have taken place subsequently to the marriage, a presump-

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marriage, was not born there. Nor was this an accident. It was pre-arranged. Mrs Gardner came to Milne's Temperance Hotel in Edinburgh, and there she gave birth to her child. The day after, or the next day but one, the infant was taken away. Everything connected with the event was, to use the words of Mr Milne, the hotel-keeper, 'shrouded in mystery.' And so well was this mystery maintained, that for more than twenty years neither the defender, nor the nurse who took her away, knew or suspected where either parent was to be found. Mother, indeed, as well as father, remained to the defender, to her nurse, to those among whom she lived, to every one who took an interest in her, utterly unknown. Board for the defender was paid quarterly by Dr Thatcher, the money being provided by the pursuer till the defender was fourteen years old. Then she was left to provide for herself, which she did for more than six years by working in one of the mills near Loanhead. Such is the defender's history. On the question whether this treatment was right or wrong opinions may differ; but the Lord Ordinary thinks opinions cannot differ as to the difficulty, if not the impossibility, of reconciling it with the idea that the defender is the child of the pursuer, or that there had been intercourse between the pursuer and the mother of the child in which its conception might have originated. Acts are often as strong evidence as words; and, in the opinion of the Lord Ordinary, the conduct of the pursuer testifies as strongly as his oath that the defender is not, and could not be, his child.

"If the pursuer and Mrs Gardner are to be believed the case of the pursuer is complete; but there are circumstances, on the strength of which the counsel for the defender contended in the course of an argument remarkable for its ability, that even allowing for such elements of real or supposed corroboration as exist, the testimony of the pursuer and Mrs Gardner on the cardinal point is not to be trusted. As regards the pursuer, it was said that the idea of his marriage, in the knowledge that Mrs Gardner was with child, is so inherently incredible that, whatever be the confirmatory evidence, it must be rejected. Improbable it is, certainly, but not necessarily incredible. In affairs of love it has often been said—and the saying has often been verified—'there is nothing too strange to be true.' The pursuer had long courted the woman who is now his wife; he was deeply in love; and, though he was shocked by the announcement that she was with child to another man, his attachment remained unbroken; and this proved stronger than his self-respect. He acted under a double impulse. His affections could not be extinguished; and, moreover, he both desired and hoped that if he married his sweetheart things could be so arranged that her shame, which otherwise must inevitably have been divulged, and his own weakness, would remain concealed. The fact is, that for twenty years both were concealed. Not a relative, not a neighbour, not one interested in the pursuer or in Mrs Gardner, knew or imagined what has now been revealed to the world. This expectation, therefore, was not unreasonable; and, consequently, it cannot be unreasonable to conclude that it might be entertained.

"The payments made by the pursuer for the support of the defender during the first fourteen years of her life, and the offer of a large sum provided her claim to be considered his child were withdrawn, were also, in the argument of the defender's counsel, alleged to be virtual confessions of paternity. The Lord Ordinary, however, cannot so regard them. If the birth was to be concealed, plain it is that the cost of the child's living must, at least in its early years, be provided; and the end to be served was held so important, that the pecuniary cost was held as of comparatively no consideration. Besides, a refusal to pay aliment would not have secured immunity from liability. Mrs Gardner, at any rate, would have been liable for the support of her child; and from her husband, it might have turned out, her debt could be exacted. With reference, again, to

[1] Jobson v. Reid, Jan. 19, 1830, 8 Sh. 343, and May 31, 1832, 10 Sh. 594, 4 Scot. Jur. 465; Lothian's Const. Law, p. 236.

tion is raised in the law of Scotland which can only be rebutted by proof of the absence of the husband.[1] Here the child was born after the marriage, and the sum offered by the pursuers for an abandonment of the defender's claim, the view of the Lord Ordinary is that it is not a confession, but a protest against the reality of the defender's pretension. What he was willing to give for her disavowal was far more than she could now or afterwards extort as his child; and the knowledge that she is not, and could not be his, affords the only reasonable explanation of this part of the pursuer's conduct.

"With reference to Mrs Gardner, the strongest observation made upon her evidence was, that it was not consistent with what she said in childbed, when the infant was about to be taken away by the nurse. 'Wrap it up in its father's plaid' are the words imputed to Mrs Gardner; and assuming that she used them, the argument is that they overthrow everything which subsequently was said or done inconsistent with the idea that the defender is the child of the pursuer. Upon this point the Lord Ordinary has to say, first, that the evidence as to the use of the words in question is not all one way. Mrs Gardner repudiated the expression imputed to her; and in some things the evidence of Mrs Hutchison, on whom the defender so much relies, is open to unfavourable criticism. But, secondly, even if the Lord Ordinary were to take for truth all that has been said by Mrs Hutchison, he would not think the use of the words in question such a circumstance as overcomes all the other facts in the case. There is an explanation which seems satisfactory. Mrs Gardner, in the hotel where the child was born, was not spoken of by any one or regarded by any one as anything but a married woman; but everything excepting the name she bore was a mystery. Neither the people in the hotel, nor the monthly nurse, nor the nurse who took away the child, were told or otherwise knew or had the slightest suspicion of who or what Mr Gardner was, or where he lived; and so Mrs Gardner may have thought that the words in question contained no revelation. Looking at them in the light in which they may now be read, the Lord Ordinary's opinion is that they leave unshaken the proof by which the cardinal point in the case is, he thinks, established.

"Unfavourable comments were made upon other parts of the evidence given by Mr and Mrs Gardner. Their statements in particular points were contrasted with those of the defender, and the defender's friend and adviser, the Rev. Mr Kay. Well, there is a discrepancy. Everything said by all four cannot be reconciled. But it does not follow from this that Mr and Mrs Gardner are the witnesses who, in this conflict of testimony, are on the points in question to be disbelieved. The evidence of the defender is, in many particulars, weakened by contradictions, not merely of others, but of her own; and the least that can be said is, that it would be a strong thing to hold her in the right, and Mr and Mrs Gardner in the wrong, upon all or even upon any of the matters as to which there is contrariety of opinion. Mr Kay, again, has made himself as much a party in the case as if he were personally interested in the result; and on the question of comparative credibility the Lord Ordinary sees nothing in the evidence, and he saw nothing in the demeanour of Mr and Mrs Gardner, calculated to suggest or warranting, upon a dispassionate view, the suggestion that they in anything they said were consciously giving what they knew was testimony inconsistent with the truth.

"As to the law of the case parties may be said to be agreed, and therefore the Lord Ordinary thinks it unnecessary to comment upon, or even to mention, all the authorities which were cited for his information. All, and more than all, which have been brought forward on this occasion will be found collected in Brodie v. Dyce, 29th November 1872, 11 Macph. p. 142, the latest of the cases in which a question any way analogous to the present was decided by the Court.

"The Lord Ordinary has now explained his views of this case. These have

[1] Ersk. Inst. i. 6, 49; Ersk. Prin. i. 7, 36.

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riage, but at such time that it could not have been conceived subsequent to the marriage; but still the maxim *pater est quem nuptiæ demonstrant* was broad enough to entitle the defender to the benefit of the presumption, and that being so the question came to be, had it been rebutted by the pursuer. The fact of a man who was courting a woman, and so on intimate terms with her, marrying her in the full knowledge of her pregnancy, raised a strong presumption that he was the father of her child.[1] Stair had laid it down that the concurrent testimony of the husband and wife that the child was not the husband's but that of another man, as to whom they both agree, along with the admission of paternity by the other man, was sufficient to rebut the presumption in such a case as this.[2] But the pursuer's evidence did not come up to this—Laidlaw denied the paternity. In order to make out such a case as the pursuer here required to establish before he could succeed the evidence must be clear, consistent, and leave no room for doubt.[3] Here there was throughout the whole of the evidence of the pursuer and Mrs Gardner contradictions and inconsistencies. When the actings of the pursuer with regard to this child were examined it would be seen that though they may have been unnatural they were not inconsistent with his being the father. He held, at the time of his marriage, a respectable position, and if he had been detected as having committed antenuptial fornication he would have fallen under the jurisdiction of the Church Courts, and both he and his wife would have been disgraced. Subsequently, he would have a feeling of aversion to one whom he had wronged so deeply as he had the defender. As regarded Laidlaw's evidence and the Lord Ordinary's remarks thereon, if the witness was not to be believed when he denied the paternity of the defender, neither could he be taken as supporting the pursuer's case.

Argued for the pursuer;—The presumption *pater est quem nuptiæ de-*

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been formed after anxious consideration. He is sensible of its importance, but he has no misgivings as to the way in which it ought to be decided. He hopes that, in coming to his conclusion, he has not been unconsciously biassed by a circumstance to which he has not hitherto alluded, and indeed to which no allusion was made by counsel upon either side of the bar. That circumstance is, the resemblance existing, as the Lord Ordinary thinks, between the defender and the witness Laidlaw. Of the reality of this likeness the Lord Ordinary is persuaded, but whether it can be regarded by others as more than a fancy, seeing that it was not even hinted at directly or indirectly by the counsel for the pursuer, is a question more easily asked than answered. Be this as it may, the Lord Ordinary has not made his impression a ground of judgment; and he has explained what he has set forth in this paragraph of his note, because it is possible, though he regards it as improbable, that his views of the case may to some extent have been unconsciously influenced by a consideration, for which, as things are, the only warrant is his own observation.

"The Lord Ordinary has only to add in conclusion that, though he considers the defence unfounded, he thinks it was only natural and reasonable in the circumstances that it should be submitted for judgment of the Court. This is the reason for which expenses have not been awarded."

[1] Innes v. Innes, July 7, 1835, 13 Sh. 1050, aff. Feb. 20, 1837, 2 S. & M'L., 417, 9 Scot. Jur. 465; the King v. Luffe, Jan. 31, 1807, 8 East. 193, Lord Ellenborough, p. 207; Jobson v. Reid, *supra.*

[2] Stair, iii. 3, 42, and iv. 45, 20; Fraser, Pers. and Dom. Relat. vol. ii. pp. 1-18.

[3] Routledge v. Carruthers, May 19, 1812, F.C. Ld. Pres. Blair, p. 588; Webster v. Mackay, Feb. 24, 1855, 17 D. 494, Ld. Deas, p. 506, 27 Scot. Jur. 206; Brodie v. Dyce, Nov. 29, 1872, 11 Macph. 142, 45 Scot. Jur. 92.

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monstrant did not apply.[1] Any presumption which could arise was one of circumstances—a *præsumptio hominis vel facti*—which could be rebutted by ordinary evidence such as had been led here.[2] If the pursuer really was the father of the defender he had no adequate reason or temptation to tell untruths about the paternity. But if his own statement were true he had every reason to conceal the truth and preserve his wife's character and cover his own disgrace by quietly admitting the defender's claim. It was contrary to all human experience for a father and mother to cast off their own child.

At advising,—

LORD JUSTICE-CLERK.—The question we have to decide in this case is whether the pursuer has established that the defender is not his child, and according as that question is decided the remainder of the conclusions of the summons will fall to be determined. The action is one of putting to silence at the instance of an alleged parent against one who asserts that she is his legitimate child. It is an unusual action, as generally the assertion of legitimacy comes from the child, and the father is content to deny the rights of legitimacy until they are established and enforced. I do not see, however, that the action is incompetent, although I do not recollect to have met with an instance of it before. But the pursuer of it undertakes a more weighty burden of proof than if he stood on the defensive.

The case in its detail is a very singular one, and raises questions of importance to the parties, and of some novelty in the law. The undisputed facts are shortly these:—The pursuer, who seems to be in a respectable position in life, had offered marriage to his present wife, who was then Miss Brodie, several years before 1846. She refused him at that time. He went to Australia and returned in 1846, and after some years' courtship he again proposed and was accepted, and they were married in August 1850. At that time Mrs Gardner was pregnant, and it appears that prior to the marriage she had consulted Dr Thatcher of Edinburgh as to her condition, with the knowledge of her intended husband. The marriage took place, and six weeks or two months afterwards the pursuer brought her to Milne's Hotel, in Edinburgh, privately, where she was confined of a daughter, who is the defender in the present action. The infant was immediately given to the care of a nurse, by whom she was carried away and consigned to the charge of a Mrs Hutchison, with whom she resided until very recently. The pursuer made remittances through Dr Thatcher for many years, and apparently the girl was maintained in comfort; but from the time of her birth until 1872, a period of nearly twenty-two years, she never had any personal communication with her mother or the pursuer, although she had become aware of her supposed parentage, and had latterly communicated by letter with the pursuer, chiefly in the way of demands for money. In the end she asserted her right to be recognised as his daughter, and through the Rev. Mr Kay, the Free Church minister at Loanhead, near Lasswade, some communications passed on that subject. In 1874, for the first time, the pursuer alleged

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[1] Dig. i. 5, 12; Heineccius, Com. on Pandects (*Justo tempore*), i. 6, 52 and 53; Bankt. i. 2, 3; Stair (More's), iii. 3, 42; Ersk. i. 6, 49, 50, and 51.

[2] Lepper v. Brown, Dec. 11, 1802, Hume, 488; Aitken v. Mitchell, Nov. 22, 1806, Hume, 489.

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that the defender's father was a man of the name of Laidlaw, at Peebles, with whom her mother had been intimate before his marriage, and in consequence of continued assertions by the defender the present action of putting to silence has been raised. The Lord Ordinary has decerned in terms of the conclusions of the summons, after considering a concluded proof, and has found that the pursuer was not and could not have been the father of the defender, and we are now to review his judgment.

There are two opposing theories to account for the conduct of the pursuer and Mrs Gardner in this matter. One is that of the pursuer himself. He says that his intended wife communicated to him, some weeks before the marriage, that she was in the family-way, but without mentioning the name of her seducer; that she had been taken advantage of on one occasion on the hill, and that her condition was the result. He states that, seeing no other way to save her reputation, he hastened the marriage, and adopted the other steps which I have described, but that the child was not his daughter, and that any other proceeding on his part could only have frustrated his object, and given notoriety to what he was anxious to conceal. The other theory is that the pursuer, being the son of a minister, and the brother of a minister, and himself an elder of the church, adopted these proceedings for the purpose not of screening his wife but of screening himself; that he was himself the father of the child, and kept its birth secret to avoid the personal and family scandal which it would have occasioned.

It is impossible not to see that what he did might have proceeded from either of these motives. If in reality he was not the father of the child, and resolved to proceed with the marriage notwithstanding, a course not very reconcileable with the ordinary motives of human nature, the steps which he adopted were those by which alone his object could be obtained. As a single woman it was impossible for Mrs Gardner to have been confined without inquiry and detection, and to expect him, after the sacrifice which he says he made, forthwith to proclaim his wife's frailty, and to make a charge against another which he probably felt he might not be able to prove, would be entirely inconsistent with any view of the fact, and the prolonged cross-examination on this head seems to me entirely without point. In that view, however ill-judged his conduct was, it was not destitute of humanity even to the object of it, for the disclosure of the paternity which he alleges, while it would have disgraced his wife, could have been of no benefit to her daughter. On the other alternative, his conduct would be without defence, for, on that assumption, he sacrificed the status of his legitimate daughter to his own reputation and position in the world.

In cases of this kind, relative to status and legitimacy, especially where the interval of time has been great, more light is to be derived from the presumptions of law and fact raised by the conduct of the parties than can be gained from direct evidence. But before I deal with the presumptions which arise in this case I shall very shortly state the impression which the direct testimony has made on my mind.

The contention of the pursuer is that he is not and could not have been the father of the defender, but that the father is the witness Laidlaw, who at that time was a shepherd in the employment of Mrs Gardner's brother at Cademuir, where he was for ten years from 1846. As far as the pursuer's own evidence is concerned he knew of his wife's intimacy with this man only from her own statement, she

having disclosed his name a year after the marriage, when she thought herself dying. Beyond this his testimony only amounts to a denial of any improper intimacy with his wife before marriage. But Mrs Gardner is examined, and tells the story in detail. She says in substance that on one occasion, several months before her marriage, she met Laidlaw on the hill by appointment, and that the intercourse then took place which resulted in the birth of the child. It is impossible to deny that the coincident testimony of the husband and wife is an important element in the case, and has always been so considered in questions of this kind; so much so, that both Craig and Stair lean to the doctrine that the concurrent testimony on oath of the father and mother will be sufficient to overcome the presumption arising from a child being both conceived and born in wedlock. Though I cannot hold this to be law it is still a very important element in this case that not the husband only but the wife also, the mother of the child, encounters the disgrace which the confession implies, and states on oath that not he but Laidlaw was the father. I am very far, however, from saying that the mere statement of the husband and wife is necessarily sufficient to decide the legitimacy of the defender. It would be hazardous to make any such assumption.

The case, however, does not rest there, for Laidlaw, the shepherd, is examined, and he admits that he did meet Mrs Gardner on the hill by appointment. Indeed he says that they often so met; that he sat for an hour with her under the same plaid; that endearments passed between them; and although he denies that they resulted in intercourse, it is quite clear, from the expressions in the letters written shortly before his examination, and from his answers when examined upon them, that these equivocal denials truly amount to an affirmative of the fact which he was intended to prove. I may observe in passing, that of the competency of admitting his testimony and importing into it the letters, the writing of which he acknowledged on oath, I have not the slightest doubt, nor does it signify to the substantial result of his testimony, that though an interested and reluctant witness, he was called for the pursuer.

I am of opinion, therefore, that as far as that fact is material in the case it has been proved that Mrs Gardner had improper intercourse with this man Laidlaw before her marriage. But assuming this to be so, there is one very serious defect in the evidence in establishing the proposition contained in the summons. Laidlaw does not and cannot fix the time of this event. Indeed his letters indicate this very plainly. Notwithstanding his futile attempts to explain away the expressions contained in them, they truly mean nothing but this,—What you say as to our intimacy is quite true, but before I can say I am the father of your child you must satisfy me as to when this took place, for I do not recollect it, and if you meant to make this charge you should have done it four-and-twenty years ago.

Such, shortly, is the case of the pursuer on the direct evidence, and the Lord Ordinary, who saw the witnesses, takes the same view of its import. But it is manifest that the intimacy with Laidlaw, even were the time proved, is only half the pursuer's case. He has still to prove—and he undertakes the negative—that he had no intercourse with Mrs Gardner before marriage. Now, on this point there is one consideration, and one only, which is material in the direct evidence for the defender. I attach no importance whatever to the account given by the defender of her conversation with her mother. I think it bears

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improbability on the face of it. It is impossible to suppose that the mother, who had gone to Loanhead for the purpose of satisfying Mr Kay that Laidlaw was the father of her child, should, immediately after she had made that statement, have told her daughter a story exactly the reverse, knowing, as she must have known, that it would be immediately repeated. The story itself is absurd, for she represents her mother as saying that the man she met on the hill was the pursuer, it being quite certain, on the one hand, that she met Laidlaw on the hill, and equally certain, on the other, that the pursuer would never have chosen such a place for an assignation with his promised wife. The defender, a few minutes afterwards, heard the reverse stated by the pursuer in Mr Kay's presence without remark, because, as she now says, she was pledged not to tell, and she straightway proceeded to put Mr Kay in possession of this alleged communication. Looking to the statement which she makes about the letter which she says her mother wrote to her, which, if it had been preserved, would have been conclusive of this case, I am not disposed to attach weight to her unsupported testimony.

But Mr Kay's evidence stands in a very different position. He distinctly speaks to the pursuer having confessed to him that he had taken liberties with his wife before marriage. I cannot discard this evidence as worthless. It is exceedingly material, although not in itself conclusive. I may add, on this point of the case, that the communications with Dr Thatcher seem all to have proceeded on the footing that the pursuer was the father of the child, although that also is not irreconcileable with the design which the pursuer professes to have been anxious to accomplish.

If the evidence rested there I should have found it to be distressingly perplexing, and I should have doubted whether, although the balance might incline to the affirmative of the summons, the proposition contained in it was proved. I do not regard as of any consequence the alleged inconsistencies in some of this testimony. They are almost inseparable from an investigation of this nature. But if it remains doubtful, as I think it does, first, whether the intimacy with Laidlaw corresponded in point of time with the birth of the child, and secondly, whether the pursuer had taken liberties with Mrs Gardner before marriage, the pursuer cannot prevail. But I pass from the direct testimony to what I consider of far more importance in this case, the presumptions derivable from the conduct of the parties.

We must assume that, in our own law, which in this respect differs from that of England, the application of the maxim, *pater est quem nuptiæ demonstrant*, depends not on the time of the birth but on the time of conception. That has long been a controversy among Continental jurists; and there will be found in the 17th vol. of the French Causes Célèbres a case before the Senate of Turin having features in some respects analogous to the present, with very full and learned arguments on both sides of this question. But with us all our institutional writers are agreed that such is our law. It by no means follows that the fact that the child is born in wedlock may not raise a presumption of fact of the greatest possible moment, and even in those systems which, like our own, reject the maxim as a presumption *de jure*, where the birth is not in what is called *justo tempore*, that fact has often been accorded the greatest possible importance. I cannot better express the view which I take of the Scottish law on this matter than in the words of Sir Ilay Campbell, as noted in his Session Papers in the

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case of Lepper, Hume, 488. "Case of a child produced five months, and no more after the marriage took place. *Pater est quem nuptiæ demonstrant* does not seem to apply. It may perhaps *in dubio* be presumed that the husband had antenuptial dealings with the woman, but this is a much weaker presumption depending on circumstances, and not *præsumptio juris et de jure*. All that can be said is that the favour is for legitimacy, *i.e.* legitimation *per subsequens matrimonium*, which our law allows, and therefore will presume this rather than bastardy, if no circumstances to the contrary appear. But here the circumstances are almost conclusive that Brown is the father." See Session Papers, vol. 107, No. 72, Fac. Lib.

We must look, therefore, to what the presumptions are deducible from the conduct of the parties. One thing the pursuer has in his favour. He did not treat the defender as his legitimate daughter. He sent her away and kept her out of sight, and therefore she had no reputation of the status of being legitimate. But, on the other hand, there are these four considerations, which tend very strongly in an opposite direction: They are, first, that Mrs Gardner's pregnancy took place during the pursuer's courtship, and was followed by marriage; secondly, that the pursuer admits that he was aware of her condition when he married her; thirdly, that the pursuer did not openly disclaim the child or charge any one else with being her father, but, on the contrary, assumed the burden of her maintenance and education as incumbent on himself; and, lastly, that he never said to any one that he was not the father, or put the paternity on Laidlaw, for four-and-twenty years.

As to the first, the presumption arising from courtship and subsequent marriage, I may refer to an opinion of the celebrated Chancellor D'Aguesseau, recounted by Merlin in his Repertoire,—a work which, under the head of Legitimité, contains the fullest desertation on this subject of which I am aware. It will be found at page 230. The French law coincided with ours in regard to the maxim, *pater est quem nuptiæ demonstrant;* and D'Aguesseau, speaking of the presumption which may arise, when the child is born in wedlock but not *justo tempore*, puts the two cases of the marriage being anterior to the time of conception, and the intercourse not being followed by marriage at all; and then he proceeds,—"But if there be found at the same time both an intimacy (frequentation) at the time of conception and also a marriage at the time of the birth, can one not say that these two facts united form a presumption less strong, it is true, than the first, because it is absolutely founded on marriage, but much stronger than the second, because it is not founded solely on the previous intimacy, and that the marriage which followed gives it a degree of force of evidence and of authority which it is almost impossible to resist." This *dictum*, from so high an authority, is followed by a detail of several cases, one of which, that of L'Heritier, bears a very singular resemblance to the present, and in it the legitimacy of the child was sustained. I cannot but regard as a very important circumstance that the conception took place during the period of the pursuer's courtship, and that it was followed by marriage. But the second consideration which I mentioned adds infinite force to the first, for it is not only a presumption of fact, but it is a conclusion founded on the ordinary laws of social action, that if a man marries a woman in that condition it is because it is the only reparation he can make her. It may not be so in point of fact, but he who follows this course must expect to have the ordinary convictions of society applied to him. I do not say that the presumption may not be overcome,

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although that has been the law of England for centuries; and even Craig, in his treatise, sneers at this peculiarity of the law of England, which he thinks inconsistent with their rejection of legitimation by subsequent marriage. But the force attributed to such an act by great lawyers receives a strong testimony from the fact that the Code Napoleon, while following the civilians who hold the right of the husband to disclaim a child not born *justo tempore*, provides, in the 314th article,—"A child born within 180 days from the marriage shall not be disavowed by the husband in the following cases,"—and the first of the cases is,—"If he had knowledge of the pregnancy before marriage." We do not and cannot follow this as authority, nor should I lay down the rule in these terms, but I think that, coupled with the previous courtship, it lays upon the pursuer an obligation of unquestionable proof, which he has not been able to sustain.

As regards the third, that the husband never publicly disavowed the child but continued to aliment and support it, while it does imply that he was ashamed of its birth, implies also an admission of his parental obligation; or even if it did not necessarily support that inference, it is inconsistent with that of prompt, distinct, and unequivocal repudiations, which is essential to prevent the legitimate construction which the public and the law will put upon his acts. Here, again, the Code Napoleon furnishes an illustration, for it goes so far as to provide, sec. 316,—"In the different cases where the husband is authorised to disavow, he must do so within a month if he be on the spot where the infant is born." Lastly, the lapse of time, for which the pursuer is entirely responsible, raises the strongest presumption against his attempt, after the lapse of twenty-four years, when many of the witnesses who could have given testimony must be dead, the events passed from memory, and most of the details unknown, to deny the paternity which he has practically assumed during the whole period, and to fix that paternity on another who never heard of the charge during the whole of that interval. I think that would, in many cases, and would in this, be of the most dangerous results to the public. The status of legitimacy is matter of public policy, and depends more, as I have said, on presumptions arising from conduct than on direct evidence of a fact on which certainty never can be attained. The story of the pursuer may be true, but his conduct, in my opinion, has precluded him from proving it.

Lord Neaves.—The conclusion I have arrived at is the same as that reached by your Lordship, and the grounds on which I have come to that conclusion are in every important particular similar to those you have stated.

The law makes a general presumption of legitimacy in favour of all the lieges, even where the parentage is unknown,—that is, *ex quocunque patre*. There is another presumption, founded on the maxim *pater est quem nuptiæ demonstrant*, but this only arises in full force where the child is born at such a time that it could have been begotten during the subsistence of the marriage. There is not the same presumption where the child is born within too short a time after marriage—say, two or three months. In such a case other facts must concur to infer legitimacy. That is the opinion of Erskine and other authorities, and it is a reasonable rule.

A child born two or three months after marriage might rather be presumed to be that of another man than the woman's present husband. Take the case of a married woman whose husband dies and who marries again in three months,

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" or ere those shoes were old with which she followed" her first husband's body. Then, if a child is born in other three months, that child would be presumed to be the child of the first husband.

I doubt much whether, in such an inquiry, it is relevant to consider whether some man other than the woman's husband might or might not be the father of the child. The question rather is, whether the man pointed out by the marriage is or is not presumably the father. I doubt if the complexion of a child would entitle any one to fix the paternity of that child. Similarity or dissimilarity and possibility are not the questions in such a case. In a case such as the present we must be guided by the additional circumstances which come in aid of the presumption, such as it is, which is raised here. The presumption is not full, because the child was born at a time when it undoubtedly could not be the fruit of the marriage. What is to be found is whether any, and what circumstances, in addition to the fact of marriage, exist, so as to strengthen whatever presumption is raised by the leading fact. I think that if a man marries a woman who is visibly pregnant at the time this will strengthen the presumption, if not make it insuperable. It is contrary to the nature of men's minds for a man to marry a woman who is about to produce the child of another man. Cases have occurred where women so marrying have not known that they were pregnant, and in that case the husband would probably be equally ignorant. But the case before us is one where the pregnancy was well known both to the wife and to the husband. Not only had the husband been told by the woman, but, at his suggestion or desire, Dr Thatcher was consulted, and advised an early marriage. That marriage took place, and then the parties came to Edinburgh, and Dr Thatcher was called in in a regular way to attend the confinement. I have no doubt that Dr Thatcher lived and died in the belief that this child was the result of connection between these two married persons, who had presumably anticipated their marriage, and to whom he had given the advice.

Moreover, we must look to the behaviour of this pursuer at and immediately after the birth of the child. He allowed it then to be considered and treated as his own. I am of opinion that a man who so deals with a child as his own, and allows it to be reputed his at birth, raises the strongest possible presumption in favour of the legitimacy of that child and of his own paternity. If a married woman gives birth to a child, it seems to me that her husband must at once make up his mind whether he will repudiate it or not. He cannot and ought not to play a double part—first recognising it, and then repudiating it. I need not go through the other circumstances of the case noticed by your Lordship. I think it sufficient to say that there was neither impossibility nor improbability in the supposition that the pursuer was the true father of the child. The parties were acquainted and on intimate terms. The woman was not of inaccessible virtue, and the pursuer was not averse to taking liberties. It was natural that though she was his child he should keep her out of the way for a time so that the chronology of events might not excite remark, and that after a time he might be averse to bring her back where she might take precedence of his other children; but his supporting her so long through Dr Thatcher, and his never telling her who her father was, if she had another father, is inexplicable, and if true would have been unjust and reprehensible. Altogether, I am of opinion that the rules of law in such delicate questions require that we should negative the conclusions of this action.

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LORD ORMIDALE.—As observed by the Lord Ordinary, this is a remarkable case; and, I may add, one, as well in its form as in its circumstances, of a very unusual description. No objection, however, has been taken to its competency, and I do not say that it is incompetent. But there can be no doubt that the pursuer in such a case, having regard to all its circumstances, and the decree of declarator, concluded for to the effect that the defender is not his child, and that she "ought and should be decerned and ordained to desist and cease in all time to come from asserting or otherwise representing, directly or indirectly, that she is the child of the pursuer, and that she ought to be put to perpetual silence thereanent," undertakes a very onerous burden, and one of which he cannot, I think, be relieved except on the clearest and most conclusive evidence.

I am not, however, to be understood to mean that the pursuer is confronted with the maxim *pater est quem nuptiæ demonstrant* in the sense that he must be held to be the father of the defender in respect she was born, although not conceived, in wedlock, unless he proves the impossibility of his being so from impotency, or want of opportunity of intercourse, owing to absence from the country, or other circumstances. On the contrary, the proved and undisputed fact that the defender was born within two months after the pursuer's marriage to her mother must be held, on the authorities cited in the course of the argument, to render inapplicable the maxim referred to. It rather appears to me, therefore, that the Lord Ordinary, while he has decided against the defender, has extended and applied the maxim *pater est quem nuptiæ demonstrant* too favourably for her, keeping in view the short time which elapsed between the date of the marriage of the pursuer with her mother and her birth.

But although the defender can, in the circumstances, take little or no benefit from the presumption embodied in the maxim referred to, there are other presumptions arising from the circumstances of the case which the pursuer has to contend with, and to overcome, before he can succeed.

There is the presumption arising from the circumstance that some time—according to the pursuer, four or five weeks—before his marriage with the defender's mother, he became fully aware that his wife was with child. That he should, notwithstanding this, have married the defender's mother, assuming that he was the father of her child, is quite intelligible, and not surprising. By doing so he only made her the reparation which was due from him, and to which she was entitled. And besides, by marrying the mother at the time he did, he would not only legitimate his offspring, but also make it certain that his child would be born in wedlock. It is to be presumed that a person not insane but in the full possession of his faculties, as the pursuer was, intended what his acts and conduct were calculated fairly and reasonably, if not necessarily and unavoidably, to lead to. On the other hand, it is all but incredible that the pursuer, an educated man of mature years (about forty-five), and occupying a respectable position, should have voluntarily and deliberately married the defender's mother in the knowledge that she was far advanced in pregnancy with a child which could not possibly be his, but the fruit of her connection with some other man, and that, too, while—if he is to be believed—he was paying his addresses to her in honourable courtship. The presumption is, to my mind, all but irresistible, that neither the pursuer, nor any individual circumstanced as he was, would have so acted. To suppose the contrary would be to disregard all the ordinary motives and springs of human action. Nor do I think it improves the position of the pursuer, but, on the contrary, renders his conduct all the more unaccountable, that

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Lord Ormidale.—As observed by the Lord Ordinary, this is a remarkable case; and, I may add, one, as well in its form as in its circumstances, of a very unusual description. No objection, however, has been taken to its competency, and I do not say that it is incompetent. But there can be no doubt that the pursuer in such a case, having regard to all its circumstances, and the decree of declarator, concluded for to the effect that the defender is not his child, and that she "ought and should be decerned and ordained to desist and cease in all time to come from asserting or otherwise representing, directly or indirectly, that she is the child of the pursuer, and that she ought to be put to perpetual silence thereanent," undertakes a very onerous burden, and one of which he cannot, I think, be relieved except on the clearest and most conclusive evidence.

I am not, however, to be understood to mean that the pursuer is confronted with the maxim *pater est quem nuptiæ demonstrant* in the sense that he must be held to be the father of the defender in respect she was born, although not conceived, in wedlock, unless he proves the impossibility of his being so from impotency, or want of opportunity of intercourse, owing to absence from the country, or other circumstances. On the contrary, the proved and undisputed fact that the defender was born within two months after the pursuer's marriage to her mother must be held, on the authorities cited in the course of the argument, to render inapplicable the maxim referred to. It rather appears to me, therefore, that the Lord Ordinary, while he has decided against the defender, has extended and applied the maxim *pater est quem nuptiæ demonstrant* too favourably for her, keeping in view the short time which elapsed between the date of the marriage of the pursuer with her mother and her birth.

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There is the presumption arising from the circumstance that some time—according to the pursuer, four or five weeks—before his marriage with the defender's mother, he became fully aware that his wife was with child. That he should, notwithstanding this, have married the defender's mother, assuming that he was the father of her child, is quite intelligible, and not surprising. By doing so he only made her the reparation which was due from him, and to which she was entitled. And besides, by marrying the mother at the time he did, he would not only legitimate his offspring, but also make it certain that his child would be born in wedlock. It is to be presumed that a person not insane but in the full possession of his faculties, as the pursuer was, intended what his acts and conduct were calculated fairly and reasonably, if not necessarily and unavoidably, to lead to. On the other hand, it is all but incredible that the pursuer, an educated man of mature years (about forty-five), and occupying a respectable position, should have voluntarily and deliberately married the defender's mother in the knowledge that she was far advanced in pregnancy with a child which could not possibly be his, but the fruit of her connection with some other man, and that, too, while—if he is to be believed—he was paying his addresses to her in honourable courtship. The presumption is, to my mind, all but irresistible, that neither the pursuer, nor any individual circumstanced as he was, would have so acted. To suppose the contrary would be to disregard all the ordinary motives and springs of human action. Nor do I think it improves the position of the pursuer, but, on the contrary, renders his conduct all the more unaccountable, that

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on his ascertaining, before the marriage, the condition in which his wife was, she refused to disclose to him the name of the individual with whom she must have had illicit intercourse, notwithstanding that he desired and pressed her to do so.

And what is the reason given for such extraordinary, and I think I may say unnatural, conduct on the part of the pursuer? None, positively none, that is worthy of serious consideration. He says, no doubt, that if he did not go on with the marriage he was afraid the defender's mother might do injury to herself, but I can see nothing in the proof to support the pursuer in this statement. His wife does not do so, and she is not even asked a question on the subject.

Without, therefore, going the length of saying, in accordance with the opinion referred to in a footnote at page 403 of Phillip's Treatise on Evidence (vol. i., 8th ed.), "that if a man married a woman visibly pregnant it is a conclusive inference of law that the child is legitimate," I must repeat, what I have already said, that the pursuer is at least met at the outset by a very strong and weighty presumption adverse to his contention in this case, which it is incumbent on him to get over by very satisfactory evidence.

Another adverse presumption, scarcely less formidable, which the pursuer has to encounter, is that arising from his own as well as his wife's silence for so long a period as about twenty years, during which he kept the defender in ignorance of her paternity, and abstained from intimating to Laidlaw, whom he now says is her father, or mentioning to any one else that he was not himself her father. I must own my inability to reconcile such conduct with what I must hold to have been his duty to the defender, whether he was her father or not. If he was not her father, or at least was not to be held as adopting that position, what right had he to treat her as he did? What right had he to send her away, almost immediately after her birth, with Mrs Hutchison, and leave her for many years in the keeping and charge of that person without disclosing who her father was? I find it difficult to answer these questions, and when I keep in view that for twenty years or more he supplied the requisite funds for the defender's upbringing—acting so far towards her as if he were her father—I feel myself almost driven to the conclusion that he was either in very truth her father, or must be held to have adopted her as his child, and is now barred from maintaining that she is not.

In support of the same view, the consequences to the defender in the loss of evidence bearing on the question of her legitimacy is not to be overlooked. Take, for example, Dr Thatcher senior, who was consulted by the pursuer some time before the marriage as to Mrs Gardner's condition, and who acted as accoucheur at the birth of the defender, and Mrs Robertson, the sick-nurse who attended the defender's mother at the birth, and for sometime afterwards, both of whom have long since died: It cannot be doubted that Dr Thatcher senior, and Mrs Robertson, might and most probably would have been able, if alive, to throw a great deal of light on the present subject of inquiry. Dr Thatcher could have explained what he meant on ascertaining the condition of Mrs Gardner a short time before her marriage, by telling the pursuer the sooner the better she was married. He could not well have advised the pursuer to marry her if he was not satisfied that he was the cause of her condition. And Dr Thatcher could also have given an explanation not only of the particulars noted in his visit-book, as shewn in the excerpt therefrom, No. 62 of process, but stated what would have been most material, who were "the child's parents," referred to in his

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memorandum, No. 63 of process. As to Mrs Robertson, again, the serious nature of the loss to the defender sustained by her death appears from the evidence of Mrs Hutchison, the person with whom the defender was after her birth sent away, and with whom she resided for many years. Mrs Hutchison says, among other things,—"I called the child Mary Gardner. I got the mother's name from Mrs Robertson." And again, in a subsequent part of her evidence, Mrs Hutchison says, on being asked whether Mrs Robertson told her about the father of the child,—"No, she never said anything, but that Mr Gardner was the father, but she said that. (Q.) Did she say that Mrs Gardner told her so when on childbed? (A.) Yes. (Q.) Did she tell you that Mrs Gardner had told her so frequently afterwards? (A.) Yes." It is true that, from other answers given by Mrs Hutchison, the real import and effect of what she says she heard from Mrs Robertson is attended with some doubt, and cannot now be cleared up in consequence of the death of Mrs Robertson,—another striking example of the great disadvantage to which the defender is subjected by the ignorance in which the pursuer managed to keep her for such a length of time in regard to everything connected with her parentage. It is hard, however, that the defender should suffer more than is unavoidable from the loss of evidence not arising from any remissness on her part but solely from the conduct purposely persisted in for such a length of time by the pursuer. To some extent, therefore, I think it only just and conformable to legal principle that the evidence now lost to the defender must be presumed, if it had been available, to have told against the pursuer.

At the same time, and giving all due effect to the presumptions to which I have now referred, I cannot say that the pursuer is to be held as precluded from rebutting them, and shewing, if he can, that he is entitled to the decree for which he concludes, and which the Lord Ordinary has pronounced in his favour. The question is, has he done so?

Although a considerable number of witnesses have been examined in the case, it rather appears to me that the determination of the disputed question depends substantially upon the presumptions I have noticed, and the view that may be taken of the testimony of the pursuer himself, his wife, and John Laidlaw, on the one hand; and the defender, the Rev. Mr Kay, and Mrs Hutchison, on the other.

The great object of the pursuer in the proof was to make out that prior to his marriage with the defender's mother she had carnal connection with John Laidlaw, and that he and not the pursuer is the defender's father. It would no doubt be very important for the pursuer, although not conclusive, if it had been established that before his marriage sexual intercourse had taken place between his wife and Laidlaw. But I must own I am not quite satisfied that the proof warrants such a conclusion. The only evidence bearing on the matter is that of the pursuer's wife and Laidlaw himself. Now, in regard to the pursuer's wife, I feel myself unable, looking at her conduct from first to last, to give any effect to her testimony, except in so far as it is otherwise distinctly and unequivocally supported and corroborated. But not only are her statements uncorroborated but they are also far from consistent or credible in themselves, and in many particulars, of more or less importance, directly contradicted and shewn to be incorrect by the other evidence in the case. Thus, while she says in one part of her evidence, when examined as a witness, that Laidlaw had connection with her only once, she, according to the pursuer's statement in the record (Cond. 4), told him that she had connection with Laidlaw "on two or more occasions,"

and when pressed at her examination she says,—"I only remember of two times," explaining, however, that on one of them he succeeded, but on the other made the attempt merely. Again, while in one part of her evidence she says that she was waylaid and violated by Laidlaw notwithstanding her resistance, she in another part admits that she had met him by appointment on the hill-side, where the alleged violation took place, and that she always thought a great deal of him. And certain it is that there is nothing whatever to shew that she complained to any one, or otherwise acted at the time as it must be presumed a virtuous woman would have done had she been waylaid and violated by her brother's shepherd. On the contrary, she expressly says that "there was no difference in my conduct towards him after the occurrence of what I have described." Over and above all this there are the inconsistent and contradictory statements regarding the matter made by the pursuer's wife to the defender and Mr Kay. The defender says that her mother told her she had been waylaid by a man with a plaid, who, without ever speaking to her, got the better of her and then went away, evidently meaning to convey the impression that the man was a stranger to her. Then on Mr Kay coming in and asking her who the man was, she said she could not tell, but he was a gentleman, and had a plaid on. She no doubt denies that she made this statement, but Mr Kay distinctly corroborates the defender in regard to it, and for my own part I can see nothing in his evidence, or otherwise in the case, to lead me to discredit the statements of Mr Kay, especially in so far as they coincide with those of the defender.

Nor is the matter regarding the account given by the pursuer's wife of the meeting she had with Laidlaw or some other man on the hillside of Cademuir improved by the statements of the pursuer himself, for not only are they in themselves inconsistent and contradictory in many essential particulars, but they are also inconsistent with and contradictory of the statements made by his wife, and the communications made by him to the defender and Mr Kay. Thus, while the pursuer says that when prior to his marriage his wife told him of her being in the family-way he got no further information from her except that she had "been forced by a blackguard on the hill," and that although he certainly pressed her on the subject she would tell him nothing except that she had been "waylaid by a blackguard and abused," and that she gave him to understand it was a man she had never seen before and whom she knew nothing about,—the pursuer's wife says that although the pursuer asked her who the man was "he did not press me to tell him." And the matter does not rest there, for, according to the defender and Mr Kay, the pursuer at one of his interviews with them expressly stated that he did not know who the defender's father was, further than that he was a dissipated man, and out of the country; although, long before this, according to his own and his wife's testimony, he was told by her that Laidlaw was the father. Not only is this flagrant contradiction established by the evidence of the defender and Mr Kay, but by the testimony of the pursuer himself; for he expressly says that "when my wife first told me the circumstances connected with her getting into the family-way she spoke of a blackguard having waylaid her on the hill, and when she thought she was dying; a year after we were married, she revealed the name of the man—John Laidlaw." And Mr Kay says that, in answer to some questions of his, the pursuer stated "that Mrs Gardner had been met by a man on the moor and that he had forced her, and that having forced her she was in this condition. I put the question to him, where is that man? He said he did not know. I asked, is he in the

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neighbourhood of your place, or in the neighbourhood just now? He said, not just now. Could he be found? I asked. No, he said. Where was he? I asked. He said he thought he was not in the country at all, and that owing to his conduct with Mrs Gardner he had become a dissipated man. I have a distinct recollection of Mr Gardner telling me these things."

But further still, and what perhaps is of more importance than anything that has been yet noticed, it is clear—unless the defender and Mr Kay are to be held as perjured witnesses—that the pursuer had confessed to him that he had at least attempted, if he did not succeed, to have sexual intercourse with Mrs Gardner before their marriage. The defender states that, at one of the pursuer's meetings with Mr Kay, when she was present, she heard him say that he had once tried to take advantage of Mrs Gardner. "I heard him say that. Mr Kay had asked him about the hill meeting, and Mr Gardner said he had once tried to take advantage of her." Mr Kay is even more full and explicit. He says,—"Mr Gardner and I had a meeting in March 1874. Mrs Gardner and Mary were present. (Q.) Was anything said on the occasion by Mr Gardner as to anything taking place between him and Mrs Gardner prior to their marriage? (A.) Yes. By that time Mary had told me her mother's story to her, and I told Mr Gardner what Mary had said, and, among other things, that Mr Gardner had said that he had attempted to force her once, and also a second time. To which he returned answer, and said, Well, I confess I tried it once. (Q.) That was, that he had endeavoured before marriage once to have connection? (A.) To force her. (Q.) To have connection? (A.) Yes. (Q.) What was it you understood he had tried to do; to commit a rape, or to have connection with her? The position I put is this: I am told that you courted Mrs Gardner, and had frequent meetings with her, and on one occasion you tried to force her when she was unwell, and you did not succeed. On a second occasion you forced her, having trysted her to a different place on the moor, and that you had succeeded only too well the second time. He immediately added, Well, I confess to having tried it once. He did not confess to having been successful. It was at that meeting, immediately after the confession, that he made an offer of £1000. He just said, I am here to make a settlement."

Bearing in mind these portions of the evidence, together with the whole proof, so far as it is of any materiality, I must own my inability to come to the conclusion that the pursuer has established his case. On the contrary, I am disposed to think, when I keep in view the evidence of Mrs Hutchison, of the defender Mary Gardner, and of Mr Kay, that the paternity of the defender has been made out against the pursuer rather than Laidlaw. I am not to dispute, however, that the testimony of the defender, especially as regards the letter she says she received from her mother, but destroyed, acknowledging that the pursuer was her father, is open to much unfavourable remark. In regard, therefore, to the defender's own testimony, I have given effect to it only in so far as it is distinctly supported and corroborated by Mr Kay, whose evidence, I cannot see, is exposed to any well-founded objection. He has no disqualifying interest in the controversy; and it is only fair to presume that an educated man, and a clergyman, as he is, would tell the truth, and nothing but the truth, as I believe he has done. The testimony of Laidlaw stands differently, and is certainly, in many respects, very equivocal and unsatisfactory. But he is the pursuer's witness. Now, according to the pursuer's contention—and the exigencies of his case require it—Laidlaw must be held as stating what is false in all the more

important points at issue between the parties, especially as stating what is false when he says that he never at any time had sexual intercourse with the defender's mother.

In the words of the Lord Ordinary, "his deposition abounds with contradictions as well as with palpable falsehoods, and is in most important particulars a flagrant example of wilful prevarication. His letters to Mrs Gardner, which were put before him, and on which he was examined, are not of themselves evidence that the statements they contain are true; but they prove, and in this way they are by the general tenor of his deposition amply corroborated, that he is a witness whose sworn testimony is not to be believed." All I can do with evidence so characterised by the Lord Ordinary, I think correctly, is to refuse any weight to it as against the defender.

In this view the pursuer's case is left on the evidence of himself and his wife. Now, although the pursuer denies that he had actual connection with the defender's mother before their marriage, it is proved, I think, by testimony which cannot be disregarded, that he on one occasion, at least, before the marriage, endeavoured to have connection with her. And the proved, and indeed admitted, levity and looseness of conduct—not to use any stronger language—of Mrs Gardner, prior to her marriage, renders it not unlikely that the pursuer may have gone further than he has admitted, and might have been the defender's father. As previously observed by me, it is all but impossible to suppose he would have married her mother at all in the condition he knew her to be in, except in the knowledge that he himself was or might have been the cause of that condition. Neither is it unreasonable that the pursuer, the son of a clergyman, the brother of another, and himself an ordained elder of the Presbyterian Church, should have been anxious to conceal the birth of the defender, and the circumstances in which it occurred.

But whatever may have been the motives of parties, and whatever may be the truth of the case, the pursuer cannot prevail without establishing, by clear and unmistakeable evidence, that he is not the father of the defender. And although unwilling to interfere with the judgment of the Lord Ordinary, who, it is evident, from the able note to his interlocutor, has bestowed great pains on the case, I am unable, having regard to all the circumstances, and the presumptions against the pursuer arising from his own actings and conduct, to come to the conclusion that he has relieved himself from the burden he has undertaken. On the contrary, the only conclusion I can come to is that the pursuer has failed to establish his case, and therefore that the interlocutor of the Lord Ordinary ought to be recalled, and the defender assoilzied from the conclusions of the summons.

LORD GIFFORD.—This is a very interesting and important and a very difficult case, and it is only with great hesitation, and after very anxious consideration, that I have come to concur in the opinion now expressed by all your Lordships, that the interlocutor of the Lord Ordinary ought to be recalled, and the defender assoilzied from the conclusions of the action.

In one point of view the question is entirely one of fact dependent upon the evidence, and the Court are called upon to decide, in point of fact, upon that evidence, whether or not the pursuer is the father of the defender, Mary Gardner. In another, and perhaps a more accurate point of view, however, the question is one as to the effect and force of certain legal presumptions from which paternity

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is to be inferred, and the difficulty of the case consists in rightly estimating the force and effect of the presumptions which arise from the circumstances proved in evidence, and in determining whether these presumptions have or have not been sufficiently overcome by the contrary evidence relied on by the pursuer. "The birth of a child," said Lord President Blair in Routledge v. Carruthers, 19th May 1812, "is a fact which may be proved by witnesses, but the conception is a fact that can never be proved," but can only be inferred from the position and relation of the supposed father. Paternity, in this view, is always a matter of inference or presumption, never of direct proof; and according to the special circumstances of each case the presumption or inference of paternity will be more or less strong—in some cases being so strong as to be almost irrefragable, and in other cases being so weak as to be easily overcome.

The best known, and in general the strongest of these presumptions, is expressed by the rule *pater est quem nuptiæ demonstrant*,—a child conceived and born in marriage is presumed to be the child of the married spouses. In strictness this maxim only applies to cases where the child may have been conceived during the marriage, and I think it is the result of all the authorities that the maxim does not apply where the child is born ten months after a marriage is dissolved, or within six months after its celebration. In such cases, however, other presumptions may arise from the special circumstances which may raise an inference almost as strong as that which arises in the proper cases to which the maxim is strictly applicable. In the present case I agree with your Lordships that the brocard does not in strictness apply. Mary Gardner, the defender in this action, was born only six weeks after the marriage of Mr and Mrs Gardner. It is therefore impossible that she could have been conceived in wedlock, and so the *nuptiæ* cannot of themselves demonstrate who the father was.

The presumption arising from conception, or possible conception, during marriage, is a mere presumption which may be rebutted and overcome by clear and satisfactory contrary evidence. The law of Scotland has never made or treated this strong presumption as a *presumptio juris et de jure*. It must yield to evidence, and I think the law of Scotland has always been that the presumption may be overcome not only by evidence that it was physically impossible that the husband of the mother could be the father of the child, but by every species of moral evidence sufficient to satisfy a reasonable mind that the child was begotten by some one else than the husband. From the authorities which have been cited to us this seems also to be the rule in England, at least since the decisions in the Banbury Peerage case, and in the subsequent case of Morris v. Davis, 1837, 5 Clark and Finnelly, 463.

Now, I am of opinion that the rule of law is exactly the same in regard to all other presumptions of paternity which may arise from the special circumstances of each particular case. They are all mere presumptions which may be overcome, and not fixed rules which must be accepted as conclusive; and the two questions which will arise in every case, and which arise in the case now before us, are, first, what is the strength of the presumptions which the circumstances create; and, second, is the contrary evidence sufficient to overcome and to set aside these presumptions.

In the present case I shall confine myself to indicating very shortly the grounds of my opinion that the presumptions which arise in favour of Mary Gardner's legitimacy—that is, the presumptions that the pursuer is her father—are so

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cogent that they have not been overcome even by the very considerable body of contrary evidence relied upon by the pursuer.

In the first place, a certain presumption of paternity arises from the bare fact that a man knowingly marries the mother of an illegitimate child previously born. But this is a very weak presumption. In the absence of all other evidence, all that can be said is probably that it is more likely than not that he is the father. Such presumption would be greatly strengthened if previous to the marriage the mother of the illegitimate child had been the mistress or concubine of the man who afterwards married her, and had cohabited with him at or about the time of conception, and the adoption or acknowledgment of the child as his by the husband would probably make the presumption almost conclusive, though still capable of being rebutted by contrary proof.

Where, as in the present case, a man marries a woman who at the time of marriage is in a state of pregnancy, the presumption of paternity from that mere fact is very strong, and is perhaps in almost all such cases in entire accordance with the actual truth. Still farther, where the pregnancy is far advanced, obvious to the eye, or actually confessed or announced, as in the present case, to the intended husband, a presumption is reared up, which, according to universal feeling, and giving due weight to what may be called the ordinary instincts of humanity, it will be very difficult indeed to overcome. The man who marries a woman in the condition in which Mrs Gardner was on 29th August 1850, the date of their marriage, when she was seven or eight months gone with child, says, almost as emphatically as he could do by the most express words, "I am the cause of the pregnancy, and the father of the expected child."

No doubt, if Mr Gardner could shew that he could not be the father, the presumption must yield. If at the date of the marriage he had newly returned from Australia,—if he had landed from the ship only a day or two before the marriage,—the impossibility of his being the father would have met and overcome all presumptions. But his position was very different. He had been an old suitor of Miss Eliza Brodie (now Mrs Gardner) before his emigration. She had originally refused his proposals; but he returned to this country four or five years previous to his marriage, and he renewed his addresses, which were ultimately accepted, although the precise date of the acceptance does not appear. There seems to have been a courtship of considerable duration. There were very frequent meetings between Mr Gardner and Miss Brodie, and there was abundant opportunity for intercourse if the parties were so disposed. In such circumstances, it is unfortunately true, as we are otherwise aware, that in certain districts and in certain ranks of life improper intercourse does sometimes take place before marriage, and the fact is undoubted that a very considerable number of births are registered where the conception must have taken place before any formal marriage was celebrated. Now, wherever an avowed and open courtship has taken place, and there have been opportunities of access, and thereafter the man marries the woman in an advanced state of pregnancy, knowing that she is so, and hurrying on the marriage, as happened here, for that very reason, I do not say that the presumption of paternity is absolutely conclusive, but I do say it is almost as strong as such a presumption can be. No words, no express declaration on the part of both the man and the woman, could be stronger than the mere fact of marriage under such circumstances. It is as if both the man and the woman had expressly confessed their premature indulgence, and hastened to do what they could to repair their fault. To my mind, in such a

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case, the presumption is quite as strong as the mere presumption which arises when a child is conceived during marriage that the husband is the father. Indeed in some aspects it seems to be even stronger, for it has in it the element of express or actual confession or avowal, which does not always arise, or arises with less force, from the mere subsistence of a nuptial tie.

Suppose, what sometimes used to happen, and used to happen in former times much more frequently than now, that parties who marry as Mr and Mrs Gardner did, submit to Church discipline, and are reproved or temporarily suspended from Church ordinances for antenuptial fornication—and such proceedings used to be very common in some of the churches in Scotland—would not the presumption of paternity be quite as strong as if the child had been conceived after the marriage ceremony? I think it would, and in an extended sense of the maxim it would apply with peculiar emphasis—*Pater est quem nuptiæ demonstrant.*

Still it is conceivable that even in such a case the husband who marries his pregnant bride may not be the father of her child. His marriage and his conduct may be explained in some other way. We have heard, at least, of childless men with large possessions thus attempting to secure an heir, and exclude distant or hated relatives. At least such cases may be figured, and proof might be brought so cogent as to illegitimise the child so fraudulently and surreptitiously adopted. But nothing of this kind arises here. The pursuer might have been the father of Mary Gardner—every likelihood—every probability—his own implied avowal, asserts that he was, and at the very least there is laid upon him by these circumstances, going no farther in the history than I have already done, an *onus* as weighty almost as it is possible to conceive of removing the presumption by some preponderant proof.

Now, the pursuer's case is that he married Miss Brodie in an advanced state of pregnancy, not because he was the father of her child, not because he had antedated the rights or privileges of marriage, but in order to screen his wife from the disgrace of having an illegitimate child with which he had nothing to do, but which she said was the consequences of a criminal assault of which she was the innocent victim. He says it was an act of generosity on his part, to cover Miss Brodie's grievous calamity, and to hide for ever the knowledge of an event which she said was to her a miserable misfortune, but which certainly others would hold to have been her fault and her crime. The pursuer says that Miss Brodie told him that she was pregnant in consequence of her having been forced and violated on Cademuir Hill.

Now, I do not say that it is impossible that this can have been the pursuer's motive in marrying Miss Brodie in the state of pregnancy in which she then was. It is possible, just as the strangest and most unexpected events are often shewn to be within the range of possibility. But while I admit the abstract possibility of the statement which the pursuer now makes, I think I may say that it is a statement which the law will not take off the pursuer's hands without the most pregnant, undoubted, and unimpeached evidence of its truth. Now, unfortunately for the pursuer, of such evidence the pursuer has really none, for, when analysed, the whole rests upon the single uncorroborated and utterly unsupported assertion of Mrs Gardner alone.

It is said that Miss Brodie told her intended husband that she had been forcibly violated without her consent. There is no evidence whatever of this, and her statement to her promised spouse is admitted to have been false in many

particulars and details. She said to him that "she had been waylaid by a blackguard on the hill and abused," and she led him to believe that she did not know who the man was; but in her own examination she was forced to admit that she had not been waylaid, but had met with Laidlaw on the hill by assignation and appointment. I do not believe that any rape took place; but it is enough to say that there is not the slightest evidence at which the law for a moment could look as instructing such an occurrence. There was no complaint at the time, no information given to her friends, no exhibition of marks of violence, no such marks to exhibit. There were subsequent meetings between Miss Brodie and Laidlaw without complaint, and without her making any difference in her treatment of him. Mrs Gardner herself says that Laidlaw afterwards attempted liberties with her, which were unsuccessful, but of which still she made no complaint. Can such an extraordinary story be credited now, as told by Mrs Gardner, after the lapse of four-and-twenty years, she having given quite a different account of it to her intended husband at the time when she first mentioned it? No doubt it was urged that Miss Brodie was entitled to deceive her promised husband, so as to get him to marry her, and I do not dispute that some excuse may be stated for her; but what is this but to say that under a strong motive she told lies to her husband at first, and the result is that she cannot now be trusted as a witness, and as the sole witness on whom we are now asked to rely. The whole case at this point of it is made to turn upon her statement alone, and to discredit Mrs Gardner is to destroy the whole structure which the pursuer sets up.

If the question had arisen immediately upon the birth of the child, or before its birth, but after the marriage, I cannot but feel that the presumption of that child's paternity would not have been overcome by all the evidence which is now laid before us.

But the case does not stop at the birth of the child, and it is not in the same position as if the pursuer had then repudiated the child or declared it his wife's bastard. The circumstances attending the birth are important. Mr Gardner placed his wife in a temperance hotel in Edinburgh to be confined there. No doubt he did so secretly, and without giving his name or address, but can it be doubted that he did so avowedly as the father of the child of which she was pregnant? I do not go into the details of the evidence, but his every act was a confession and avowal, to Dr Thatcher, to the hotel-keeper, to the hotel-keeper's wife, to the waiters, to the midwife, to the sick-nurse, and to everybody else, that he was the father of the child. His sending Miss Brodie to Dr Thatcher before the marriage, and his own visit to Dr Thatcher to learn the result of the examination, will admit of no other interpretation, and constitute proofs or evidence or avowals of paternity which, in an action of filiation, would be absolutely conclusive.

The pursuer says he did all this in order to "smother up the thing as much as possible." But what does this mean? It means, that is, he avowed the child as his in order to conceal the fact that it was not his. He led, or allowed others to assume, that he was the father of his wife's child, in order to conceal what she said was the fact, that she had been violated. But he could only "smother up the thing" by adopting the child as his, and after having once done so and continued to do so I think he is now barred from maintaining that the whole was a pretence and a falsehood.

Suppose Mrs Gardner had died in childbed, and the pursuer had then repudi-

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ated the child, what defence could he have had to an action of aliment by the parish authorities, or to a subsequent action by the child itself.

I give full weight to the repudiation of a child by both the married spouses even when the child is conceived during the subsistence of the marriage, and I quite admit that moral evidence without physical impossibility may sometimes be sufficient to bastardise a child, even though both conceived and born while a marriage subsisted. But there is high authority for holding that not the slightest regard is to be paid to such disclamation by the spouses after they have once in any way whatever acknowledged the child. Now, it seems to me that all through Mrs Gardner's residence in Milne's Temperance Hotel, both spouses treated and virtually acknowledged the child as theirs, that all through the pursuer's communications with the late Dr Thatcher he virtually confessed to Dr Thatcher that he, the pursuer, was the father of the child. I cannot doubt that when Dr Thatcher, after having examined Miss Brodie, told the pursuer that the marriage should go on at once, that he meant the pursuer, as the father, should at once marry the pregnant mother. I will not take from the pursuer his ambiguous description of Dr Thatcher's words, that without referring to any person, he only said,—"Let the marriage go on." I take it to be clear that what he said to the pursuer was virtually "Marry her at once," for the pursuer's conduct was too explicit an acknowledgment of paternity to need any farther words.

And then the history still confirms the confession with which it began. For years the pursuer goes on paying the defender's aliment, first through old Dr Thatcher, and then through his son. Every payment was an acknowledgment by the pursuer that he was the girl's father. It is vain to say that the pursuer made these payments as for the support of his wife's bastard, and that he did so because he was liable for his wife's debts contracted before marriage. The plea is absurd, and absolutely inconsistent with the pursuer's whole actings throughout. Nobody ever dreamt such a thing, and the pursuer, after a lapse of five-and-twenty years, is not entitled now to put it forth with any expectation that it will be believed.

The lapse of time seems to me to be almost a conclusive element against the pursuer. Without his evidence, and without the evidence of his wife, Mrs Gardner, admittedly the pursuer would have no case whatever. If Mr and Mrs Gardner had died any time during the course of the last four-and-twenty years, —nay, if even one of them had died before proceedings were instituted,—it would have been hopeless to attempt to disprove the defender's legitimacy. No hearsay, no written declaration, no bequest of bastardy, would do. Now, I altogether dispute the right of the pursuer, by himself or in conjunction with his wife, to hold the question of the defender's legitimacy in suspense at their pleasure, that they make her as they please at any time of their lives illegitimate, and declare her a bastard, but still retain in their own hands the arbitrary power of being silent, and by dying without proceedings thus bequeath to her a legitimacy which she could not claim as matter of right. When husband and wife resolve to repudiate a child of the wife's as a bastard they must do so instantly, or at least timeously, when witnesses are alive who can speak to the material facts. Delay in such a case may become an absolute bar. I think the delay has become so in the present case, and this altogether apart from the implied acknowledgment of paternity which the pursuer's conduct inferred.

The continued and persistent conduct of both parents in excluding the de-

fender from their family, and treating her so differently from Mrs Gardner's other children, is strongly founded on by the pursuer. It is impossible to justify such conduct, but I am not prepared to say that in its commencement at least it is not accounted for by the natural anxiety of the pursuer and of his wife to conceal the fact that a child was born six weeks after marriage. The pursuer was an elder of the Established Church—he could scarcely have retained his eldership if it was publicly known that he had a child born six weeks after marriage. His father and brother were ministers of the Established Church. Such a disclosure would have been extremely unpleasant to them. It is conceivable that concealment begun for such motives should be continued from the awkwardness of afterwards introducing into the family a child of whom no one had previously been allowed to hear.

I have only a word to add on the credibility of certain of the witnesses. I have already said that I cannot trust the evidence of Mrs Gardner. From whatever motives, and with whatever excuses, she has undoubtedly given different accounts of the matter at different times, and it is almost fatal to the whole case if she is not to be implicitly relied on. I cannot help thinking that the pursuer also has to some extent been seriously attacked as to his accuracy and credibility. If Mr Kay's evidence is to be trusted, and there is nothing to impugn it, the pursuer made admissions and confessions totally inconsistent with the case which as a witness he maintained. Mr Kay could hardly be mistaken as to the pursuer's statements and admissions to which he depones, and no prepossession in favour of the defender would account for such statements as were mistakes or misapprehensions. They very seriously tell against the pursuer's credibility. The evidence of Laidlaw I feel myself compelled almost altogether to lay out of view. It is plain he is a person upon whose testimony no reliance whatever can be placed, and although the statements and implications in his letters might well be held evidence against himself if he were the defendant in or a party to an action, I think it would be unsafe to read them when coupled with his oral testimony as evidence against the present defender. The evidence of the defender herself I am also unable implicitly to rely on, but the case stands quite clear of her testimony. Of course she cannot know anything of the material facts and circumstances on which the case depends, and although I lay out of view her account of her mother's statements, this does not materially affect the real issue.

The result is that I have come to be of opinion, though with difficulty, and not without hesitation, especially considering that the Lord Ordinary reached an opposite conclusion, that the pursuer has not adduced evidence strong enough or cogent enough to overcome the weighty, and, it appears to me, the concurrent presumptions which arise from the whole history of the case, and which compel me to hold in law, whatever may be the state of the occult fact, which I cannot reach, that the pursuer must be held to be the father of the defender. This leads to decree of absolvitor from the whole conclusions of the action.

THE COURT pronounced this interlocutor;—"The Lords having heard counsel on the reclaiming note for Mary Gardner against Lord Craighill's interlocutor of 15th November 1875, Recall said interlocutor: Find that the pursuer (respondent) has failed to prove that he is not the father of the defender (reclaimer) Mary Gardner: Find the defender entitled to expenses, and remit," &c.

GILLESPIE & PATERSON, W.S.—LINDSAY, PATERSON, & Co., W.S.—Agents.

No. 121. DUKE OF ROXBURGHE AND OTHERS, Heritors of the Parish of Jedburgh, Petitioners and Appellants.—*D.-F. Watson—Kinnear.*

June 1, 1876. Duke of Roxburghe, &c.

Church—Allocation of Area—Quoad Sacra Parish—Stat. 7 and 8 Vict. cap. 44, secs. 8 and 9.—The lands of certain heritors in the parish of J. were, in 1855, under the provisions of the Act of 7 and 8 Vict. sections 8 and 9, disjoined from the parish of J. *quoad sacra*, and, along with certain portions of other parishes, erected into a *quoad sacra* parish. In 1874 the parish church of J., the area of which had been for a long period divided among all the heritors of the parish according to an extrajudicial agreement, was excambed for a new church. In an application by the heritors to have the area of the new church divided by the Sheriff, *held* that heritors whose lands were entirely within the *quoad sacra* parish were not entitled to share in an allocation of the area of the new church according to their valued rent, but the question of their right to a family seat in the new church reserved—(Lord Deas *dis.* on the grounds (1) that the excambion did not affect the rights of the seat-holders in the old church, and that the seats in the new church fell to be allocated as the seats had been allocated in the old at the date of the excambion; and (2) that if an allocation had been necessary, as in the case of a new church erected by the heritors, the heritors whose lands were in the *quoad sacra* parish were entitled to share in the allocation according to their valued rent, in respect that they were still (in his Lordship's opinion) liable for the expense of maintaining the original parish church; and Lord Mure *dis.* on the former of these grounds).

Opinions reserved as to whether the heritors whose lands had been disjoined *quoad sacra* were still liable for the maintenance of the fabric of the church of the old parish.

1st DIVISION, with three Judges of 2d DIVISION. Sheriff of Roxburgh, Berwick, and Selkirk. M.

A PORTION of the ruined abbey of Jedburgh had from a remote period been fitted up and used as the parish church of Jedburgh. The parish included both the burgh and a large landward district. The area of this church had been extrajudicially divided among the provost and magistrates and the heritors in 1793, and as additions were made to the accommodation these were also extrajudicially divided.

In 1869, the church having fallen into disrepair, the late Marquis of Lothian, the proprietor of the rest of the abbey, who was desirous of acquiring the old church with a view to the restoration of the abbey ruins to their ancient state before the foundation of the church, and to their preservation as ruins, offered to erect a new parish church at the sight of and to the satisfaction of the heritors, and to convey it to them on condition that they would convey to him the old church in the abbey. This offer was accepted, and the late and present Marquises of Lothian proceeded to feu a site and to erect a new parish church for the parish of Jedburgh. This new church was completed in November 1874, when a deed of excambion between the Marquis of Lothian and the committee of heritors of the parish of Jedburgh was executed, whereby the new church was conveyed to the committee of heritors in exchange for and in lieu of the old church in the abbey. This deed contained no reference to the existing state of possession of the area of the church by the heritors, nor any provision as to the division of the area of the new church among the heritors.

The clerk to the heritors then presented a petition to the Sheriff (Pattison) in the names of the Marquis of Lothian, as principal heritor of the parish, and himself, as clerk to the heritors and as representing them, praying the Sheriff to divide the area of the new parish church among the heritors "in terms of law."

In February 1855 a portion of the landward part of the parish of Jedburgh, along with small portions of the neighbouring parishes of Oxnam and Southdean, had been disjoined and erected into a new *quoad sacra*

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parish called the parish of Edgerston, in terms of the statutes 1707, cap. 9, and 7 and 8 Vict. cap. 44, secs. 8 and 9. The question thus arose in the division of the area of the new church at Jedburgh whether the heritors of the part of the old parish of Jedburgh, which had been attached *quoad sacra* to the parish of Edgerston which had a church of its own, were entitled to a share of the area of the new church at Jedburgh in proportion to the valuation of their lands, including those attached to Edgerston. The lands of only two of the heritors, viz., the Duke of Roxburghe and Mr Rutherfurd of Edgerston, were entirely within the *quoad sacra* parish of Edgerston.

It appeared that in point of fact the majority of the tenants and inhabitants of the lands attached *quoad sacra* to Edgerston had continued to occupy their old seats in the parish church of Jedburgh, as they did not approve of the seat-rents charged in Edgerston Church.

The Sheriff, after hearing parties, pronounced an interlocutor on 30th April 1875, wherein, among other findings, he decided with regard to this question as follows:—"Finds that by decree of the Court of Teinds, dated the 21st day of February 1855, the church of Edgerston, situated within the parish, was, under and in terms of the statutes 1707, c. 9, and 7 and 8 Vict. c. 44, sections 8 and 9, erected into a parish church in connection with the Church of Scotland, and a considerable portion of what was then the parish of Jedburgh was disjoined *quoad sacra* from the said parish, and along with small portions of the parishes of Oxnam and Southdean, the whole constituting a district about seven miles in length by about three miles in breadth, erected into a parish *quoad sacra* in connection with the Church of Scotland, to be called now and in all time coming the church and parish of Edgerston: Finds that, in so far as regards the dividing and apportioning of the area and seatings of the new parish church of Jedburgh recently erected, the heritors of the land so disjoined and erected into the parish of Edgerston *quoad sacra* are not to be considered as heritors of the parish of Jedburgh: . . . Finds that the remaining two-thirds fall to be allocated and divided among the other heritors of the parish (excluding as aforesaid) according to their valuations as appearing in said valuation-rolls." *

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* "NOTE.— . . . With regard to the landward heritors, the question is more difficult.

"It is as parishioners properly that the heritors within the parish are made liable to build and repair the parish church, &c., according to the value of their respective lands. Sir George Mackenzie, in his Observations upon the statute 1572, chapter 54, says that the law burdens them with the repair of the church 'because they get the advantage in it of the word and sacraments.' They have in consequence, and for the same reason, a right in the like proportion to the area and seatings of the church. But this is not an absolute right, like that to their lands, for the exclusive benefit of the heritors themselves. They hold it for behoof also of the tenants and residenters on their lands, that these persons may also get the same 'advantage' in the church 'of the word and sacraments.' The heritor is bound to give the benefit to his tenants and the residenters on his lands within the parish. He cannot alienate his lands and retain a right to the area of the church. Nor can he alienate his share as a separate right of property and retain the lands. It must go with the lands in respect of which it is assigned to him, subject to the conditions and burdens; nor can the right be converted to any other use or purpose than that of hearing the word and partaking in the sacraments, and other religious ordinances of the church. It is altogether an obligation and a right of a peculiar kind, being part of the machinery by which the constitution and law of this country ensure provision being made for the worship of God and the support of

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The Duke of Roxburghe and the other heritors, whose lands, or parts thereof, had been attached *quoad sacra* to Edgerston, appealed against this

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the Christian religion, according to the doctrines and system of church government adopted and recognised by law. Keeping these things in view, the question arises, whether the heritors, whose lands have been disjoined from the parish by competent decree of the Teind Court, and erected along with other heritors' lands into another parish *quoad sacra*, are still to be considered as heritors of the parish from which they have been so disjoined, and as such entitled to the same proportion of the area of the parish church as if their lands still formed part of the parish.

"It was maintained on the part of the Duke of Roxburghe, whose whole lands within the original parish of Jedburgh are disjoined therefrom, and along with others erected into the *quoad sacra* parish of Edgerston, that it was incompetent in this process to pronounce any judgment which would have the effect of excluding the Duke from a portion of the area of the new parish church, because this would be dealing with a heritable right, and also that in respect of the right which he possessed in the old parish church this could be done only by way of reduction and declarator. Reference in support of these pleas was made to the cases of Smith, 22d June 1826 (4 Shaw, 738), and of the Magistrates of Hamilton, 23d June 1846 (8 Dunlop, 844). These cases, however, do not support any such general proposition; neither of them applied to the case of a new church. And even as to the churches to which they related (being old churches, in regard to which an existing and long-established state of possession was sought to be subverted without any material change of circumstances), they both proceeded upon the ground of special onerous agreements in regard to the particular seats there in question, and which had been made and acted upon for upwards of fifty years. There is no case of that kind presented as regards the Duke of Roxburghe, either in reference to the old church or the new. Besides, a judgment to the effect supposed does not deprive the Duke of Roxburghe of any heritable right which he has as heritor to the area of the parish church. It proceeds on the ground that he is not an heritor to that effect, in consequence of his lands no longer forming part of that parish, but being disjoined therefrom. If that is so, it is not the judgment of the Sheriff which excludes him from an area of the parish church, but the decree of the Court of Teinds, by which his lands were disjoined from the parish and attached to another parish. And the Sheriff's judgment only gives effect to that decree according to his understanding of it. When called on to divide the area of the church among the heritors according to law—which is a proceeding quite competent before him—he must have jurisdiction to ascertain who the heritors are among whom the division is to be made. With regard to the plea that a reduction or declarator was necessary, because otherwise the Sheriff would be depriving him of the right which he had in the old parish church, this assumes that the whole right which at one time existed in and to the area of the old church is imported or transferred to the new parish church, a proposition which appears to the Sheriff not to be well founded.

"Besides, since that right, such as it was, was assigned to the Duke, the circumstances are changed. His position in the parish is no longer the same. And this just raises the question in another shape: What is the effect in this matter of the decree of disjunction and erection already mentioned?

"That decree proceeds at the instance of, among others, the Duke of Roxburghe himself, the late Marquis of Lothian, William Oliver Rutherfurd, Esq. of Edgerston, and others, and it recites, *inter alia*, the Act of Parliament of Scotland, 1707, authorising the Court of Session, as Commissioners for the Plantation of Kirks and Valuation of Teinds, to, *inter alia*, disjoin too large parishes, and to erect and build new churches, &c. It also recites the Act 7 and 8 Vict. c. 44, entituled 'an Act to facilitate the disjoining or dividing of extensive or populous parishes in that part of the United Kingdom called Scotland,' and the 8th and 9th sections thereof, and after setting forth the erection of the church of Edgerston, manse, offices, and pertinents connected therewith, it proceeds as

interlocutor. No appearance was made in support of the Sheriff's judgment. The cause was heard by the First Division in November 1875, No. 121. June 1, 1876. Duke of Roxburghe, &c.

follows :—' That the said church has existed for a considerable period, and has been found of great advantage to the inhabitants of the district within which it is placed, which district is situated principally within the parish of Jedburgh, and partly within each of the parishes of Jedburgh, Oxnam, and Southdean, also in the said Presbytery; that with reference to the population and superficial extent of said parishes, and more particularly to those of the parish of Jedburgh, which contains a population of about 6000, it is highly desirable that an additional place of worship and additional spiritual superintendence should be provided and permanently secured in connection with the Church of Scotland, and for this purpose that a certain portion of the said parishes should be disjoined therefrom, and erected into a new parish *quoad sacra*.' It then sets forth that there has been the necessary provision made to secure a permanent endowment for the minister of the said new church and parish, and that the petitioner Mr Rutherfurd had undertaken, and was ready to make provision for the maintenance of the fabric of said church and others. It recites an application to the General Assembly for, and their grant of a constitution to, the said church, and the terms thereof, and that the property of the church had been vested in certain trustees named, and that the terms of the constitution had been complied with, and a decree of the Presbytery pronounced approving of the disjunction and erection of said church of Edgerston. It sets forth the description and boundaries of the district to be attached to the said parish and church of Edgerston, and adds, 'that this district above set forth and described, which is about seven miles in length by about three miles in breadth, contains a population of about four hundred; and although hitherto used only as a missionary station, there is at present a considerable congregation in connection with Edgerston church, and a corresponding number of communicants, and both are steadily on the increase.' By the decree the 'Court erect the church of Edgerston, situated within the parishes of Jedburgh, Oxnam, and Southdean, and Presbytery of Jedburgh, into a parish church in connection with the Church of Scotland; have disjoined, and hereby disjoin, *quoad sacra*, from the said parishes of Jedburgh, Oxnam, and Southdean, the district now attached to the said church,' the description of the boundaries of which district then follows; 'and have erected, and hereby erect, the said district into a parish *quoad sacra* in connection with the Church of Scotland, to be called now, and in all time coming, the church and parish of Edgerston; and have found and declared, and hereby find and declare, that the minister and elders of the said church shall have and enjoy the status, and all the powers, rights, and privileges of a parish minister and elders of the Church of Scotland,' &c. . . . .

" Now, what is the effect of disjoining lands from a parish *quoad sacra*, erecting them into another parish, and attaching them to another church? The church of Edgerston is declared to be a parish church, and the minister and elders are to have and enjoy the status and all the powers and privileges of ministers and elders of such. No doubt this is only *quoad sacra*. But it was long ago decided in the case of Drummond v. the Heritors of Monzie, Moneidie, Crieff, and others (1773, M. 7920), that the heritors of the lands annexed *quoad sacra* are not liable to contribute for upholding 'the fabric of the parish kirks from which they are disjoined.' A decision to the like effect was recently pronounced by Lord Ardmillan in the Outer-House in the case of the Scottish North-Eastern Railway Company v. Gardner (29th January 1864, 2 Macph. 537); and although that part of his Lordship's judgment was not affirmed in the Inner-House, because it was held not to fall within the conclusions of the summons, Lord Ormidale expressed his concurrence in it. Reference may be also made to the views thrown out by Lord Neaves in the case of the Duke of Abercorn (17th May 1870, 8 Macph. 746). No authority contrary to these cases was quoted to the Sheriff. No doubt in the case of Monzie and Crieff the heritors of the new parish were found to be liable in the expense of upholding the church in the new parish, but the lands were only annexed *quoad sacra*, and only disjoined

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and was again heard by them with three Judges of the Second Division in February 1876.

Argued for the appellants;—(1) This church was not a new church erected by the heritors in fulfilment of any statutory obligation upon them. It was a *surrogatum* for the old Abbey Church. The division of the area fell therefore to be made in the same proportion as that in which the area of the Abbey Church had been made, and as it existed at the date of the excambion. The new church was conveyed in the deed of excambion to the committee of heritors by name, and one of that committee had no lands out of the *quoad sacra* parish. The intention of the parties in entering into the excambion was clearly that matters should remain as they were as regarded the division of the area. (2) The heritors whose lands had been disjoined and erected into the *quoad sacra* parish would still be liable to maintain the fabric of the parish church to which they were still attached *quoad civilia*, and that in proportion to the valuation of all their lands in the parish as it was originally constituted. That being so, they were entitled to a part of the area of the parish church proportioned to their valued rent on the principle *cujus commodum ejus debet esse incommodum*. There was no allocation of area in the *quoad sacra* church to the heritors whose lands were attached to it, nor was there any obligation on them to maintain the fabric of that church; the

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quoad sacra from the former parish. It was not a disjunction and erection in general terms or *quoad omnia*. It is therefore the same as in the present case. It is true that the heritors of the disjoined lands are under the statute of Victoria not liable to be assessed for the expense of repairing the church and manse of the newly erected parish to which they are attached, and that the statute requires provision to be made otherwise for that purpose by obligation secured over the lands of the obligant. The statute and constitution of the church also provide that the rents of a portion of the seats of the church (but of a portion only) may be partly applied to that purpose in relief of the obligation.

"But this is just another way of throwing the burden of supporting the church on those for whom it is provided. For it seems not to make much difference in principle whether the heritor pays such expense for the benefit of himself and his tenants, recouping himself, so far as they are concerned, by the rents which he exacts from them, or that they and he pay it in the other form of seat-rents. The terms of the decree establish that the church and parish were erected for the accommodation of the inhabitants of the district, and it is to that church that they are expected and intended to resort to 'for the word and sacraments.' Accordingly the lands are disjoined from the parish of Jedburgh *quoad sacra;* they are no longer parts of that parish. It may be difficult to define all that the words *quoad sacra* mean; but surely it cannot be doubted that the preaching of the word and administering the sacraments and partaking are *inter sacra*, and these are the very benefits contemplated by the law in respect of which there is laid upon the heritors the burden and duty of providing and repairing churches, and in respect of which there is given to them, as the counterpart, a right for themselves and the tenants and occupants of their lands in the area of the church. It would surely be an extraordinary thing that the law should provide two parish churches, two parish ministers, and two kirk-sessions for the inhabitants of the same district. It appears to the Sheriff that the disjunction of the lands *quoad sacra* from the parish of Jedburgh would have no meaning if things were to remain in this respect exactly as they were before; and if the heritors in these disjoined lands were still to be liable for the repairing, and, if necessary, rebuilding the church of the parish from which they have been disjoined, and entitled to a portion of the seatings therein, and that for the benefit of the inhabitants of a district for whose convenience *in rebus sacris* a new parish church has been erected by decree of the Court of Teinds, in the terms and on the considerations therein expressed."

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At advising,—

LORD PRESIDENT.—My Lords, this is an appeal against an interlocutor pronounced by the Sheriff of Roxburghshire on a petition presented to him by the heritors of the parish of Jedburgh for the division of the area of a newly built church in that parish. The Sheriff, before proceeding to the actual work of dividing the area, thought it right, by the findings in his interlocutor, to clear away several difficulties that had presented themselves or had been suggested in the course of the discussion before him. With most of these we are not concerned. But that part of his interlocutor which is objected to principally by the appellants is in these terms :—" Finds that, by decree of the Court of Teinds, dated the 21st day of February 1855, the church of Edgerston, situated within the parish, was, under and in terms of the statutes 1707, c. 9, and 7 and 8 Vict. cap. 44, sections 8 and 9, erected into a parish church in connection with the Church of Scotland, and a considerable portion of what was then the parish of Jedburgh was disjoined *quoad sacra* from the said parish, and, along with small portions of the parishes of Oxnam and Southdean, the whole constituting a district about seven miles in length by about three miles in breadth, erected into a parish *quoad sacra* in connection with the Church of Scotland, to be called now and in all time coming the church and parish of Edgerston : Finds that, in so far as regards the dividing and apportioning of the area and sittings of the new parish church of Jedburgh recently erected, the heritors of the lands so disjoined and erected into the parish of Edgerston *quoad sacra* are not to be considered as heritors of the parish of Jedburgh." But in a subsequent part of his interlocutor, after defining the portion of the area that is to be appropriated to the burgh, and leaving two-thirds for the landward part of the parish, he finds " that the remaining two-thirds fall to be allocated and divided among the other heritors of the parish (excluding as aforesaid) according to their valuations as appearing in said valuation-rolls."

Now, the import and effect of this judgment is very clear. It settles that, in dividing the area of this new parish church, the heritors of lands which are no longer part of the parish of Jedburgh, but have been, with other lands, erected into a separate parish *quoad sacra*, have no right to claim any portion of the area of the parish church.

The question is one of some importance, and, it may be, of general application, although disputes regarding the division of the area of a parish church are by no means common ; and, indeed, these things are, as we know, almost always settled by arrangement. But there can be no doubt that when a new parish

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and was again heard by them with three Judges of the Second Division in February 1876.

Argued for the appellants;—(1) This church was not a new church erected by the heritors in fulfilment of any statutory obligation upon them. It was a *surrogatum* for the old Abbey Church. The division of the area fell therefore to be made in the same proportion as that in which the area of the Abbey Church had been made, and as it existed at the date of the excambion. The new church was conveyed in the deed of excambion to the committee of heritors by name, and one of that committee had no lands out of the *quoad sacra* parish. The intention of the parties in entering into the excambion was clearly that matters should remain as they were as regarded the division of the area. (2) The heritors whose lands had been disjoined and erected into the *quoad sacra* parish would still be liable to maintain the fabric of the parish church to which they were still attached *quoad civilia*, and that in proportion to the valuation of all their lands in the parish as it was originally constituted. That being so, they were entitled to a part of the area of the parish church proportioned to their valued rent on the principle *cujus commodum ejus debet esse incommodum*. There was no allocation of area in the *quoad sacra* church to the heritors whose lands were attached to it, nor was there any obligation on them to maintain the fabric of that church; the

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church is erected,—where the nature of the work is not merely an extension of the old church or repairs of the old church, but the erection of a new church,—the heritors or any of them are entitled to apply to the Sheriff to have the area divided among them according to their legal rights. Now, the legal rights of the heritors in connection with the parish church are, I think, very well settled. I do not think there can be any dispute about what they are. The heritors have the burden, which is imposed by statute, of building and maintaining parish churches, as well as other ecclesiastical buildings, and the buildings which they so build and maintain are in law the property of the heritors. But I need hardly add that they are only property in trust,—in trust, that is to say, for the whole body of the parishioners within the parish; and when, in the division of the area among the heritors, the accommodation in the parish church comes to be appropriated so much to one heritor and so much to another, I think, in like manner, each individual heritor becomes trustee for those of the parishioners that reside upon his estate. The portion of the area that is assigned to him is not his property in any sense of the word. The heritors are joint proprietors of the parish church itself, in trust, as I said already; but the portion of the area that is assigned to each heritor is given to him not to be occupied exclusively by himself and his family,—not to be shut up, for that is illegal,—not to be hired out for money, for that is equally illegal,—but to be used for the benefit of the parishioners who are resident upon his estate; so that each individual heritor, after the division is made, is equally a trustee for a portion of the parishioners, as the whole heritors, before the division was made, were trustees for the entire parish. Now, I do not at all doubt that both the burden and the right of the heritors in this matter are civil burden and civil right, and fall to be adjudicated upon by civil jurisdiction only. All that is perfectly clear. The title of the heritors to the parish church is a title founded upon civil law, and their burden to maintain and uphold the parish church is a burden imposed upon them by public statute. But it does by no means follow that those for whom they hold the parish church in trust have civil rights in connection with it. That would be a most dangerous assumption. The parishioners other than the heritors, I apprehend, have no right or interest in the parish church except such rights and interests as are entirely *inter sacra*. They are entitled to attend the parish church to hear the word, and there to have the sacraments administered to them, and they are entitled to the pastoral superintendence of the minister of that church, and they are liable to the kirk-session of that church in all ecclesiastical discipline and censure; and, so far, there can be no doubt that the parishioners are exclusively interested in that church, and I may say, at the same time, exclusively attached to that church, for according to the ecclesiastical law of Scotland it is their proper church, and they have no other. But when a parish is erected *quoad sacra* under the operation of the statute 7 and 8 of the Queen, and a portion of an old parish is cut off from that old parish and erected into a new parish *quoad sacra*, what is the result to the people of that district which is so disjoined and erected? My Lords, for answer to that question I look to the case of Hutton v. Harper, and I really have nothing to add to what I there said, and in which I understood that all your Lordships who were present and took part in that judgment concurred. I said then, as I am prepared to say more shortly now, that the people within the district that is so disjoined and erected have, after the disjunction and erection, no parish church but the new parish church *quoad sacra*. To it alone they are in law entitled to

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resort as their parish church. They are subject to the pastoral superintendence of the minister and to the ecclesiastical jurisdiction of the kirk-session of that *quoad sacra* parish and church. They must resort there for the administration of the sacraments and the solemnisation of marriage, and that is the proper place, as we also held in that case, for their banns to be proclaimed. Now, that being so, the question arises in the present case, first, whether the people who formerly were in the parish of Jedburgh, but are now in the parish of Edgerston *quoad sacra*, are not completely severed and cut off from all connection with the parish church of Jedburgh. I am speaking now of the body of the parishioners, not of the heritors, and to that I think there can be but one answer,—that they are most effectually cut off from and have no longer any right or interest in the parish church of Jedburgh, and that their only parish church is the parish church of Edgerston, which, according to the judgment in Hutton v. Harper, is just as much a parish church as the parish church of Jedburgh.

Well, then, if that be so, the question comes to be, whether the heritors, the proprietors of those lands which form the new parish *quoad sacra*, are nevertheless entitled to have a portion of the area of the old parish church of Jedburgh allocated to them in the same way as if the erection of the new parish had not taken place. It is said that they are not relieved from their liability to maintain the old parish church, and that it would be very strange if they were to be subject to that liability and not to have the corresponding privilege of having a portion of the area assigned to them. That is at first sight very plausible; but if you remark for a moment what is the purpose for which a portion of the area is assigned to those heritors I think we shall find there is really no strength in the argument at all. The purpose of assigning a portion of the area to those heritors is that they may accommodate the tenants and residenters upon their estates. But the tenants and residenters upon their estates are bound to go elsewhere, and do not go to the parish church of Jedburgh, for it is no longer their parish church, and if these gentlemen, being, as I have said, trustees for the parishioners, find they have nobody for whom they can use the portion of the area they ask to have assigned to them, it would be very strange that they should still be entitled to have it. They are not entitled to shut it up; they are not entitled to let it out for money: What can they do? They cannot fill it with their own people, and therefore, even if it were assigned to them, they could make no use of it. Now, that seems to me to be a plain practical answer to the demand which is here made. It may very well be that, notwithstanding this, they may still be liable in the old burden of maintaining the parish church of Jedburgh. I am very far from giving an opinion upon that question, because it is not before us, and we could not decide it even if we were willing to do so.

But assuming that that is so,—assuming that the heritors of the disjoined district are still liable to bear their share of the maintenance of the parish church of Jedburgh—I do not think it in the least degree follows that they are entitled to what they now demand. It might perhaps have been very properly provided in the statute 7 and 8 of the Queen that they should be relieved of that burden, or it might very properly have been provided that they were not to be relieved of their burden, although they no longer had any interest in the division of the area, and I think it is to be regretted that the statute did not decide the matter the one way or the other. The truth is, that the legislation in that statute is in some of these respects rather imperfect legislation, and all that we can do is to say

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what is the natural and necessary legal consequence of that which the statute has done in those cases in which it has not itself provided for those consequences.

I do not at all agree with the view which the Sheriff takes of the case of Crieff. I think the authority of that case is questionable. There are a variety of reports of the case, and a perusal of the Session Papers has rather led me to the conclusion that there was no very general question decided there at all,—that the case was one of a very special kind indeed,—and, therefore I confess I do not attach any importance to that authority. I proceed entirely upon what I conceive to be the direct, legitimate, and necessary consequence of the erection of a parish *quoad sacra* under the operation of the statute 7 and 8 of the Queen.

My opinion, therefore, is, that the interlocutor of the Sheriff, so far as it is complained of here, is well founded.

Lord Deas.—It is historically known that, from a remote period, probably from about the time when Presbytery was finally established in Scotland, down to the year 1874, or thereby, those of the parishioners of Jedburgh who adhered to the Establishment habitually assembled for the purposes of public worship in a portion of the nave of the old abbey of Jedburgh, which has immemorially been considered and dealt with as the parish church. In order to adapt it for that purpose great liberties were from time to time taken with the elegant architecture of the abbey, by roughly building up portions of the windows, introducing an intermediate ceiling, and other alterations, which, although made at much expense, greatly deteriorated the appearance of the venerable pile, as those of your Lordships who have had occasion, as I have had for many years, to hold Circuit Courts at Jedburgh, must often have seen. In the meantime, the late Marquis of Lothian, the proprietor of the abbey, whose cultivated tastes, matured by study and improved by travel, naturally suggested to him such a task, had become desirous to remove the blots which hid or defaced the beauty of the building, and marred its effect as an interesting relic of antiquity. With this object the late Marquis, in 1869, entered into an agreement with the heritors, including the burghal community of Jedburgh, and with the Presbytery, to erect, at his own expense, a parish church on a different site, such as in all respects would satisfy the heritors and Presbytery, and bound himself thereafter to enter with them into a contract of excambion, conveying that church in perpetuity to the heritors, in consideration of their conveying to him all right and interest they had in the existing church (which is therein recognised as being the then existing parish church), the Marquis engaging that, after the materials thereof should be removed, so far as consistent with the stability of the ancient building, the abbey should be retained as a preserved ruin, accessible to the public, under appropriate regulations, in all time coming. After the death of the late Marquis, his brother, the present Marquis, desirous to carry out in all respects the designs of his predecessor, acquired the necessary ground, and erected thereon the handsome new church, the area of which is now sought to be divided, and commenced expensive operations, still in progress when I was on circuit there a few weeks ago, upon the abbey itself, besides erecting (what I do not observe to have been stipulated for) a new manse, in order to get quit of the old manse, as an obstruction to the view of the ancient ruins. On the new church being completed, the deed of excambion and agreement now before us, of 17th and 20th November 1874,—stipulated for in the agreement of 1869,

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and embodying and giving effect to the purposes and conditions of that agreement, —was duly executed by all the parties concerned. This deed of excambion formally dispones and conveys the ground on which the new church is built, and the church itself, to the persons therein named, and their respective successors, "as trustees for the said heritors of the parish of Jedburgh," that is to say, for the whole heritors of the civil parish, "heritably and irredeemably," and, on the other hand, the committee of heritors appointed for the purpose, "as representing the said heritors of the parish of Jedburgh, and duly authorised as aforesaid to execute these presents on their behalf," with consent of the Presbytery of Jedburgh, disponed and conveyed to the Marquis, "and his heirs and assignees whomsoever, heritably and irredeemably, All and Whole the present parish church of Jedburgh, situated within the abbey of Jedburgh and county of Roxburgh, together with the materials of the said church, and all right, title, and interest of the heritors of the said parish of Jedburgh, and of the community of Jedburgh, in the said church, and materials thereof," the Marquis becoming bound, on the terms already mentioned, as to the preservation of the ruin.

Nearly twenty years before the date of the contract of excambion (viz. in February 1855) the lands now forming the *quoad sacra* parish of Edgerston had been disjoined from the parish of Jedburgh, and erected into a separate parish *quoad sacra*, under sections 8 and 9 of the statute 7th and 8th of the Queen, c. 44; but it is not alleged that this had had any effect, or led to any change, upon the previously existing allocation and possession of the area of the old church, as settled by voluntary agreements in 1793 and 1834. The decree of disjunction and erection was necessarily an echo of the 8th and 9th sections of the statute under which it proceeded. The individual contributors became bound and gave security for permanently repairing and upholding the previously existing fabric of the church, now called the church of Edgerston, manse, offices, and appurtenances, and for payment of the prescribed stipend to the minister. The whole sittings were directed to be specially appropriated in terms of the statute—viz., one-tenth to be free to all comers; a portion, not exceeding two-tenths, to be let at rents not exceeding a rate to be fixed by the Presbytery; a pew to be set apart for the minister; another for the elders; and the remaining sittings to be let in a manner to be agreed on by the minister and the contributors for the endowment of the church, and the proceeds to be applied to the purposes specified in the statute. No right was conferred on the heritors of the *quoad sacra* district to seats in the church unless they chose to pay for them. In their capacity of heritors they obtained no unconditional rights, and became liable to no burdens in connection with that church, or the district assigned to it; and, on the other hand, nothing was said, or, so far as I see, could have been said, in the decree, consistently with the statute, to deprive them of any rights of occupancy, or relieve them from any burdens connected with the then existing parish church of Jedburgh.

Matters had been in this position for nearly twenty years when the contract of excambion now under consideration was entered into, and to which no objection is taken as being other than a legal and binding contract. The conveyance in that contract is a conveyance of an heritable subject in favour of the whole heritors of the civil parish of Jedburgh, and the consideration given for it is, in like manner, a conveyance of an heritable subject which previously had been vested in the whole heritors of that parish. The question did not and could not arise what would have been the respective liabilities and rights of

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and embodying and giving effect to the purposes and conditions of that agreement, —was duly executed by all the parties concerned. This deed of excambion formally dispones and conveys the ground on which the new church is built, and the church itself, to the persons therein named, and their respective successors, "as trustees for the said heritors of the parish of Jedburgh," that is to say, for the whole heritors of the civil parish, "heritably and irredeemably," and, on the other hand, the committee of heritors appointed for the purpose, "as representing the said heritors of the parish of Jedburgh, and duly authorised as aforesaid to execute these presents on their behalf," with consent of the Presbytery of Jedburgh, disponed and conveyed to the Marquis, "and his heirs and assignees whomsoever, heritably and irredeemably, All and Whole the present parish church of Jedburgh, situated within the abbey of Jedburgh and county of Roxburgh, together with the materials of the said church, and all right, title, and interest of the heritors of the said parish of Jedburgh, and of the community of Jedburgh, in the said church, and materials thereof," the Marquis becoming bound, on the terms already mentioned, as to the preservation of the ruin.

Nearly twenty years before the date of the contract of excambion (viz. in February 1855) the lands now forming the *quoad sacra* parish of Edgerston had been disjoined from the parish of Jedburgh, and erected into a separate parish *quoad sacra*, under sections 8 and 9 of the statute 7th and 8th of the Queen, c. 44; but it is not alleged that this had had any effect, or led to any change, upon the previously existing allocation and possession of the area of the old church, as settled by voluntary agreements in 1793 and 1834. The decree of disjunction and erection was necessarily an echo of the 8th and 9th sections of the statute under which it proceeded. The individual contributors became bound and gave security for permanently repairing and upholding the previously existing fabric of the church, now called the church of Edgerston, manse, offices, and appurtenances, and for payment of the prescribed stipend to the minister. The whole sittings were directed to be specially appropriated in terms of the statute—viz., one-tenth to be free to all comers; a portion, not exceeding two-tenths, to be let at rents not exceeding a rate to be fixed by the Presbytery; a pew to be set apart for the minister; another for the elders; and the remaining sittings to be let in a manner to be agreed on by the minister and the contributors for the endowment of the church, and the proceeds to be applied to the purposes specified in the statute. No right was conferred on the heritors of the *quoad sacra* district to seats in the church unless they chose to pay for them. In their capacity of heritors they obtained no unconditional rights, and became liable to no burdens in connection with that church, or the district assigned to it; and, on the other hand, nothing was said, or, so far as I see, could have been said, in the decree, consistently with the statute, to deprive them of any rights of occupancy, or relieve them from any burdens connected with the then existing parish church of Jedburgh.

Matters had been in this position for nearly twenty years when the contract of excambion now under consideration was entered into, and to which no objection is taken as being other than a legal and binding contract. The conveyance in that contract is a conveyance of an heritable subject in favour of the whole heritors of the civil parish of Jedburgh, and the consideration given for it is, in like manner, a conveyance of an heritable subject which previously had been vested in the whole heritors of that parish. The question did not and could not arise what would have been the respective liabilities and rights of

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parties if a new church had required to be erected at the expense of the heritors. It had not even been determined or ascertained that a new church had become necessary. Mr Bryce, with whose eminent qualifications we are all familiar, had reported that, by expending £2700, in the way he pointed out, "the church will become fitted for public worship," with the same amount of accommodation as it then afforded, while Mr Bell, the only other man of skill employed, reported that, by an expenditure of £2000, the church "would form an equally suitable and more noble place of worship than could be got beyond the walls of the abbey for ten or twelve thousand pounds." In short, it was not the necessity for a new church to accommodate the congregation, but the laudable desire of the noble Marquis to vindicate the dignity and beauty of the historic building which led to the agreement under which the new church was erected, and to the contract of excambion subsequently executed.

The question at issue, therefore, rather appears to me to be limited to this:—What is the fair and legal import and effect of the contract of excambion of November 1874? The old church accommodated about 1000 sitters; the new church, it was explained at the bar, accommodates about 150 more than that number. The one church has been excambed for the other, and the natural result of that excambion appears to me to be that the parties who were previously in possession of the one should now be entitled to possession of the other. The case is not varied by the fact that the Marquis had to build a church to be conveyed by the excambion, in place of being possessed of an existing church suitable to be so conveyed. It is still a case of excambion of one church for another, and nothing can be more expressive of the nature of the transaction than the word excambion itself, which is both the legal and the conventional name of the contract.

It is true that, although, after enlarging the number of free sittings which are proper to be set apart in every parish church, the number to be allocated would have been the same as before, there would necessarily be a change of arrangement, rendering judicial regulation necessary; but for this the Sheriff was just as competent where the question arose upon a contract of excambion as if it had arisen in any other way. It is true, as the Sheriff remarks, that the petition craves a division of the area "in terms of law," but that I take to be in terms of law applicable to the agreement which is expressly narrated and founded on in the petition. How far the Sheriff's judgment might or might not, in certain events, preclude a declarator in this Court, it is not necessary here to consider; but I am not, for my own part, disposed either to throw out the proceedings for want of jurisdiction, or to hold them conclusive as amounting to an arbitration. An arbitration certainly they are not, and were never meant to be. They are a reviewable process, or they are nothing. It is on the merits that I am disposed to differ from the able judgment of the Sheriff. I think what he should have done was simply to have regarded the new area as substituted for the old,—allocating it, as nearly as might be, as the parties themselves had previously and immemorially allocated it, and making no farther changes than the different arrangement of the seats rendered necessary. There was no expense to be allocated either for building or for repairs. All that fell to be done was to modify and regulate the possession so as to give effect to the contract of excambion.

If, however, your Lordships do not think this limited view sufficient, of itself, for the disposal of the case, I am then of opinion that the first thing to be con-

sidered is who would have been liable for the expense of the church if it had fallen to be built by the heritors themselves?

I cannot find any difference of opinion among the authorities that the two things go together—the liability for the expense of erecting a new church, and the right to a share in the allocation of the area of that church.

It is upon this principle that questions between the burghal and landward portions of a parish have been settled. We have the weighty opinion, to this effect, of Lord Braxfield in the first case of Crieff, nearly a century ago (Hailes, pp. 892-3),—"They who profit by a church when built should naturally be at the expense of building it. Here the town must have three-fourths of the area of the church, because three-fourth of the inhabitants of the parish live in the town, and consequently it must pay three-fourths of the expense." In the same case Lord Monboddo said,—"If the inhabitants of the town pay nothing, they can have no share in the division;" and the Lord President observed,—"If the heritors build the church the area must belong to them." Accordingly the interlocutor of the Court expressly found that the expense of that portion of the church which was allotted to the landward heritors must be defrayed by them according to their respective valued rents, and their share of the area divided among them in the same proportion; and that the expense of the portion allotted to the burghal proprietors must be defrayed by them according to their respective real rents, and their share of the area divided among them in the same proportion (M. 7927).

The same principle, viz., that the burden of building and maintaining the church infers a corresponding right to a share of the area, is distinctly laid down in the late case of Reid v. The Commissioners of Woods and Forests, 10th February 1850, 12 D. 1211, and runs through all the cases.

It has been suggested that, in the present case, we are not called upon to consider whether the heritors in the *quoad sacra* parish do or do not remain liable to maintain the church of the old parish, and to rebuild it if that should become necessary. I cannot take that view of the matter. The immediate question, no doubt, is their right to a share of the area. There is no burden at present exigible, because the Marquis has liberally agreed to relieve them of whatever is instantly payable; but their permanent liability either remains or does not remain, and upon that depends their having right or having no right to a share of the area in this process of division, if it is to be regarded, as your Lordship proposes to regard it, as a regular process of that description. To exclude them from all share in the division of the area of the church, without reference to whether they are or are not liable to contribute to the maintenance and ultimate re-erection of the church, would be to divorce two things which, in their own nature, are, and in the practice of the Court, always have been, inseparably united. Such a course would neither be just nor judicial. It is in respect of the permanent liability or of the non-liability alone that our judgment can proceed, whether these words be used in the judgment or not, and that question is, therefore, as I have said, the first point to be considered.

Now, apart from the effect of the *quoad sacra* disjunction and erection, nobody will dispute, that, in a landward parish, liability to build and maintain the parish church rests exclusively and equally on all the heritors in proportion to their valued rents. This is, in substance, matter of statutory enactment, because, although the old Scotch statutes, which I need not go over, bear to lay the burden upon the parishioners, the word parishioners has been invariably

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construed as meaning heritors. In the present case there is no dispute between the landward heritors and the burghal heritors or proprietors. These two classes of parties are agreed between themselves, so that, for the purposes of this argument, the question is to be taken as arising in a purely landward parish. That question simply is, does the statute 7 and 8 Victoria, c. 44, when it is followed by a disjunction and erection of a *quoad sacra* parish, under sections 8 and 9, relieve the heritors in that *quoad sacra* parish from a liability which, by the previously existing statute law, lay upon them, equally with the other heritors of the original parish, to maintain, and, if necessary, to rebuild the parish church.

If we are of opinion that this is the meaning and effect of these sections of the statute we ought so to lay it down. But, for my own part, I cannot find this in the statute. There is a clear distinction, which was given effect to in the case just mentioned of Reid v. The Commissioners of Woods and Forests, between a disjunction and erection *quoad omnia*, under the earlier sections of this statute, and a disjunction and erection *quoad sacra*, under sections 8 and 9. That difference is not new. Every lawyer knows that, long before the date of this statute, the Commissioners of Teinds had and exercised the power in both ways, but the effect of the one was never confounded with the effect of the other. The provisions I have noticed in sections 8 and 9 of this statute relative to the stipend, seat-rents, and supporting the fabric of the new church, manse, &c., contrasted (as was observed in Reid's case) with the terms of the previous sections, make it clear that, as to these matters, this statute does not destroy the distinction between the one kind of disjunction and erection and the other. Liability for the expense of maintaining and rebuilding the parish church is a civil liability. No ingenuity can plausibly represent it as anything else. It is precisely similar, in this respect, to liability for the stipend. The one is a burden on the lands and the other a burden on the teinds, and it might just as well be contended that a mere disjunction and erection *quoad sacra* relieved the teinds of the one burden as that it relieves the lands of the other. On the same principle the uniting of lands to a parish *quoad sacra tantum* does not render the lands so united liable to civil burdens in the parish to which they are so united, as was long ago found in Park v. Maxwell, 13th July 1748 (M. 8503, and Elchies, *voce* Manse, No. 3), where lands united *quoad sacra* to the parish of Carmunnoch were held not liable to contribute towards building a manse for that parish. Bankton accordingly (book 2, tit. 3, sec. 50) lays down the law thus:—"Part of a parish on some occasions is dismembered from one parish and united to another *quoad sacra* only, *i.e.*, in respect of divine service. This is done where it is more commodious for the inhabitants of the dismembered part to attend the ordinances at the neighbouring parish church than at their own, and only subjects them to the cure and charge of the minister of the adjacent parish; but in all questions of a civil concern it remains still a part of the same parish of which it was formerly before the annexation; and the heritors therein are not bound to contribute to the repairs of the church or manse of the parish to which the lands are united in that manner;" and he cites the case of Park v. Maxwell, which I have just referred to. Erskine lays down the same doctrine, and says,—"But such annexation affects only the inhabitants; the lands continue in all civil respects part of the old parish"—(2, 10, 64). The case of Thomson v. Pollock and others, 17th November 1808, F. C., which related to the maintenance of a pauper child, illustrates the same

principle. The interlocutor of the Lord Ordinary, which was unanimously adhered to, expressly bore to be in respect that the lands which were annexed *quoad sacra* to the parish of Gorbals "are locally situated within the parish of Govan, and that the said act of annexation does not affect the civil rights of the parties."

There can be no distinction, in this respect, between civil rights and civil burdens. In the opinion of your Lordship (the Lord President), concurred in by the other Judges then present (six in number), in the late case of Hutton v. Harper, 7th July 1875 (2 Rettie, p. 893), your Lordship expressly mentions "the maintenance of churches" among the burdens which, subsequent to the Reformation, have been "naturally and even necessarily classed *inter civilia*."—(*Vide*, p. 900). I quite concur in your Lordship's opinion upon that point, as well as in the soundness of the judgment pronounced in that case, which, indeed, has been affirmed by the Court of last resort. But that case stands in contrast to the present. The proclamation of banns, there in question, was an act performed within the church to satisfy not the civil law, but the rules of the Church. It is one of the tritest principles of the law of Scotland that marriage is a civil contract perfected by consent alone. The marriage is just as valid in law without as with the proclamation of banns, which could not well therefore be regarded otherwise than as a *quoad sacra* act. The obligation to maintain, in perpetuity, the parish church of Jedburgh is an obligation *quoad civilia* attaching to the lands in the district, which have not been disjoined *quoad civilia* from the original parish, and the civil law consequently demands implement of that obligation. The case of Hutton, therefore, only illustrates the difference between a *quoad sacra* act and a civil liability or a civil right.

Holding that the heritors in the *quoad sacra* parish of Edgerston remain liable to maintain, and, if necessary, to rebuild the parish church of Jedburgh, I think it follows, as a necessary consequence, that, in a process of division, they are entitled to a proportion of the area, unless, by prescription or agreement, some different arrangement has been sanctioned, which, in the present case, is not averred.

The only authority which has been supposed to imply the contrary is the Crieff case of Drummond, 2d February 1773, F. C., and M. 7920. But that case, when carefully examined, will be found to be quite consistent with the rule *commodum sequitur onus*, and to have been intended, in fact, to carry out that rule. The reports, or rather notices, of it (for they cannot be called reports) give nothing but the judgment,—the effect of which depends entirely on the circumstances, which are not given to any extent, probably just because they were so special that the case could not form a precedent for any other. I have attentively read the Session Papers, so far as extant, and I have come to the conclusion that the judgment had reference to the views contended for by the respective parties in the very special circumstances of that case, and was not meant to disturb the general law as laid down by Bankton (ii. 8, 50) and Erskine (ii. 10, 64), and recognised in all previous decisions, both as to rights and burdens connected with a parish church.

The pursuer of the action was Mr Drummond, whose lands of Logiealmond were disjoined *quoad sacra* from the parish of Monzie, and annexed *quoad sacra* to the parish of Moneidie. The parties who appeared as defenders were, 1st, the Duke of Atholl, whose lands of Glenalmond were disjoined *quoad sacra* from the parish of Crieff and annexed *quoad sacra* to the parish of Monzie; 2d,

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certain heritors of the original parish of Monzie; and 3d, certain heritors of the original parish of Moneidie.

The decreet of disjunction and erection referred to had been pronounced in 1702, and included portions of various other parishes, the ground assigned for that decreet of disjunction being distance from the parish kirks. Mr Drummond's lands of Logiealmond, for instance, were upwards of ten miles from the parish kirk of Monzie but quite near to the parish kirk of Moneidie. The parties being at variance as to the possession which had followed by the tenants of Logiealmond in the kirk of Moneidie, it was agreed to hold certain declarations, taken before the minister, as evidence. From these declarations it appeared that, from the date of the decreet downwards, Mr Drummond's tenants of Logiealmond had been accommodated with seats in and attended the kirk of Moneidie, in place of the kirk of Monzie; that, up to 1722, they sat in a loft on the north wall of the kirk of Moneidie; that in that year a loft was built for them, at their own expense, on the west wall of that kirk, which was called Logiealmond loft; that they occupied this loft till it was broken down and removed in the course of some alterations being made upon the kirk; and that, from that time forward, they still continued to come to the same kirk and sat in it wherever they could find room. It was said there had been some formal division of the area of the kirk of Moneidie prior to the date of the decreet, but of this there was no evidence, and it was not alleged that there had been any subsequent division.

Before these declarations were taken a supplementary summons had been brought by Mr Drummond against the heritors of Moneidie, which is not among the papers preserved. But it is stated, *narrativé*, in the information for the Moneidie heritors, that the leading conclusions of that summons were in these terms:—"1mo, that he (Mr Drummond) and his tenants of Logiealmond had an undoubted and just title to a share of the area either of the kirk of Monzie or Moneidie, in proportion to his valued rent, and that a division, either of the one kirk or the other, ought to be made and a seat set apart for him; and that he should be free in all time coming of the expense of repairing and upholding the church, churchyard dike, manse, and schoolhouse of the said other church. 2do, Or, in case it should be found that he was not entitled to a share of the area of either of the churches of Monzie or Moneidie, that, in that case, he should be free of any expense of repairing or upholding the same."

The same paper further bears:—"These processes having afterwards been conjoined by the Lord Ordinary, it was contended for the pursuer at a calling of this date (6th December 1770) that he was entitled to kirk-room in one or other of the kirks of Moneidie or Monzie, and was only bound to uphold one or other of them, and declared that, if he was freed of all burden of the kirk of Monzie, he would, at his own expense, build and uphold an aisle to the kirk of Moneidie for accommodating himself and his tenants; but that, if he was not freed of the burden of the kirk of Monzie, the heritors of Moneidie must find room for him."

As regards the heritors of Moneidie, they "declared that they were willing to allow Logiealmond to build an aisle to the church of Moneidie at his own expense; but that, as they had peaceably enjoyed, past all memory, their possession of the body of the church, which was no more than sufficient for their own accommodation, they could not be obliged to give up those possessions in

order to accommodate Logiealmond, or to lay any additional burden on themselves." No. 121.

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On the other hand, the heritors of Monzie pleaded, in substance, that the pursuer, Mr Drummond, must find kirk-room as he best could in the kirk of Moneidie, in which he and his tenants had been in use to be accommodated, but that he must remain liable to repair the kirk of Monzie. For the Duke of Atholl it was specially contended, "that as the tenants of his lands annexed to this parish had been in possession, long past the years of prescription, of the seats which they now possess in the church of Monzie, they could not now be disquieted by the pursuer, whose lands had been annexed to the parish of Moneidie, where his people have a right to seats and to attend divine ordinances."

It was in this state of the pleadings that the interlocutor was pronounced, which is said to have been in these terms:—"The Lords find that the heritors of the lands annexed *quoad sacra* are liable in their proportion of upholding the fabric of the kirks to which they are annexed, and in no other parochial burden: Find that they are not liable to contribute for upholding the fabric of the parish kirks from which they are disjoined; but that they remain liable in all other parochial burdens in these parishes; and remit to the Lord Ordinary to proceed accordingly."

It is obvious, from these quotations, that it would be very unsafe, to say the least of it, to hold that the judgment in the case of Drummond was intended to alter or disturb the general law, as ruled in previous cases, and laid down by the institutional writers. That judgment rather seems to have been intended to give effect to the usage which, for nearly double the period of the long prescription, had followed upon the decreet of 1702, and to the mutual concessions and expressed wishes of the parties, with such modifications only as were necessary to make the result arrived at a consistent result. But the principle affirmed, after all, was that the right to the area and the burden of supporting the fabric of the church, must go together; and that is precisely the principle which the appellants seek to vindicate in the present case. They are bound to support the fabric of the church of Jedburgh, and consequently they claim a share of the area of that church. They have no right to any share of the area of the church of Edgerston, and they are admittedly not bound to support the fabric of that church. In both of these respects the case differs from the case of Drummond, which, whatever view may be taken of it, cannot form a precedent for the Sheriff's judgment in this case. There was indeed, in the case of Drummond, no *quoad sacra* church or *quoad sacra* parish at all. It was a case of prescriptive usage and special arrangement with reference to different parish churches, properly so called, and decided no question of general law. The existence of the judgment in that case could not be unknown to the Judges in the comparatively recent case of Reid v. The Commissioners of Woods and Forests, for besides being noticed in the Faculty Collection and the Dictionary, it was referred to in a note by the first editor of Erskine, who does not, however, seem to have looked beyond the interlocutor, which, as I have said, is all that is to be found in either of the reports. But the Judges, in Reid's case, obviously did not regard the judgment as disturbing the old doctrine enunciated by Lord Braxfield in the case of Crieff. On the contrary, the Lord Justice-Clerk expressly said, in Reid's case, that the disjunction and erection being only *quoad sacra*, the heritors "remain liable for the maintenance of the old church," the new church being maintained from the rents of the seats, which the heritors might

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take or not as they chose; and Lord Mackenzie observed,—"If the heritors are relieved from the maintenance of the church, they have no right to have a division of the area."

It is not because I suppose that your Lordships will think the case of Drummond, to any extent, or in any view of it, a precedent for the Sheriff's judgment here that I have thought it right to analyse that case thoroughly, but because the imperfect notice of it in the books is calculated to mislead, and the Session Papers, even to those who have access to them, being diffuse and voluminous, the true nature of it is not easily ascertained. Laying it aside, I venture to say that the authorities are uniform to the effect that, at the date of the passing of the Act 7 and 8 Vict., cap. 44, the law was that the heritors were bound to build and maintain the parish church, and were entitled to participate in the division of the area in proportion to the valued rent (or real rent as the case might be) on which they were assessed.

The statute in question does not say that when a disjunction and erection, applicable to a portion of the parish, takes place, under sections 8th and 9th of the statute, this shall affect either the burden of maintaining the parish church or the right to participate in the area. It is said that this is done by implication. Or rather it must be said (and the current of opinion among your Lordships seems, accordingly, to be drifting to that) that the right is taken away by implication, but the burden remains. This is attributed to imperfect legislation. I can understand that if the Legislature had expressly abolished the right to participate in the area of the parish church, and said nothing about the burden, we might have had to give effect to the abolition, although we thought the legislation imperfect in saying nothing of the burden. But I can find no implication here which, if it applied to the right, would not apply to the burden. Nor, so far as I can see, have any grounds been suggested for such implication which a Court of law can give effect to, either as to the one or the other. The legislation may, very possibly, be imperfect; but if so, it is an imperfection which the Legislature alone can remedy. If we were to attempt to deal with it we should be legislating and not judging.

None of your Lordships, I presume, will say that the right of an heritor to sittings in a parish church for himself and his tenants is a *quoad sacra* right. I never heard that suggested either at the bar or on the bench; and if there be any authority for it I am ignorant where it is to be found. We have no consecration of parish churches in Scotland. It is nearly two centuries ago since the Lords found, in the case of Lithgow v. Wilkieson (15th January 1697, M. 9637), "that both seats in churches and burial-places were not *res sanctæ et religiosæ*, so as to be *extra commercium*, but were conveyable by infeftment and affectable by creditors,"—that is to say, they were adjudgeable by creditors along with and as pertinents of the lands; or, where there was a right to a particular aisle or seat secured by infeftment followed by prescriptive possession (of which there are known instances), that right might be adjudged from the owner. The case of Lithgow seems to have been a competition for a family seat between the purchaser of a few acres of the lands, whose disposition made no mention of the seat, and the purchaser of the mansion-house, whose disposition expressly conveyed the seat; but the merits of that competition do not enter into the purpose for which I mention the case.

I may observe, however, that the allocation of a family seat to a principal heritor is simply a sub-division between himself and his tenants of the portion

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of the area corresponding to his whole valued rent, as was found in the case of The Earl of Marchmont v. The Earl of Home and Others, 17th December 1776, M. 7924; so that there never can be a good claim to a family seat unless there be a good claim to a share of the area corresponding to the heritors' whole valued rent.

Nor can I see the consistency of holding the right of the heritor to be a civil right, and the right of his tenants to be a *quoad sacra* right. The heritor may farm his own lands—many heritors do—or he may farm a portion of his lands, sometimes larger, sometimes smaller. Is the right to vary from civil to sacred, and sacred to civil, according to such circumstances, which are constantly varying? That would be very anomalous; and equally so that the same act of sitting in the church which was *quoad sacra* in the tenant should be *quoad civilia* in the landlord—in other words, that the right to the same seat should be civil or sacred according as a heritor or a tenant happened, for the time being, to occupy the seat. The only consistent view is that the right must be the same whoever exercises it. If it were a *quoad sacra* right the minister and kirk-session might be expected to have a control over it. But it was determined a century and a half ago that they have none.—Heritors of Falkland v. The Minister and Kirk-Session (20th February 1739, M. 7916).

The right to a portion of the area of a parish church is a pertinent of the lands. It is comprehended in the infeftment, and is just as much a civil right as the right to the lands themselves. It is not only a civil right, but it is a heritable right. It descends to the heir-at-law along with the lands, and it passes to a purchaser or other disponee of the lands as part and pertinent, although not mentioned in the disposition. So much is this the case that it cannot, unless under very peculiar circumstances, be separated from the lands, nor even from the occupancy of the lands. The tenant's claim to the sittings corresponding to the valued rent of the lands he occupies is a claim in his own right, to vindicate which nothing is necessary but production of his lease of the lands, although the lease may be silent on the subject of these sittings. These very restrictions on the power of the proprietor, in the use and disposal of the right, afford the strongest illustration that can well be given of its being an inherent pertinent of the lands, and never to be held disjoined from them by implication.

In the case of Duff v. Brodie (29th June 1769, M. 9644) the report bears:—"The question was, whether a seat in a church was understood to be carried by a disposition of the lands, without being expressed in the disposition?" "The Lords found the pursuer (the disponee) entitled to the seat."

In the case of Peden (21st November 1770, M. 9644) a rural estate was purchased by the burgh of Paisley, at a judicial sale, without any mention being made of the church-seat. A house and garden in the town of Paisley were, at the same sale, purchased by a lady, Mrs Cochrane, who took possession of the seat, and used it undisturbed for several years. The magistrates having then objected to her disponee, Mrs Peden, retaining the seat, Mrs Peden applied to the Sheriff to vindicate her possession. The Sheriff found she had no right to the seat. The Lord Ordinary remitted *simpliciter*, and the Lords unanimously adhered.

Mr Erskine accordingly says (ii. 6, 11),—"The right in the area of the parish church, though it cannot properly be called part of the lands contained in the charter, is yet so closely connected with them that it is carried to the purchaser

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as pertinent, in virtue of the natural right that every landholder has in such a proportion of it as corresponds to the valuation of his lands in the parish;" and he cites the case of Duff, which I have just referred to.

But it is suggested (and this seems the view mainly relied on) that there are no longer any parties connected with the lands to occupy the relative seats in the parish church.

This, however, depends upon the pleasure of the heritors in the *quoad sacra* parish and their tenants. There is nothing, that I know of, to prevent any or all of them continuing to attend the parish church as formerly, if they think proper. They may prefer to occupy their free seats in the parish church to paying for seats in the *quoad sacra* church, or they may choose sometimes to attend the one church and sometimes the other. There is happily no thirling of those who adhere to the Church of Scotland to a particular clergyman or a particular church. It is common enough for those of us who have town houses and country houses to take the benefit of the only ordinances known in the Scotch Church, viz., baptism and the Lord's Supper, sometimes in the town church and sometimes in the country church, whether it be a proper parish church or a *quoad sacra* church. And there may be those who do not care to take the benefit of the ordinances in either church, but who are not thereby disqualified from occupying the seats appropriated for them in either church, or from delegating their right to do so, temporarily and gratuitously, during pleasure, to any friend or friends in the parish, although they cannot let the seats, or make them, in any way, a source of profit. The jurisdiction which a clergyman of the Church of Scotland has over members of his congregation is purely ecclesiastical and of the slightest possible description. The ordinance of baptism may be duly administered, and marriage may be celebrated, quite consistently with the rules of the church, by any ordained clergyman at any time and in any place. Baptisms in private houses, by Established as well as Dissenting clergymen, are common, and marriages in Scotch churches, in modern practice at least, are all but, if not entirely, unknown. Admission to the sacrament of the Lord's Supper is refused only on the ground of objectionable life or doctrine; and even this refusal does not affect the right of the party, where he has that right, to sit in the church, or any of his other civil rights. Nor is it considered an ecclesiastical offence, but rather a merit, for a member of a particular congregation of the Church of Scotland to have joined at the dispensation of the Lord's Supper in another congregation of the same church where he happens to be at the time, and is known to the minister and kirk-session who sanction his doing so. Accordingly all the clergymen, from other congregations, who assist a brother clergyman in dispensing the sacrament, habitually, themselves, become communicants, in his church, on these occasions.

Moreover, in this question of division of the area of a parish church the law does not inquire whether the heritor and his tenants will attend the parish church or not. It is enough that they are capable of attending,—that is to say, that they are examinable persons, which they are held to be if twelve years of age. In allocating the area of a parish church among the heritors no distinction falls to be made between Churchmen and Dissenters, whether Roman Catholics, Episcopalians, Free Churchmen, United Presbyterians, or Dissenters of any other class. The right, as I have said, is a pertinent of the lands, and does not depend on the religious views either of the heritor or his tenants for the time being, or the churches which they habitually attend. Accommodation falls to be provided

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for two-thirds of the whole examinable inhabitants upon these lands, whatever may be their creeds, of which accommodation they may or may not avail themselves at their pleasure.

It was so decided in the case of Tingwall, 22d June 1787, M. 7928. The Lord Ordinary found "that when it becomes necessary to build a new church the heritors of the parish are bound to provide one sufficient for the accommodation of the parishioners capable of attending public worship; and that this is a burden under which they acquired and held their estates." The Court made this judgment more definite by finding that the heritors "are obliged to build a church capable of containing two-thirds of the examinable persons in the parish, not under twelve years of age, and remitted to the Lord Ordinary to proceed accordingly."

The report also bears that "this was laid down as a general rule to be observed in all time coming."

The rule has accordingly been held fixed and enforced ever since, wherever it has been sought to be enforced. It was commented on and considered, in that view, in the comparatively recent case of M'Leod v. Carment, 9th February 1830, 8 S. and D. 475. The direct question in that case was, whether the large portion of the population of the parish of Rosskeen, who spoke the Gaelic language, fell to be taken into account in building a new church. The practice of the clergyman was to preach in Gaelic on one part of the Sunday and in English on the other. Lords Glenlee and Cringletie, without impugning the general doctrine, raised a doubt, at first, whether the fact of two services being provided, at neither of which could it be expected that both the Gaelic and the English population should attend, did not make the case distinguishable from the case of Dissenters. The Lord Justice-Clerk (Boyle) said the question was one of the most important of the kind which could occur,—"Whether in providing additional accommodation we are to look to the language spoken; and because one-half is Gaelic and the other half English, we are only to provide for half the population. This certainly has the merit of novelty. The principle would just lead to this, that if the heritors can shew that part of the population are Catholics or Dissenters, who will not attend, they are to be left out of view. This doctrine was never entertained in regard to difference of religious opinion, and it should not be listened to on account of difference of language."

Lord Pitmilly observed,—"We can have no difficulty that we are not to take into view that the one-half is English and the other half Gaelic any more than if they were Dissenters. We are to hope all will be able to attend. No doubt the objection has the merit of novelty, but that is a demerit in a Court of law; and as there is no authority or dictum to support it we must hold that the church should be built to accommodate two-thirds of the whole examinable population."

The case was allowed to stand over till a subsequent day, when both Lord Glenlee and Lord Cringletie stated that, on consideration, they concurred with the opinions of the Lord Justice-Clerk and Lord Pitmilly; so that the judgment was unanimous.

Having regard to these undoubted principles of law, I am not able to see grounds for depriving the heritors in the *quoad sacra* parish of the pertinential right, inherent in their lands, simply because there is a *quoad sacra* church in which they may obtain seats by paying for them. It is true they and the other heritors did not build the new parish church of Jedburgh, but they gave the

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former church in excambion for it, which was substantially the same thing. If they have been benefited, to any extent, by the generosity of the noble Marquis, the heritors of the original parish have equally been so. They would be equally liable with these other heritors to rebuild the church if it were burned down to-morrow, and they are equally liable with them to repair it so soon as it requires repair, whether by natural decay, or by dry-rot getting into it, or by a storm destroying the windows, removing the slates in whole or in part, or from any other cause.

On the whole, I am of opinion, 1st, that, taking the case upon the contract of excambion, the one church ought to be held to come in place of the other, and the heritors generally should be held entitled to continue in possession of the one as they were of the other; 2d, that, taking the case in a more general view, the result is to entitle the whole heritors to participate in the division of the area of the church in the same proportion in which their lands are liable for its support.

LORD NEAVES.—This case comes before us in peculiar circumstances as regards the facts, and in a peculiar form as regards the pleadings.

A new parish church for Jedburgh having lately been erected, it became necessary to have a division and allocation of its area. In 1855, now twenty years ago, a considerable portion of the parish was disjoined from the rest, and erected into a parish of Edgerston *quoad sacra*. In the division and allocation of the proper parish church, now in course of being made, the question has arisen whether the heritors of lands in the *quoad sacra* parish of Edgerston are to be admitted to, or excluded from, the division. The question having come before the Sheriff, he has decided that the *quoad sacra* heritors are to be excluded, and against that judgment an appeal has been entered by the excluded heritors. No appearance has been made by the other heritors, or by any one to support the Sheriff's judgment.

In ordinary circumstances this Court might be justified in altering the judgment complained of, in respect it is not supported by an appearance on the part of those in whose favour it was pronounced. But the view has been taken, and in that view I cannot refuse to concur, that this allocation being a matter of public and permanent interest, we ought not to dispose of it merely as a case in absence and *causa incognita*, but ought to consider it upon the merits, and support the Sheriff's judgment if we think it right. At the same time it cannot be doubted that the non-appearance of those who ought to have been respondents has placed us at considerable disadvantage.

On the merits it must be confessed that the case has been found to be attended with a good deal of difficulty, and suggests ulterior matters that may possibly occur in this or in other cases of the same kind, which require very grave consideration. The difficulties thus suggested are mainly owing to the very defective and unsatisfactory nature of the Act of 7 and 8 Vict., under which mainly the erection of the new *quoad sacra* parish was carried out.

The basis of that erection necessarily was that the original parish was too large for its due ministerial administration, and that the inhabitants of a specified portion of it should be detached from the old parish and placed under the spiritual and ecclesiastical control and discipline of a new and separate minister and kirk-session. The necessary effect of such a step was to remove a large portion of the existing congregation of the original parish, and to that extent to

diminish the parties adhering to it, and not only liberating the new district from attendance on the old parish church but positively excluding them from it, and ordering them to worship and attend ordinances in the new parish church, under the new minister. The logical accompaniment of that change should have been that if not the whole area, yet at least the portion of the area hitherto occupied by those who were now extruded, should be allocated among those who remained, thus making room for the assumed increase of the parishioners, and disposing of the sittings thus left vacant. But from a fear, probably, of going beyond the strict limits of a *quoad sacra* arrangement, no such measure seems to have been adopted, and I cannot help thinking that if the old parish church had still stood and been available there would have been no warrant or power to alter the existing allocation of the area, and a large portion of it might still have been appropriated to the use and service of absentees. It is a strange anomaly in the case that now, at the distance of twenty years, we are called upon and considered competent to make a new allocation, which was just as necessary and proper at that early period as it is now.

Had the new church of Jedburgh come into existence in the ordinary and usual way, we should have stood face to face with one of the chief difficulties that attend this case. The church would have been built by the heritors, and the double question would have arisen whether the whole heritors were bound to contribute to its erection, and, if the *quoad sacra* heritors were so bound, whether they could be excluded from the allocation of area in the church which they had thus concurred in erecting. That same question occurs here, not practically but speculatively, as bearing upon the general position of parties, and it is impossible to deny that the mode of its ultimate solution has an important influence on the practical point which now occurs. None of the heritors here have been put to the expense of building the new church, which has been erected and presented to them by the liberality or generosity of the Marquis of Lothian; but even still questions will hereafter arise as to the maintenance of the church, and ultimately even as to its reconstruction if it should be injured or destroyed. I cannot, however, hold the arrangements thus made to amount to an excambion of the old church so as to make the old allocation literally transferable to the new church. Physically it is impossible, and the new church and its area must be divided of new, and I see no specialties in the case that prevent or exempt us from looking upon the present as a new allocation as at the date at which it is now made.

With regard to the question as to the liabilities of parties as to the maintenance of the old church, the Sheriff in his note has very summarily and very easily got over these difficulties. He lays it down as being quite fixed as a general rule that heritors of lands annexed *quoad sacra* are not liable to uphold the parish church from which they are disjoined. I cannot concur in this positive opinion. The case of Drummond, on which it is rested, does not appear to me to rule a case like the present. The annexation there, which occurred more than a hundred years ago, was not identical with that which was effected here under the modern Act.

This difference is suggested by the very first finding of the Court in the case of Drummond referred to, viz., "that the heritors of the lands annexed *quoad sacra* are liable in their proportion of upholding the fabric of the kirks to which they are annexed." This being found, it was reasonable, if not inevitable, that the other and correlative finding should be "that they are not liable to contri-

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bute for upholding the fabric of the parish kirks from which they are disjoined." No such combination of findings could here be pronounced, and therefore the supposed parallel between the cases is destroyed. It cannot here be found that the annexed heritors are liable proportionably in upholding the *quoad sacra* church, for no such liability is or could be imposed upon them, it being a statutory condition of the erection of such a *quoad sacra* parish not only that a church shall be provided at first, but also that "due provision shall be made for the future maintenance of the fabric of the said church;" and this accordingly appears to have been done in the present case, it being expresly set forth that the petitioner, Mr Rutherfurd, "had undertaken and was ready to make provision for the maintenance of the fabric of the said church."

It seems plain in this way that the annexed heritors could not bring themselves literally under the case of Drummond, and could not maintain that they would have a double burden to bear if they were still to maintain the original parish church. There may be other grounds for their claiming exemption from maintaining the old church, but the result of such a claim must be considered as doubtful, and cannot be anticipated as a certainty in the way laid down by the Sheriff.

If the annexed heritors are virtually secured against the expense of maintaining the *quoad sacra* church—and they seem undoubtedly to be so to some extent—there is not the same equity in their demanding a cessation of their liability for maintaining the old church, and that burden might conceivably be due without injustice and without its entitling them to a share of the old area. The contribution of heritors to maintain a church and a minister in every parish is not a mere counterpart of their sharing the area and having sittings. It is the essential idea of an established church that the land of the country should provide the means of general Christian civilisation. An heritor cannot escape from such liability by being a Dissenter or a Papist or a Jew. We live in a Christian country, where Christianity is to be taught and upheld for the national benefit throughout all parishes, and no parishioner, *i.e.*, heritor, can escape the liability by declining to go to church, or going to another church which he may prefer, either from cheapness or anything else.

Prima facie, all the heritors of a parish are bound to bear this tax just as their teinds are due to the minister. The annexation of lands to another parish, whether new or old, *quoad sacra tantum*, does not, *prima facie*, infer a change of liabilities *quoad civilia*, which money payments undoubtedly are.

Neither can it be said that the denial of seats in the proper parish will extinguish the liability to contribute, more especially when the arrangement stands as it does here—that the annexed heritors have no similar contribution in their own parish. They may have other inconveniencies to balance their general conveniency, but they are not made liable in more than once and single payment of the expense of maintenance.

The point immediately before us is this—A new parish church of Jedburgh has been obtained, and it is necessary to divide and allocate its area. Such a step is inevitable, for it is impossible to transfer the old allocation to the new area, which is not likely to correspond to it either in shape or extent. The conflicting views are these—Shall we divide the area among all the heritors of the original, and still legal, parish, or only among the heritors who are not disjoined? This question drives us to the consideration, what is the practical object of the division? Except for practical uses, the division might stand over

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indefinitely, and the general right of the heritors in the area remain *pro indiviso*. But it seems difficult to resist the view that it is for occupation that the division is made—it is with reference to sittings in the church during public worship that the process is to be gone through. Now, on that basis the question comes to be, shall we include in this occupational division—this allocation of sittings —those who cannot, or cannot legally, occupy or sit there, to the exclusion of those who can and ought to be there; for a want of room may thus be the result, the common case of the creation of a new parish being that there is an increase in the population of the whole. The rateable allocation of this area among the whole heritors would virtually ignore or render useless the new erection. It seems difficult to reject the Sheriff's view without holding either that the *quoad sacra* heritors may hold sittings which those who hold them are excluded from occupying, or that they may turn those sittings to profit by letting them to whom they will. In the one case they would be playing the part of the dog in the manger; in the other they would be making the transfer of their seats a matter of merchandise, for they themselves are under a perpetual ecclesiastical *alibi*, being bound to be at their assigned post elsewhere on all days of public worship. The result may be that while the heritors as a body may still be trustees of the whole church for behoof of those whom it may concern, and may thus be bound to maintain it, they yet may be barred and precluded from nullifying the erection *quoad sacra* by encroaching on the too limited space which the original church possessed, and which would be as much crowded as before if no vacuum was to be left for the expansion of the remaining congregation.

On the whole, while feeling the difficulties and anomalies of the case, I cannot bring myself, in the circumstances, to alter the Sheriff's interlocutor, though not concurring in all or the most important of his grounds of judgment, and not wishing to prejudge any question not immediately before us.

LORD ARDMILLAN.—The newly-erected parish disjoined from Jedburgh, and now called Edgerston, affords an accommodation which the law holds to be the legal and appropriate accommodation for the inhabitants of the new district forming that new parish. I quite agree with your Lordship in the chair that the law, without compelling attendance, assumes the attendance of all within the district at that new church. The parishioners are provided with accommodation, and are legally held to be there accommodated. But the heritors in the parish of Edgerston had undoubtedly certain rights of property within the old abbey, and may now have certain rights within the parish church of Jedburgh. I think the right of each heritor is divisible on principle into two parts. So far as his personal right to attend in his place in that old church goes it is a right of property for his own benefit. In so far as his right is for the benefit of tenants, cottars, and dependants, it is a territorial right of the nature of a trust for them; and I adopt what I think your Lordship in the chair has most clearly explained,—the distinction between the two. We have no question here raised about personal or family sittings. I wish at present to give no opinion about that. A claim for family sittings may be much stronger than any claim now made; but the claim now made is for territorial sittings, and I think that while the right of the heritor is a civil right, the right of the beneficiaries for whom he holds in trust the territorial right is a right *inter sacra*. It has been decided that the proclamation of banns of marriage is *inter sacra*, and that being decided, effect was given to the principle in the case of Hutton v. Harper. But,

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if the proclamation of banns be *inter sacra*, is the proclamation of the gospel not *inter sacra?* Is the hearing of the gospel not *inter sacra?* Is the worship of the church not *inter sacra?* To use the words given in the old Act, is the having recourse to it "for word and sacraments" not *inter sacra?* I think it is, in every one of these respects, and therefore I view the decision in the case of Hutton v. Harper as having great weight on the question now before us. I think that, whatever may be the claim—on which I do not at present venture to adjudicate—of the heritor to a right to a personal sitting, or to a family sitting, in the new church at Jedburgh, which has now been erected by arrangement, through the generosity of Lord Lothian,—whatever may be the extent of the heritor's right to family sittings there, I do not think he has a right there, as a civil right, to secure accommodation under the territorial trust for the benefit of those who dwell in the *quoad sacra* parish of Edgerston. These parties themselves are not so restricted as to be compelled to attend, but they are regarded in law as attending appropriately and legally that church at Edgerston, and I think they attend it in the exercise of a right which is in them *inter sacra*. Upon that view I think the Sheriff has rightly decided. I think his judgment is a very complete and clear judgment, though I do not agree with all the terms and expressions of opinion, some of which are not quite applicable to this case; and, on the whole matter, I think we should adhere to the judgment of the Sheriff, very much—indeed, almost entirely—on the views so well explained by your Lordship in the chair.

Lord Ormidale.—In this novel case, as it appears to me to be, the question for the decision of the Court is, whether the appellants, whose lands are situated within the recently erected *quoad sacra* parish of Edgerston, are entitled to have allotted to them a portion of the area or sitting accommodation in the new church of the parish of Jedburgh commensurate with their lands.

It does not appear to me that this question can be affected by the circumstance that the new church of Jedburgh has been built in consequence of, and in accordance with, the transaction referred to in the record of the nature of an excambion between the Marquis of Lothian and the other heritors of the parish. The proceedings now in question, which have been taken for a division of the area or sittings of the church, do not depend on any such specialty. The petition is presented to the Sheriff by, and in name of, the Marquis of Lothian "as the principal heritor of the parish of Jedburgh," and of William Millar, solicitor, Jedburgh, as "clerk of the heritors of said parish for and as representing said parish." And after setting out that a new church had been completed and handed over to and received by the heritors, and is now the church of the parish of Jedburgh, and that it was ready for occupation, but that it was necessary before occupying it that it should be "divided amongst those having right thereto in terms of law," the petition prays the Sheriff to proceed with the division accordingly.

There being, therefore, nothing special in the case arising out of the transaction between the Marquis of Lothian and the other heritors of the parish, I proceed to consider the question as if it had related to a new parish church, built in consequence of the decay or insufficiency of one which had previously existed. And in so dealing with the question I am disposed to think that it must be answered adversely to the appellants, and in conformity with the Sheriff's judgment.

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The lands belonging to the appellants, and the parishioners residing on these lands, are within the newly erected *quoad sacra* parish of Edgerston. The district, or the greater part of it, comprehended by this newly erected parish, was disjoined from the parish of Jedburgh, and erected into a new one in virtue of the Act 7 and 8 Vict. c. 44, entituled "An Act to facilitate the disjoining or dividing of extensive or populous parishes in that part of the kingdom called Scotland." It is true that the disjunction and erection was only *quoad sacra;* but it cannot be doubted, I think, that the right to the occupancy of a church for the purposes of divine worship and the dispensation of religious ordinances is of the nature of *res sacræ*, and if so, it necessarily follows that the connection of the parishioners, including the appellants, resident within the new *quoad sacra* parish, is now, in regard to church accommodation, with the new *quoad sacra* church, and that their previously existing connection for that purpose with the parish church of Jedburgh has been severed. It would be very anomalous, and I think most unreasonable, and contrary alike to the terms and objects of the statute, to hold that the appellants, in respect of their lands which are within the newly erected parish, the church of which has been substituted by the statute as their proper place of worship instead of the church of Jedburgh, should nevertheless be entitled to accommodation in the latter as well as in the former. Supposing they were held to be so entitled, they and their lands could not be said to be disjoined from the old and annexed to the new church and parish even *quoad sacra;* and in this way the statutory disjunction and erection of the *quoad sacra* parish of Edgerston might be in a great measure, if not entirely, rendered nugatory and unmeaning,—a result all the more startling when it is kept in view that it would be brought about by the very individuals who took a leading part in getting the new *quoad sacra* parish of Edgerston disjoined and erected.

Nor am I able to understand for what legitimate object the appellants can desire to have a portion of the area of the parish church of Jedburgh allotted to them, and the parishioners resident on their estates, seeing that they have such accommodation more conveniently in the church of Edgerston. They cannot use at the same time sittings in both churches. And they are not entitled to dispose of to others, as if they belonged to them in property, the seats in either church, or to insist that they should remain unoccupied. The area or sitting accommodation in a parish church does not belong to the heritors, and cannot be disposed of by them like the rest of their property. It pertains to them merely, and at most, in trust for the parishioners residing on their estates, who, again, have no right to it except for religious purposes. But as for all such purposes the appellants' estates have been disjoined from the parish of Jedburgh, and annexed to the newly erected parish of Edgerston, there are in truth and reality no parishioners for whom the appellants can claim sitting accommodation in the church of Jedburgh, and consequently the appellants' right and interest to maintain the present controversy entirely fail.

These are the grounds upon which my opinion has been formed that the Sheriff's judgment appealed against is right, and ought to be affirmed. And in coming to this conclusion it does not appear to me to be necessary to determine whether the appellants, if they are to have no accommodation in the church of Jedburgh, are bound to contribute towards the expense of maintaining the fabric of that church. There are, indeed, no *termini habiles* for determining that question in the present case; and for myself I desire to reserve my opinion in regard to it. I may remark, however, that the case of Drummond v. The Heri-

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tors of Monzie (1773, M. 7920) seems to have been different in some important particulars from the present. There no new parish, even *quoad sacra*, was erected, as here, the portion disjoined from an existing parish having been annexed to another already existing parish. There, also, different from the present case, the heritors of the disjoined lands, while they were on the one hand held "not liable to contribute for upholding the fabric of the parish kirk from which they are disjoined," were, on the other hand, held liable "in their proportion for upholding the fabric of the kirk to which they were annexed." But here, as in every case of the erection of a *quoad sacra* parish in terms of the statute, provision is made for keeping up the fabric of the church. Neither can I very well see how the observations of the Judges in the case of Drummond, which was raised and decided under essentially different circumstances from the present, and of course long before the passing of the Act under which the disjunction and erection now in question took place, can have much, if any, application at all to the present case. A similar remark may be made in regard to the *dicta*, some of which have been referred to, of the text writers and other authorities, who did not and could not deal with such a question as that we have been here called upon to dispose of.

For the reasons I have now stated I am of opinion that the judgment of the Sheriff ought to be adhered to, and the appeal dismissed.

LORD MURE.—There are two separate and distinct questions here raised for decision in the view I take of this case: 1st, Whether the appellants, the heritors in the portion of the parish of Jedburgh which has been disjoined from that parish and erected into the new parish of Edgerston *quoad sacra*, are entitled to an allotment of sittings in the new church in the parish from which they have been disjoined; and 2d, If they would not be so entitled in the ordinary case, whether there are any specialties connected with, or arising out of, the excambion of the old for the new parish church of Jedburgh, which can give them that right. Neither question is raised in a satisfactory shape, for the proceedings are here entirely *ex parte;* and, in the absence of a full argument, I have felt great difficulty in forming an opinion upon them.

(1) The solution of the first of them appears to me to depend mainly upon whether the appellants would still be liable in a share of the expense of repairing or rebuilding the church of the parish from which they have been disjoined. To this extent I concur in the opinion of Lord Deas. Because it is, as I apprehend, the fact of a party being required to contribute towards the expense of erecting a parish church in respect of his having property in the parish in which the church is, which gives him a claim to a share in the allocation of seats. Now, the Sheriff has here held that the appellants, because their lands have been disjoined from the parish of Jedburgh, and added *quoad sacra* to the newly erected parish of Edgerston, have been freed from all obligation relative to the repairing or rebuilding of the church at Jedburgh, and are, on that ground, not entitled to any share of the sittings in the new church. And if that be so—if these heritors are in law now freed from the burden of assessment for church building purposes in connection with the parish of Jedburgh—I should be disposed to concur in the interlocutor appealed from. This is, however, in my opinion, by no means a clear proposition, although there is a great deal to be said in favour of it,—having regard to the rules on which the Court appear to have proceeded in deciding the case of Drummond, referred to in the

Sheriff's note. But if these heritors, on the other hand, still remain subject to the burden of maintaining the old church, on the grounds so clearly explained by Lord Deas, it is very difficult to say that they are not entitled to the correlative right of a share in the area of the church of their original parish, although they may, by force of the new erection, be declared to be heritors in the new parish, and in that view have now no property in the parish for which the new church is required.

The effect of the Act of 1844 in this respect is remarkable. For it not only provides for disjoining the lands from the old parish, but it makes express provision for the erection and repair of the church in the new parish irrespective of any assessment upon the owners of the disjoined lands, and thereby tends to shew that the intention of the Legislature may have been to leave the burden, relative to the maintenance of the church, in the original parish, where it was before. At the same time the lands have, by force of the statute, been expressly taken out of the parish of Jedburgh as regards ecclesiastical arrangements, so that the appellants are no longer heritors, in an ecclesiastical sense, in the parish from which they have been disjoined. And when, in these circumstances, there is no express provision made in the Act of 1844 relative to the rebuilding of churches in new parishes *quoad sacra*, in the event of that becoming necessary, although provision is made for their repair, I am not prepared to say that, should a question be raised in such a newly erected parish relative to the liability of the heritors for the building of a new church, the Court, having regard to the rules laid down in the case of Drummond, might not hold the proprietors of the lands annexed *quoad sacra*, liable in the expense of erecting a new church, and so free from all obligation to bear the same burden in the parish from which they had been disjoined. But these are questions which cannot be satisfactorily disposed of in this case. They have not been regularly argued—although they may have been put hypothetically, sometimes the one way and sometimes the other, in the course of the discussion—and cannot therefore be now authoritatively settled; and I am free to admit that I have not formed any decided opinion one way or other upon this matter. The result, therefore, of my consideration of this part of the case is that I am not, as at present advised, prepared to say that I think the Sheriff was wrong in holding the principles of the case of Drummond to apply, or to differ from the conclusion which I understand the majority of your Lordships have come to.

(2) But on the other question, viz., the effect of the excambion, I am of opinion that the argument of the appellants is well founded. For although there does not seem to have been any express stipulation, in the proceedings relative to the excambion, to the effect that the appellants were to have right to seats in the new church, I think that this may be held to be implied in the transaction. Because the nature of that transaction, as disclosed in the deed of excambion, appears to me to be that, when the old church was exchanged for the new, the latter was to be conveyed to the whole heritors of Jedburgh, including the appellants, as a *surrogatum* for their right to the old church, which was conveyed by them to Lord Lothian; and that they were thus to acquire in the new church rights equivalent to those which they had in the old. There is nothing in the proceedings to shew that these appellants abandoned, or ever intended to abandon, their right to sittings in the new church, corresponding to those which they held in the old one. And the circumstance that they may be, in one view, no longer heritors in the parish of Jedburgh, is not, I conceive, of itself con-

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clusive against their right to claim sittings in the new church. Various decisions are noted by Mr Dunlop in his work on Parochial Law (p. 37, sec. 65), and among them the cases of St Andrews and North Leith, in which parties, who were not heritors in the parish, were held entitled to retain seats in the division of a parish church; and I can see no reason in principle why a similar rule ought not to be acted on here. I shall not, however, detain your Lordships by enlarging on the grounds on which I think that this should be done. On this point I concur in the opinion of Lord Deas; and the circumstance that none of the other heritors have appeared here to oppose the claim of the appellants goes far, in my opinion, to shew that such was their understanding of the arrangement.

LORD GIFFORD.—I concur in the opinion expressed by your Lordship in the chair, and in the result arrived at by the majority of your Lordships. I am of opinion that the heritors of lands in the disjoined *quoad sacra* parish of Edgerston are not entitled as such to any share or allocation of the area of the newly built parish church of Jedburgh, but that the area of that new church, after setting apart one-third thereof for the community of the burgh of Jedburgh, must be allocated and divided among the heritors of the existing landward parish of Jedburgh, excluding the district forming the *quoad sacra* parish of Edgerston.

The disjunction and erection of the *quoad sacra* church and parish of Edgerston was effected on 21st February 1855, by a decree of the Commissioners of Teinds, pronounced in terms of the statute 7 and 8 Vict., cap. 44. The decree bears that the church of Edgerston is erected into a parish church, and that the district therein specified is erected "into a parish *quoad sacra* in connection with the Church of Scotland, to be called now, and in all time coming, the church and parish of Edgerston." The minister and elders of Edgerston church are declared to have and enjoy the status, the powers, rights, and privileges of a parish minister and elders of the Church of Scotland, and provisions are made for the patronage of the church and parish of Edgerston, and for various other incidents attending the erection of a *quoad sacra* parish. It is clear, therefore, that the new district marked out as Edgerston parish is no longer *quoad sacra* a part of the original parish of Jedburgh, although it is still a part of the original parish *quoad civilia*.

The question which arises is—What rights, duties, and privileges are included under the expression *quoad sacra* in the sense of the statute 7 and 8 Vict., cap. 44,—what parochial or ecclesiastic rights, duties, or burdens are transferred from certain parts of the old parish of Jedburgh to the new parish of Edgerston, and what rights and duties are to remain as before?

Now, it may be, and I think it is, extremely difficult accurately and precisely to define abstractly what are *inter sacra* and what are *inter civilia*, but into that wide and intricate region I do not need to enter, for the question is limited to the special meaning and intention of this particular statute. What are *inter sacra* in the sense of this Act? Keeping in view the purpose for which the *quoad sacra* church and parish have been erected, I cannot doubt that it was intended that the inhabitants of the newly erected district should resort for worship and for the ordinances of religion to the newly erected *quoad sacra* church —indeed, under the old practice in disjunctions, there used to be a decerniture to that effect—and if so, then they are no longer expected to worship in the

church of the original parish, and no seats will require to be provided for them in any new parish church erected for the original parish. Indeed, the very purpose of providing a *quoad sacra* church is that by reason of the increase of population in, or the local situation of, the disjoined district, or for some similar reasons, it is judged expedient that the population of a particular district shall no longer be under the ecclesiastical superintendence of the minister of the original parish, nor have accommodation provided for them in the original parish church; but in things ecclesiastical—for this, I think, is the true meaning of the word *sacra*—they shall be held to be parishioners of the newly erected district. The right of sitting in a church to hear preaching, or to join in worship, or to partake of ordinances, is clearly an ecclesiastical privilege or duty, and not in the sense of this statute *inter civilia*. The property of the seat itself—that is, either the ground it occupies or the materials of which it is constructed—may be the subject of a civil suit or of civil question, but the use and enjoyment of the seat is an ecclesiastical privilege—that is, in the sense of this Act, is *inter sacra*. In this view it is quite as much *inter sacra* to hear preaching or to receive sacraments as to preach or to administer sacraments. In the provision of this statute surely preaching and prayer are *inter sacra*, and hearers and worshippers, as much as those who conduct the service, are engaged in a sacred duty. It seems to follow that whenever a new allocation of the area of the original parish church becomes necessary it shall be confined to the parishioners residing within the limited district, and shall not include those within the newly erected territory.

It is true that although the area of the church is intended for parishioners, it is in point of form allocated to heritors, but this seems to be a mere mode of arranging the use of the area, the heritors being trustees for the parishioners, who are often a more fluctuating and changing body.

It is also true that the expense of providing a new church is laid upon the heritors; but this has been introduced by custom, for originally the burden both of providing and of maintaining the fabric of the church was laid upon the parishioners of the parish.

The question of the expense of the new church does not arise in the present case, for the new church has been provided under a contract of excambion, instead of the old one; but I am not prepared to say that it follows from the decision now to be given that the heritors of the disjoined or *quoad sacra* district would not be liable to be assessed for the expense of the original parish church. It might very well be that the use of the area of the fabric might be held *inter sacra*, at least so far as religious ordinances are concerned, and yet the expense of providing the fabric might be held a civil burden, which is not removed by a mere *quoad sacra* disjunction. The simple payment of money, or the simple obligation to pay money, is always a civil matter. But this question does not arise in the present case.

If it were to be held that notwithstanding the disjunction the heritors of the disjoined district were still entitled as such to a share of the sittings in the original church, it could only be for the purpose of occupying them by themselves and by the residents upon the lands; but this would be to defeat the very purpose for which the *quoad sacra* church and parish were erected. I am therefore of opinion that the judgment of the Sheriff should be affirmed, and the appeal dismissed.

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THE COURT pronounced this interlocutor:—"In conformity with the opinion of a majority of the seven Judges present at said hearing, refuse the appeals, but without prejudice to any claim which may be made by any of the appellants to a family seat in the parish church of Jedburgh, and to the other heritors their answers thereto as accords, and decern."

MACKENZIE, INNES, & LOGAN, W.S.—Agents.

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HENRY DUBS AND OTHERS, Appellants.—*Pearson.*
THE LORD PROVOST, MAGISTRATES, AND TOWN-COUNCIL OF GLASGOW, Appellants.—*D.-F. Watson—Balfour.*
THE POLICE COMMISSIONERS OF THE BURGH OF CROSSHILL, Respondents.—*Scott.*
W. S. DIXON AND OTHERS, Respondents.—*R. Johnstone.*

Burgh—Sheriff—Act 20 *and* 21 *Vict. c.* 70, *sec.* 1—*Competency of Appeal.*—*Held* that a deliverance of a Sheriff upon a petition for the extension of the boundaries of a burgh under the statute 20 and 21 Vict. c. 70, finding that neither the boundaries described in the petition nor any others which might be within its scope satisfied the requirements of the statute, and therefore refusing the petition, was not subject to review.

2D DIVISION. Sheriff of Lanarkshire. I.

IN January 1876 a petition under the Act 20 and 21 Vict. c. 70,* was presented to the Sheriff of Lanarkshire for the extension of the boundaries

* Sec. 1.—"Any ratepayers, to the number of twelve or more, in respect of lands and heritages situated beyond the existing boundaries of any royal or parliamentary burgh in Scotland, may present a petition to the Sheriff of the county in which such burgh or part of a burgh is situated, praying him to take the steps provided by this Act for extending the boundaries of the burgh to the extent to be specified in such petition; and the Sheriff shall, within three weeks from the date of the presentation thereof, define and specify in a written deliverance on the petition such boundaries, which shall include an area two-thirds of which is wholly or partially built on or laid out for building, as in his opinion would be suitable for the extended boundaries of the burgh, and the same shall be thereafter published by advertisement in such manner as the Sheriff shall direct; and it shall be lawful for the proprietor of any unbuilt on land within the proposed extended boundaries, or to the police committee of the county to be appointed in terms of any Act passed during the present session of Parliament, within one month after the last advertisement so appointed, to appeal by note of appeal to any one of the Lords Ordinary of the Court of Session, who shall have power, in a summary way, to dispose of such appeal after such inquiry as to him shall seem fit; and the judgment of such Lord Ordinary dismissing such appeal, or sustaining the same in whole or in part, shall be final and conclusive."

Sec. 2.—"On the lapse of one month from the last advertisement, as aforesaid, without any appeal having been taken, or, in the event of an appeal having been taken, so soon as the same shall have been disposed of, the Sheriff shall, except where the Lord Ordinary shall on such appeal have found that no part of the lands and heritages proposed to be included within the boundaries of the burgh should be included therein, by such advertisement as he shall direct, call a public meeting, at such time and place as he shall appoint, of the ratepayers in respect of lands and heritages situated beyond the existing boundaries of the burgh, and within the extended boundaries thereof, as defined by the Sheriff, or by the Lord Ordinary on appeal, to consider the proposal to extend the said boundaries." . . . The Act then provides further procedure to be taken by the town-council of the burgh to which the district is proposed to be annexed, and by the ratepayers of the district.

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of the burgh of Glasgow, so as to include a certain district, in which the petitioners, thirteen in number, resided and paid rates.

The Sheriff ordered certain intimations and advertisements, and appointed the agent for the petitioners and all parties interested to be heard on a specified day.

Various parties having compeared and stated objections orally, the Sheriff pronounced a deliverance in which he "allows the petitioners a proof of their averment that the district described in the petition is built or laid out for building, to the extent of at least two-thirds; and also, that the boundaries described in the petition, or any others that may be suggested to the Sheriff, and that may be within the prayer of the petition, are suitable for the extended boundaries of the burgh of Glasgow: Allows to the compearers above mentioned a conjunct proof thereupon."

After a proof the Sheriff pronounced this deliverance:—"Glasgow, 7th February 1876.—The Sheriff having visited the area in question, in presence of the agents for the petitioners, and for the several parties compearing, having heard them fully, and made avizandum—Finds (1) that the boundaries described in the petition, or any others which might be within its scope, do not contain an area two-thirds of which is wholly or partially built on, or laid out for building; (2) that they are not such as, in the opinion of the Sheriff, would be suitable for the extended boundaries of the burgh of Glasgow: Finds, accordingly, that the Sheriff is unable to define and specify any boundaries within the scope of the petition which would be in accordance with the provisions of the Act 20 and 21 Vict. cap. 70: Therefore refuses the prayer of the petition, and decerns." *

Against this deliverance appeals were presented to the Court of Session by the petitioners, and by the Lord Provost, Magistrates, and Town-Council of Glasgow.

The respondents objected to the competency of the appeal, on the ground that the Sheriff's deliverance was not subject to review, his functions under the statute being administrative rather than judicial.

Argued for the appellants;—Appeal to the Court of Session as the supreme Court was always competent unless expressly excluded. The Sheriff had treated the matter as a judicial process. He had allowed a proof, and his interlocutor contained a decerniture, all in ordinary form. Moreover the words of the statute were imperative—"The Sheriff shall . . . define and specify in a written deliverance on the petition such boundaries . . as in his opinion would be suitable for the extended boundaries of the burgh." He could not refuse to define any extended boundaries. There were many cases in the books in which the Court had interfered, even where review was expressly excluded, where an inferior magistrate had exceeded his jurisdiction, or refused to exercise that jurisdiction. An appeal to the Lord Ordinary was given against the Sheriff's decision if he granted the prayer of the petition, and defined boundaries. It would be anomalous to hold that if the Sheriff refused to define boundaries his decision was subject to no review. The result would be practically to give him an absolute veto upon the extension of the boundaries of any burgh within his county.

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* "NOTE.—. . . For the reasons thus fully explained, the Sheriff is of opinion that two-thirds of the area described in the petition are not of the statutory character, and that its boundaries are not suitable. The petitioners have not suggested, and the Sheriff cannot find, any other area or boundaries within the scope of the petition which would be in accordance with the statute. He has, therefore, no alternative but to refuse the prayer of the petition. The statute does not enable him to pronounce as to the expenses."

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LORD JUSTICE-CLERK.—My impression is that this is a matter with which the Court has no concern, that it was not intended that we should have any jurisdiction, and that we have no means of explicating our jurisdiction. Previous to the passing of the statute in question there existed no power whatever for the extension of the boundaries of a burgh, except by special Act of Parliament. It is manifestly a proceeding in which great interests are involved, and the statute provides that unless there is a large preponderance of concurrence of those affected, and unless the Sheriff is satisfied that the thing is right, it shall not be carried into effect. An appeal of a special kind is given to certain parties, viz., persons who are truly owners of agricultural lands and not proprietors of houses, and who therefore are likely to have a special interest in not being put under the regulation of the neighbouring burgh. With that exception, there is no allusion to a right of appeal. The procedure is left with the Sheriff, the town-council, and the ratepayers. Each have their own functions, and I think that in the exercise of them, where there is no provision in the statute to the contrary, they must necessarily be final; at all events no power is conferred upon this Court of reviewing their determination.

No doubt there is a certain awkwardness in the way in which the 1st section of the statute commences. It directs the Sheriff to begin the proceedings on a certain assumption, which in this case has been found not to be true. It provides that upon the application of twelve or more ratepayers the Sheriff shall define such boundaries, "which shall include an area two-thirds of which is wholly or partially built on or laid out for building, as in his opinion would be suitable for the extended boundaries of the burgh." Now, in this case the Sheriff says virtually,—"I cannot say that in my opinion there are any boundaries suited for extended boundaries, for this reason, that I do not find any lands corresponding with the description in the statute, and before I point out an area which is suitable I must find that there is an area of that description, and I find there is none." The effect therefore of the Sheriff's deliverance is that there are no boundaries which he is entitled to include. That is a matter in which he is sole judge. The whole is rather a political than a judicial proceeding, in which certain powers are given to persons who are Judges, and certain powers to others who are not Judges. The effect is that the Sheriff has a veto on the extension of a burgh if he thinks that there are no suitable boundaries for extended boundaries; but that, I think, is what was intended. I am for dismissing the appeal as incompetent.

LORD NEAVES concurred.

LORD ORMIDALE.—I am of the same opinion. Looking at the terms of the statute, I cannot think that it was contemplated by the Legislature that a proceeding of this kind should be litigated as an ordinary judicial process. The whole matter is local, and the duty which the local Judge had to perform was more of an administrative than a judicial character. I do not think that it was incumbent on the Sheriff to allow a proof, although he may, in the exercise of his discretion, have quite properly taken that course to inform his own mind. But he was not bound to do so, as he might, if he had pleased, have ascertained the necessary facts in some other way,—for example, by visiting the ground himself, and employing another or others to make the requisite measurements.

Another consideration goes far to satisfy me that this cannot be treated as an

ordinary judicial process. There is no minute of defence, and no record made up and closed in any form whatever. In short, the case, as it has been presented to the Court, has none of the characteristics of an ordinary judicial process. Again, if we were to deal with such a case as a judicial process, it would follow that the litigation could be carried not only from the Sheriff Court to this Court but also to the House of Lords. If the appellant could competently come here he might, if dissatisfied with the result here, appeal to the Court of last resort. I cannot think that such a course was contemplated or intended by the Legislature, or is competent under the statute; and the whole matter is statutory.

It was argued that, in many cases, the Court has entertained an appeal from the determination of local magistrates, even where appeal was excluded, where the local magistrates had committed an excess of power. That may be so. There is always a remedy, in some form or other, against an excess or abuse of power. But I know of no case of an appeal, where, as here, the local magistrate has acted within his powers, in a matter committed by statute to him alone, in which this Court has reviewed his determination on its merits. But if we were to entertain the present appeal, it was conceded for the appellants that we must review the Sheriff's decision on its merits, for there is no complaint that the Sheriff exceeded his powers, or went beyond his jurisdiction. It was merely said that he had gone wrong in the view he took of the merits. But we cannot, where the Sheriff has not abused or exceeded his powers, review the determination he has come to; and if authority were necessary on this point it would be sufficient to refer to the case of Mackintosh v. M'Pherson, Dec. 15, 1834, 13 S. 124, in which this Court refused a bill of advocation against a decision of a Sheriff under a Public-House or Licencing Act, which conferred upon him exclusively the power of disposing of the disputed matter. For the same reason, and on the same principle on which the Court proceeded in that case, I would decide the present.

If there had been a clear excess of power on the part of the Sheriff, or if he had gone out of his jurisdiction, we might perhaps have recalled his judgment, and remitted to him to proceed in terms of the statute. But that is not the nature of the present appeal. We are asked to review the decision of the Sheriff upon its merits, which, it is conceded, were properly before him, and this, I think, it is incompetent for us to do, having regard to the nature of the subject of inquiry, and the statutory provisions under and in terms of which it could alone be gone into.

I therefore, on the grounds I have stated, concur with your Lordships that we should dismiss the present appeal as incompetent.

LORD GIFFORD.—I have come to the same result. I was at first somewhat moved by the argument for the appellants, that to exclude review in this Court, where the Sheriff has refused to design any district whatever, is practically to give the Sheriff an absolute veto on the extension of the boundaries of a burgh. It is said that if the Sheriff designs a district either too large or too small he can be corrected by the Lord Ordinary; and it is urged that if he refuses to designate any district at all his refusal should be subject to some review, and he should not be entitled at his own sole discretion to refuse to set the machinery of the Act in operation at all. There is great force in this; but, on consideration, I am satisfied that the effect of the statute is to give the Sheriff this practical veto on the extension of the burgh, that if in his opinion no part of the

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proposed district should be added to the burgh, then the proceedings can go no farther. Indeed, I think that this was the intention of the statute.

The statute appears to assume that in an application like the present, the Sheriff will be able to say that at least part of the proposed district, "two-thirds of which is wholly or partially built on or laid out for building," may suitably be added to the municipality; for the statute does not go on to direct the Sheriff to refuse the application, if he shall be of opinion that no part of the proposed district should be added to the town. But I think that such a direction must be implied from what follows. For where the Sheriff does define a district which he is of opinion may properly constitute the extended boundaries, an appeal is given to the proprietors of unbuilt on ground within the boundaries to the Lord Ordinary, and if the Lord Ordinary finds that "no part of the lands and heritages proposed to be included within the boundaries of the burgh should be included therein," then no further proceedings can be taken.

It is a strong thing, no doubt, that the Sheriff, to whom no form of procedure is prescribed, and who may go upon his own knowledge, should be able to checkmate the whole proceedings *in initio*, and, by refusing to design any extended boundaries at all, to prevent any statutory advertisement, and to decline to enter upon any farther inquiry. But, then, I think the statute virtually has made it a condition precedent that the Sheriff shall say that in his opinion certain boundaries are suitable. And this is not an unreasonable view. It will operate as a check on continual agitation for the extension of burgh boundaries, and it is quite equitable that twelve ratepayers shall not be able to set all the machinery of the statute in motion, unless, first of all, they shall satisfy the Sheriff that at least part of the district which they propose to annex is suitable and proper to be annexed to the burgh. And, then, how can we review the Sheriff's judgment? We might, no doubt, say, after inquiry, that in our opinion such and such a suitable district exists; but it is not our opinion which the statute requires, but that of the Sheriff himself, and we cannot remit to the Sheriff to say that in his opinion such a district exists. We might reverse the Sheriff's judgment, but we cannot reverse or alter his opinion; and if his opinion to a particular effect is a pre-requisite to the statutory extension, the want of it is fatal to the application.

THIS interlocutor was pronounced:—"Find that the appeals are incompetent, and therefore dismiss the same: Find the respondents entitled to expenses, but limit the same to those of one party, including allowance for appearance by two counsel," &c.

RHIND & LINDSAY, W.S.—CAMPBELL & SMITH, S.S.C.—JOHN GALLETLY, S.S.C.—MELVILLE & LINDESAY, W.S.—Agents.

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THE COMMISSIONERS OF POLICE FOR DUNDEE, Pursuers and Respondents.—*D.-F. Watson—R. Johnstone.*
ROBERT HARDY MITCHELL, Defender and Appellant.—*Asher—Strachan.*

Process—Appeal—Police and Improvement Act, 1850 (13 *and* 14 *Vict. c.* 33), *secs.* 286, 310—*Nuisances Removal Act*, 1856 (19 *and* 20 *Vict. c.* 103), *sec.* 64.—Police Commissioners served notice upon a house proprietor under the 64th section of the Nuisances Removal Act, requiring him to pave a street. The proprietor having paid no attention to the notice, the commissioners paved the

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street themselves, and raised an action in the Sheriff Court against the proprietor under the same section for recovery of the expense. The defender averred that the street was not of the description which under the statute he was bound to pave. The commissioners maintained that the defender not having appealed against the notice to the Sheriff under the 286th section of the Police and Improvement Act, 1850, he had acquiesced, and the matter was concluded. *Held* that the 286th section related solely to matters "the cost attending which was directed to be provided for by way of private or district assessment," and had no application to proceedings under the 64th section of the Nuisances Removal Act, and the relative 310th section of the Police and Improvement Act, directing expenses to be recovered as a debt, and therefore that the defender was not precluded from defending the action on the merits.

Opinion (*per* Lord Mure) that in any view the finality provisions of the 286th section could not prevent a defender from maintaining that the proceedings of the commissioners were not authorised by the statutes.

1ST DIVISION.

Sheriff of Forfarshire.

M.

THIS was an action in the Sheriff Court of Forfarshire by the Commissioners of Police for Dundee, under the Acts 13 and 14 Vict. c. 33 (Police and Improvement Act, 1850), 19 and 20 Vict. c. 103 (Nuisances Removal Act, 1856), and two local Police and Road Acts, against Robert H. Mitchell, house proprietor, concluding that "in respect of the provisions of the said Acts, and specially of section 64th* of the Act second above-mentioned, and in respect the street within the burgh of Dundee, commonly called Ann Street, was not well and sufficiently paved and flagged, or otherwise made good, previous to the adoption of the first-mentioned Act, and in respect the defender's lands abut on the said street, and adjoin to and front the same, and in respect the said commissioners duly required the defender to cause the said street to be paved in terms of the statutes, and in respect the defender failed or neglected, or refused, or delayed to execute, in terms of said requisition, the work aftermentioned, and yet did not appeal against the said requisition, which accordingly became final, whereupon the said commissioners duly and regularly, and in terms of the statutes, did, or caused to be done, the said work, and incurred expenses in the doing thereof, the defender ought to be decerned to pay to the pursuer the sum of £30, 5s. 2d. sterling, being the expenses

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* "If any street have not before the adoption of the said Act (viz., the Act 13th and 14th Vict., cap. 33), been well and sufficiently paved and flagged, or otherwise made good, the commissioners may require the owners of the lands abutting on such street to cause such street, or the parts thereof not so paved and flagged, or otherwise made good, to be paved and flagged, or otherwise made good, in such manner as the commissioners shall direct; and in the event of such owners not complying with such requisition within one month after notice in writing has been given to them by the commissioners, it shall be lawful for the commissioners to cause such street, or the parts thereof not so paved or flagged, or otherwise made good, to be paved or flagged, or otherwise made good, in such manner as they shall think fit, and the expenses incurred by the commissioners in respect thereof shall be repaid to them by the owners of the lands abutting on such street, or such parts thereof as have not been theretofore well and sufficiently paved or flagged, or otherwise made good; and the provisions and enactments of the said Act (viz., the said 13th and 14th Vict., cap. 33), with respect to ensuring the execution of the works thereby required to be done by owners or occupiers, shall apply to the execution of all works required to be done, and the recovery of all expenses incurred by the commissioners with respect to the paving, flagging, or otherwise making good such street under the provisions of this Act, and such street shall thereafter be repaired by the commissioners out of the assessment levied under the said Act."

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incurred and laid out by the said commissioners in paving the said street abutting on and bounding the defender's said lands."

The defence was that Ann Street had been formed and made good before the Police and Improvement Act was adopted, and therefore that no action lay at the instance of the commissioners.

It appeared from the record and productions that the case arose in these circumstances: In 1871 Mr Mitchell, with eighty other proprietors and householders in Ann Street and the neighbourhood, presented a petition to the commissioners setting forth that Ann Street was unpaved, and in bad order, and praying them to cause the carriage-way to be paved. The commissioners resolved to call upon the owners to pave the street, and, accordingly, served notice upon Mr Mitchell, under section 64 of the Nuisances Removal Act above quoted, requiring him to pave the carriage way of the street on which his lands abutted. To this notice Mr Mitchell paid no attention, and the commissioners executed the work themselves, and then raised this action.

The Sheriff-substitute (Cheyne), after a proof before answer, pronounced this interlocutor:—"Finds in point of fact that in 1871 the Police Commissioners for the burgh of Dundee served notices under section 64 of the Nuisances Removal, &c. (Scotland) Act, 1856, upon the owners of property abutting upon the eastern portion of Ann Street, Dundee, including the defender, requiring them to pave the carriage-way of said street opposite their respective properties in manner therein specified, and, on the owners failing to comply with the said requisition, had the work executed under a contract: Finds, however, also in point of fact, that the carriage-way of said street was made good prior to the adoption in the burgh of Dundee, of the General Police and Improvement (Scotland) Act, 1850: Finds in point of law that the owners of property abutting on said street are not liable for the expense of the foresaid works, but that the same must be defrayed out of the general police rates: Therefore assoilzies the defender from the conclusions of the action: Finds him entitled to expenses," &c.*

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* "NOTE.—After full consideration, I am satisfied that the defender is not precluded by his non-appeal against the commissioners' order from objecting in this process to the power of the commissioners to issue that order. In all that regards the execution of works, the necessity of them, their style, &c., in other words, all matters of detail involving the exercise of discretion, I fully concede that, subject only to a summary appeal to the Sheriff, the commissioners are final, but, in my humble opinion, the finality clause is no answer when it is offered to be proved, either that the works are not authorised by the statute, or, which is the case here, that the party upon whom it is sought to lay the expense of them is not legally liable—(See Lord Advocate v. Perth Police Commissioners, 7th December 1869, 8 M. 244, and Miller's Trustees v. Leith Police Commissioners, 19th July 1873, 11 M. 932). It is said, however, that, *esto* these allegations would form a relevant subject of inquiry in a suspension (which would necessarily be in the supreme Court) of a charge for payment, they cannot relevantly be inquired into in an action like the present, in which it is argued the Sheriff's duties are merely ministerial. In the absence of any decision of the Court of Session to that effect I must refuse to give any assent to such a proposition, or to take such a limited view of my functions. The action is in form an action for debt, and I can find nothing in the statutes which precludes me from considering any objections to the claim which the Court of Session could consider in a suspension. I am not asked to undo anything that the commissioners have done, or to find that the work was unlawful. All that I am called upon to determine is on whom the expense is to fall, or rather,

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On appeal the Sheriff (Heriot) recalled this interlocutor, and pronounced these findings:—"Finds in fact—(1) That the Police Act 13 and 14 Vict., c. 33, was, except the clause as to the supply of water, adopted in the burgh of Dundee in the year 1851, and is in force within the said burgh; (2) that in the year 1871 the Police Commissioners for the said burgh served statutory notices under the 64th section of the 'Nuisance Removal, &c. (Scotland) Act, 1856,' which comes in lieu of the 213th section of the said Police Act, upon the owners of property abutting upon the eastern portion of Ann Street, Dundee, including the defender, containing requisitions to pave, within one month from the service of the said notices, the carriage-way of the said portion of said street in manner therein specified, and intimations that if they refused, neglected, or delayed to execute the said work, in terms of the said requisitions, the Police Commissioners would cause the work to be executed, and that for the expense incurred by the said Police Commissioners in respect thereof proceedings would be taken against the said owners as the law directs; (3) that the said statutory notice, containing the said requisition and intimation, was served upon the defender on the 15th day of June 1871; (4) that the defender did not, as required by the said notice, execute the said work, or any part of it; (5) that the defender did not, in terms of the 285th and 286th* sections of the said Police Act, make the said statutory notice, containing the said requisition and the said intimation, the subject of appeal to the Sheriff, nor did the defender take any proceedings in any Court for having the said statutory notice, containing said requisition and intimation, set aside or superseded, nor for having the said Police Commissioners prevented from proceeding to execute the said work on the faith and in terms of the said notice, and of the intimation contained therein; (6) that the said Police Commissioners accordingly proceeded, in terms of said

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whether it can lawfully be laid on the abutting owners. That depends on its being shewn that the procedure has been regular, and that the clause of the statute applies to the street in question. The pursuer has very properly undertaken to satisfy me on both points, and he must prove his case.

"On the merits of the case I have found little difficulty . . ."

* 13 and 14 Vict. c. 33, sec. 286—"And in respect to appeal as to all other matters and things which the commissioners are by this Act empowered to do or perform, or to authorise to be done or performed, and the cost attending which is by this Act directed to be provided for by way of private or district assessment, the commissioners shall, where not otherwise hereby directed, give notice of their intention to do or perform, or to authorise to be done or performed, such matter or thing either by public advertisement in some newspaper circulating in the burgh, or in the county in which the burgh is situated, or by posting handbills in conspicuous places in the burgh, or by notice in writing to be transmitted through the post-office, or delivered personally or at their dwelling-houses to the individuals having interest, as the commissioners shall think proper: And it shall be lawful for any person whose property shall be taken or affected, and who shall consider himself injured or aggrieved in respect of such other matters and things by this Act so directed to be done or performed or provided for, to appeal to the Sheriff from any order made or notice given by the commissioners in respect of such matters or things in the manner and to the effect herein last before provided and directed: And if such matter or thing shall not be made the subject of appeal to the Sheriff, or, being appealed, shall be allowed by him, the commissioners may proceed with the same, and levy the assessments in reference thereto authorised by this Act: Provided always that the decision of the Sheriff shall in all cases be final and conclusive, and not subject to review by suspension, reduction, or advocation, or in any manner of way."

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statutory notice, which had not been made the subject of appeal to the Sheriff, and as authorised by the 286th section of said Police Act, to have the work executed under contract, and they have had the same completed at an expense of £469, 8s. 4d.; (7) that the share of the said expense incurred by the said Police Commissioners in paving the portion of the carriage-way of the said street on which the defender's property abuts, amounts to the sum of £30, 5s. 2d.: Finds in law that the defender cannot now object in this Court to repay to the said Police Commissioners the said sum expended by them in paving the portion of the carriage-way of said street on which his property abuts, paved in terms of said notice and intimation: Therefore decerns against the defender for the said sum of £30, 5s. 2d., with interest on the same at five per cent from citation till payment," &c.*

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* "NOTE.—The defender objects to reimburse the Police Commissioners in the sum expended by them in paving the carriage-way of Ann Street opposite his property. The ground of his objections is that the said street had before the adoption of the Police Act been 'made good,' as expressed by section 64 of the Nuisances Removal, &c. (Scotland) Act, 1856. Now, this may be a very good objection, if brought forward in proper time, but the Sheriff considers that he is now too late in bringing it forward.

"The defender, along with others, got a statutory notice on 16th June 1871, requiring him to do a certain work, and intimating that if he did not do so within a month the commissioners would have it done at his expense. On getting this notice (and he admittedly got it) it seems to the Sheriff that, if the defender had any objection thereto, or to the execution at his expense of the work contemplated, he had two courses open to him, he might either have availed himself of the statutory machinery provided by the Act, and made the notice the subject of appeal to the Sheriff, or he might have taken proceedings in the supreme Court for having the notice set aside or suspended, if he considered that the proceedings contemplated were outwith the statute. This last was the course followed in the case of Campbell v. The Leith Police Commissioners, 29th June 1862, 37 Scot. Jur. 446, and of Lord Advocate v. Perth Police Commissioners, 7th December 1869, 8 Macph. 244. But it is important to observe that in these cases legal proceedings were adopted before the execution of the proposed work, and before any expense had been incurred. The defender, however, took neither course. He did nothing, but looked on and allowed the Police Commissioners to proceed to have the work executed in terms of the notice. By the 286th section of the Police Act the Police Commissioners are authorised to proceed with the work, 'if such matter or thing shall not be made the subject of appeal to the Sheriff.' The defender did not make the notice the subject of any such appeal, nor did he bring a suspension of the same, nor did he do anything to make the Police Commissioners aware that he objected to the same. In such circumstances it seems to the Sheriff that the Police Commissioners were entitled to proceed with the work, on the faith that the defender had no objection to its execution in terms of the subsisting notice. Accordingly, it seems to the Sheriff to be too late in this mere secondary action to object for the first time that the commissioners are outwith the statute, and had no right either to serve or act on the said notice.

"If such a course be open to the defender at this stage the Sheriff fails to discover what is the use of the statutory machinery of appeal provided by the Act. The Sheriff could have tried the question raised by the defender as well under the appeal case as under this. The advantage of having had the question tried under the statutory appeal would have been that it would have been determined before the execution of the work, and before the expense had been incurred.

"The latter part of the 286th section of the Police Act seems to the Sheriff to have been passed for the protection of police commissioners. If the notice

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The defender appealed to the Court of Session.

At advising,—

LORD PRESIDENT.—The interlocutor under appeal is based chiefly on the findings in point of fact. The finding in point of law following on them is "that the defender cannot now object in this Court to repay to the said Police Commissioners the said sum expended by them in paving the portion of the carriage-way of said street on which his property abuts, paved in terms of said notice and intimation: Therefore decerns against the defender for the said sum of £30, 5s. 2d., with interest on the same at five per cent from citation till payment." Now, it appears to me that there is no sufficient foundation for that judgment, unless the Sheriff is right in holding that an appeal was competent to the appellant under the 285th and 286th sections of the Police Act. I shall say a word as to the fact, also founded on by the Sheriff, that the appellant did not take any other step to set aside the notice or prevent the commissioners from carrying out the proposed work; but the other is the important point.

The Dean of Faculty conceded that the 285th section was not applicable to this case. But he relied upon the 286th section, which affirms the right of a party as soon as notice is served on him to appeal to the Sheriff against the notice.

The procedure of the commissioners is based on the 64th section of the Nuisance Removal Act, 1856. But the kind of procedure authorised by that section was also previously authorised by the Police Act of 1850. The corresponding section of that Act, the 213th, was repealed, and other regulations substituted, and it is not immaterial to compare the two clauses. But before doing so I must premise that no appeal is competent under section 286 unless in regard to matters, "the cost attending which is by this Act directed to be provided for by way of private or district assessment." Now, the 213th section, which originally authorised procedure of the kind in question, is in these terms,—"That if any street have not before the adoption of this Act been well and sufficiently paved and flagged, or otherwise made good, the commissioners may cause such street, or the parts thereof not so paved and flagged or otherwise made good, to be paved and flagged, or otherwise made good, in such manner as they think fit, and the expenses incurred by the commissioners in respect thereof shall be repaid to them by the occupiers of the lands abutting on such street, or

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was left unappealed against, and was allowed to remain as a subsisting statutory notice, they were to be safe in proceeding to act upon it, and to incur expense. They were entitled to assume that no objection existed thereto, and that the parties interested acquiesced therein. Were it not for such statutory protection they might find themselves suddenly and unexpectedly made liable for large sums of money, expended by them in good faith on behalf of others. It seems to the Sheriff that the defender having received the notice, and having left the same unappealed against and unsuspended, and having stood aside and acquiesced in the Police Commissioners expending considerable sums of money on the faith of the same, is now too late in raising an objection to the right of the commissioners to act as they did.

"As to the merits the Sheriff may add, that supposing the question raised by the defender could be competently raised at this stage, there would have been considerable difficulty in holding that the street in question had been 'made good' previous to 1851 . . ."

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such parts thereof as have not been theretofore well and sufficiently paved and flagged, or otherwise made good, and such expenses shall be recoverable from such occupiers respectively, as herein provided with respect to private improvement expenses, and thereafter such street shall be repaired by the commissioners out of the assessment levied under this Act." Under that section I quite concede that money spent on such improvements might have been recovered from occupiers of property abutting on the street by means of private assessment, because that is the express provision of this section. And if the commissioners had proceeded to levy money by means of private improvement assessment they must have done it under section 73, for I can find no other means of levying private assessment or private improvement assessment, between which terms I can see no distinction.

Section 73 is introduced with these words,—"And with respect to private and district assessments under this Act for sewers, drains, and private improvements, be it enacted as follows,—That where by this Act the occupiers of any premises are made liable to the payment of any expenses, which are directed to be recoverable as private improvement expenses, the commissioners may charge the occupiers of such premises respectively with special rates over and above any other rates to which such persons may be liable under this Act after the yearly rate of £6, 10s. in the £100 on the cost of such private improvements respectively, such special rates to be payable during thirty years next after such expenses have been incurred."

Now, so stood the matter under the statute of 1850. The parties to be charged were occupiers, and the improvement assessment was to be levied on them at 6½ per cent. But here comes in the 64th section of the Act of 1856. It repeals the 213th section, and in lieu thereof re-enacts most of its provisions in nearly the same words,—and then it provides that "the provisions and enactments of the said Act (viz., the said 13th and 14th Vict., cap. 33), with respect to ensuring the execution of the works thereby required to be done by owners or occupiers, shall apply to the execution of all works required to be done, and the recovery of all expenses incurred by the commissioners with respect to the paving, flagging, or otherwise making good such street under the provisions of this Act, and such street shall thereafter be repaired by the commissioners out of the assessment levied under the said Act."

It is no longer said that private improvement expenses are to be recovered by private improvement assessment. The clause directs the commissioners to proceed under the sections of the Police Act dealing with the execution of the works thereby required to be done by owners or occupiers, and incorporates the set of clauses applicable to that subject. We find these quite distinctly laid down as a class by themselves dealing with this particular subject. They begin with the 307th, and are introduced by the following words, words *verbatim* the same as those used by way of reference in section 64 of the later Act,—"And with respect to ensuring the execution of the works by this Act required to be done by owners and occupiers be it enacted as follows." The first provision in the 307th section relates to the service of notice on occupiers. The 308th provides that in default of the owners or occupiers the commissioners may do the work, and the expense shall be repaid to them by the persons by whom such work ought to have been executed. The 309th provides that the occupiers may execute the works in default of the owner. Then the 310th is in these terms,—

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"That if the owner of any premises made liable by this Act for the repayment to the commissioners of any expenses incurred by them do not, as soon as the same become due and payable from him, repay all such expenses to the commissioners the commissioners may recover the same from such owner in the same manner as damages may be recovered under this Act, or as any debt may be recovered by the law and practice of Scotland."

It seems therefore that expenses incurred by the commissioners in doing work like the present form simply a debt against the party or parties who ought to have done the work, to be recovered in the same way as any other debt. Is it possible to say, then, that this case falls within the meaning of section 286, which is expressly limited to matters the cost of which is directed to be provided for by private or district assessment? On the contrary, it is the obvious intention of section 64, on which the action is laid, that no assessment is to be imposed for expenses of this kind, but that they are to be recovered by way of action.

I am therefore of opinion that no appeal was competent to Mr Mitchell. He could not have appealed under the 286th section, and it is conceded that he could not have done so under the 285th.

But the Sheriff seems to think he might have taken some other course in order to shew that he objected. But under the circumstances it would be unreasonable that he should be barred from stating his defence. He and other proprietors had presented a petition to the commissioners calling on them to do this work at the public expense. They refused, and served a notice on the proprietors requiring them to execute the work themselves. It is in vain to say that after this interchange of compliments the parties did not know what they were about. The question was not whether the work was to be done, but who was to pay for it.

I do not say it would have been incompetent for the present appellant to come here with a suspension. But I cannot think that he is now precluded from defending himself in this action for debt. If by omitting to take such procedure he had led the commissioners into unnecessary expense, the question would have been different. But it is admitted that the work had to be done, and the question of liability appears to me to be fairly raised by this action before the Sheriff.

It is impossible to read this record without seeing that the commissioners were themselves aware that they must recover the expenses under sections 307–310, and not by laying on a private assessment. The form of their own action plainly excludes the notion that the matter could have been dealt with in the way that they now contend for. But, without founding on that, I am of opinion that this is not a case in which an appeal lay under the 286th section. That being so, the ground of the Sheriff's judgment is gone.

LORD DEAS and LORD ARDMILLAN concurred.

LORD MURE.—I have come to the same conclusion, and on the same grounds. But I wish to add that, in my opinion, the somewhat different ground upon which the Sheriff-substitute proceeded rests upon a sound construction of the 64th section. Under that section the commissioners are only entitled to give notice and take proceedings in one event, viz. if the street was not well and sufficiently paved, "or otherwise made good," before the adoption of the Police and Improvement Act. If the street was made good before that date the machinery of the 64th section, and relative powers as to notice, do not apply;

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and the commissioners were not entitled to give notice, or make improvements at the owner's expense; because they were then not within the Act, and it is only to proceedings within the Act that the appeal and finality clauses apply. The commissioners, however, served a notice on the defender in 1871, to which no attention was paid, and no appeal was taken. In these circumstances the work was completed, and the present action brought to recover the expense. Now, in the condescendence the commissioners allege that "the street was not well and sufficiently paved and flagged, or otherwise made good, previous to the adoption" of the Act, and so made their action relevant. But that is met by a distinct denial, and by the counter allegation in defence that "the road or street had been made good before 1851." Now, that allegation, if true, is, I apprehend, sufficient to found a relevant defence; and the fact that the defender did not appeal against the notice cannot, in my opinion, be held to prevent him from defending himself in the Sheriff Court on the above ground, because the pursuers, when they gave the notice, were not acting within the statute, and unless they were within the statute I think the finality clauses have no application.

Counsel for the pursuers were then heard on the proof, and

THIS interlocutor was pronounced:—"Sustain the competency of the appeal: Recall the interlocutor of the Sheriff, dated 8th December 1875: Find in point of fact that in 1871 the Police Commissioners for the burgh of Dundee served notices, under section 64 of the Nuisances Removal, &c. (Scotland) Act, 1856, upon the owners of property abutting upon the eastern portion of Ann Street, Dundee, including the defender (appellant), requiring them to pave the carriage-way of said street opposite their respective properties in manner therein specified, and, on the owners failing to comply with the said requisition, had the work executed under a contract: Find, however, also in point of fact, that the said Commissioners of Police have failed to prove that the carriage-way of said street was not made good prior to the adoption in the said burgh of Dundee of the General Police and Improvement (Scotland) Act, 1850: Find in point of law that the owners of property abutting on said street are not liable for the expenses of the foresaid works, but that the same must be defrayed out of the general police rates: Therefore of new assoilzie the defender from the conclusions of the action, and decern: Find the pursuers (respondents) liable in expenses both in this Court and the inferior Court," &c.

LEBURN & HENDERSON, S.S.C.—DAVID MILNE, S.S.C.—Agents.

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June 3, 1876. Traill v. Smith's Trustees, &c.

WILLIAM TRAILL, Pursuer.—*R. V. Campbell.*
THOMAS FERNIE AND OTHERS (Smith's Trustees), Defenders.—*D.-F. Watson—Guthrie.*
ROBERT WATT (Ballantyne's Trustee), Defender.—*Balfour—Low.*

Fraud—Agent and Client—Reduction.—B. authorised his law-agents, S. and S., to make certain loans, and, *inter alia*, one of £1000 to T., and placed the requisite funds in the hands of S. and S. T. agreed to grant heritable security for the £1000 (which was not, however, done), and he paid interest for two years, for which receipts were granted by S. and S. as agents for B. Thereafter S. and S., to conceal their embezzlement of upwards of £1000 in their hands belonging

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to A., another client, by a fraudulent representation that A. was now creditor in the loan of £1000, induced T. to execute a bond and disposition in security for that amount in favour of A., which was duly recorded. In an action of reduction of the bond at the instance of T., *held* that although A. was no party to the fraud he was not entitled to take benefit by the fraud of S. and S., and the bond accordingly reduced.

2D DIVISION. Lord Young.

IN 1869 Dr William Traill of Woodwick had occasion to borrow money to pay for a house which he had bought in St Andrews. He accordingly instructed his factor, Mr Robert Scarth, Kirkwall, to negotiate a loan of £1000 over the house in St Andrews, and heritable property belonging to him in Kirkwall. Mr Robert Scarth applied to Scarth and Scott, W.S., Leith, to ascertain if they could furnish the money, which they undertook to do.

Scarth and Scott then laid Dr Traill's proposal for a loan before certain clients of theirs, Ballantyne's trustees, who had money to invest. At a meeting of Ballantyne's trustees in March 1870 they agreed to this and other loans, and at Whitsunday 1870 they put Scarth and Scott in possession of the funds required. In settling with their correspondent, Mr Robert Scarth, at the same term, Scarth and Scott credited him with the £1000, he having made a temporary advance to Dr Traill of the amount.

Dr Traill's titles were sent to Scarth and Scott to prepare the security in favour of the lenders, but no bond was executed. Scarth and Scott did not at first disclose to Dr Traill or his factor the source from which the loan had come, but at Martinmas 1870, when the first half year's interest was paid, they granted a receipt as agents for Ballantyne's trustees, and continued to grant similar receipts for the half-yearly payments of interest down to Martinmas 1872 inclusive. All these payments of interest passed between Mr Robert Scarth and Scarth and Scott, Dr Traill having no personal knowledge of the matter.

In January 1867 Scarth and Scott had been instructed by another set of clients, Smith's trustees, to look out for an investment for a sum of £1200 belonging to them, which was to be paid up at Whitsunday following. The money was paid up at that term, but Scarth and Scott did not re-invest it. In the accounts which they rendered to Smith's trustees they regularly credited the trust with interest.

In April 1873 Smith's trustees asked Scarth and Scott to send a statement of how the money of the trust was invested. Scarth and Scott rendered a statement which contained the following item:—"Dr Traill, over property in St Andrews and Kirkwall, £1000." At a subsequent meeting of Smith's trustees, held on 16th April in Scarth and Scott's chambers, the securities held by the trust were laid upon the table. It was then observed that there was no bond by Dr Traill corresponding to the entry in the state rendered by Scarth and Scott. On this being pointed out, one of the partners replied that by an oversight the draft of the bond, which had been prepared at the time the money was lent, had never been extended. Smith's trustees expressed surprise, and requested Scarth and Scott to have the bond executed without delay. Scarth and Scott then sent the following letter to Dr Traill:—"7th May 1873.—Dear Sir,—With reference to the loan of £1000 which we negotiated for you through Mr Robert Scarth over your property in Kirkwall and St Andrews, we find that from the matter being overlooked at the time the bond was never executed. It now falls to be taken in favour of the trustees of the late Mr Smith, and we send it herewith for execution. We will feel obliged by your signing it according to the printed directions prefixed, and returning it to us at your convenience."

The bond which was sent with this letter expressed in common form Dr Traill's acknowledgment of the sum of £1000 as having been instantly

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borrowed and received from Smith's trustees, and his conveyance to them of his property at Kirkwall and St Andrews in security.

Dr Traill, without noticing the terms of the bond, and believing it to be for the £1000 which he had borrowed in 1870, signed the bond on 9th May 1873, and returned it to Scarth and Scott, who, in July following, recorded it, on behalf of Smith's trustees, in the Register of Sasines for the county of Fife. In the beginning of 1875 Smith's trustees caused it to be recorded also in the Registers of Sasines for the burghs of St Andrews and Kirkwall.

The half year's interests due by Dr Traill at Whitsunday and Martinmas 1873 were paid as before by Robert Scarth to Scarth and Scott, but the receipts bore to be granted as for interests due to Smith's trustees.

In January 1874 Smith's trustees took their affairs out of the hands of Scarth and Scott, and appointed Scott Moncrieff and Thomson, C.A., factors on the trust-estate. The bond by Dr Traill was among the papers handed over by Scarth and Scott to the factors, who granted receipts on behalf of Smith's trustees for Dr Traill's yearly payments of interest at Whitsunday and Martinmas 1874.

In February 1875 the estates of Scarth and Scott were sequestrated. After their bankruptcy Dr Traill was called upon by the surviving trustee on Ballantyne's trust to pay the sum of £1000 with interest since Martinmas 1872 as having been advanced to him from that trust. He was also called upon by Smith's trustees to pay the sum of £1000 as due to them under the bond in their favour.

In the circumstances Dr Traill raised the present action in May 1875, in which he called as defenders both Smith's trustees and Ballantyne's trustee. The first conclusion of the summons was directed against Smith's trustees, and was for reduction of the bond and disposition in security granted by him in their favour on 9th May 1873, and also for repetition of the interest thereon paid in 1873-4. The summons also contained a conclusion directed against Ballantyne's trustee, viz., that in the event of decree of reduction of the bond not being obtained, it should be found and declared that the pursuer was not indebted to Ballantyne's trustee in the sum of £1000, or any other sum, and in particular that he was not bound to pay to Ballantyne's trustee "the sum of £1000 sterling, with accruing interest thereon, alleged to have been advanced by the trustees of the said John Ballantyne at or about Whitsunday 1870, through their agents, Scarth and Scott, writers to the signet, Leith, to the pursuer in loan, upon the security of his properties in Kirkwall and St Andrews above described, nor to grant to the said defender any bond and disposition in security or other heritable security over the said subjects."

The pursuer's averments are sufficiently indicated by his pleas in law, which were as follows:—1. The bond in question having been obtained from the pursuer by the fraud of Scarth and Scott, agents for the defenders, Smith's trustees, the said defenders can take no benefit by such fraud, and the bond should be reduced. 2. The pursuer having received no consideration for the said bond from the defenders, Smith's trustees, and having granted the said bond in essential error, induced by the fraud of these defenders' agents, the said bond should be reduced. 3. The said defenders' agents having claimed and obtained the bond in the said defenders' favour on the representation that the said defenders were then the creditors in the loan of Whitsunday 1870, and the said representation being false, the said bond should be reduced. 4. There never having been any contract of loan between the pursuer and the said defenders to which the said bond can be referred, the pursuer is entitled to decree of reduction. 5. On the same grounds the pursuer is entitled to repetition

of the interest paid to the said defenders from the term of Whitsunday 1873 inclusive. 6. *Separatim*, the pursuer is not liable to the defender Ballantyne's trustee, in respect (1) that Scarth and Scott, as agents for Ballantyne's trustees, were acting apparently within the scope of their ordinary authority in ultimately taking the bond to the other defenders; and (2) that Ballantyne's trustees, by their acquiescence in all Scarth and Scott's proceedings relative to the loan and the bond, led the pursuer to believe that Scarth and Scott had such authority. 7. The defenders having enabled Scarth and Scott to commit the fraud libelled, the pursuer is liable in only once and single payment of £1000 and interest, and he is entitled to decree in terms of either of the alternative conclusions of the summons, with his expenses of process.

Smith's trustees stated, as was not disputed, that in 1861 they had made a previous loan to Dr Traill through Scarth and Scott. In regard to what occurred in 1867 they stated;—"At Whitsunday 1867 two bonds for £800 and £400, due by a Mr Kirkpatrick and a Mr Overstone to Smith's trust were paid up; and in order to provide for the re-investment of that money, the trustees, at a meeting held on 16th January 1867, requested Messrs Scarth and Scott 'to look out for an investment for the funds at the disposal of the trust,' and they subsequently informed the trustees that they had lent the money to their client Dr Traill. Scarth and Scott acted for both borrower and lenders in this transaction, just as they had done in the previous one. . . . Smith's trustees took for granted that, in the ordinary course of business, Scarth and Scott would obtain from the borrower of the trust-funds the necessary bond. In the account between Smith's trustees and Scarth and Scott the following entry occurs on the debit side at Whitsunday 1867:—'1867, May 15. To loan to Dr Traill of Woodwick over subjects in St Andrews and Kirkwall, £1000;' and on the other side the half-yearly interests on that loan are regularly credited."

They admitted that the bond under reduction was granted at the date it bore, but added;—"If Dr Traill had not granted the said bond and paid the interest thereon the trustees would have immediately compelled Scarth and Scott to pay up the sum, which they would then have been in a position to do."

They pleaded;—(2) The pursuer's signature to the said bond having been obtained by Messrs Scarth and Scott in the capacity of agents for him, and not as agents for the present defenders, there are no grounds stated for reducing the same. (3) The said bond having been treated by the present defenders as a valid bond by the pursuer, with his knowledge and consent, and he having regularly paid interest to them under the same, he is now barred from disputing his liability under the same.

Ballantyne's trustee pleaded;—(2) The pursuer is not entitled to have decree in terms of the said conclusions, in respect that the pursuer borrowed and received the said sum of £1000 from Ballantyne's trustees at Whitsunday 1870, and that the said sum has never been repaid, but is, on the contrary, due by the pursuer to the defender, with interest from Martinmas 1872.

After a proof, the result of which has been shortly given in the preceding narrative, and is more fully stated in the opinion of the Lord Justice-Clerk,[1] the Lord Ordinary pronounced this interlocutor:—"Finds, 1st, that at Whitsunday 1870 Messrs Scarth and Scott, as agents for Ballantyne's trustees, and in pursuance of the authority and instructions of the said trustees, lent to the pursuer £1000 of the trust-funds, the pursuer agreeing to grant therefor a bond and disposition in security over his pro-

[1] *Infra*, p. 776.

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perty specified in the bond and disposition in security challenged in this action; 2d, that on 9th May 1873 the pursuer was, by the false and fraudulent representation of Messrs Scarth and Scott, to the effect that the said loan had been made on account of Smith's trustees, or that they had acquired right as creditors therein, and that the bond and disposition in security therefor consequently fell to be granted in their favour, induced to execute and deliver in favour of Smith's trustees the bond and disposition in security challenged in this action; and 3d, that the pursuer received no loan from Smith's trustees, and was not, at the date of the said bond and disposition in security, and is not now, indebted to them, and that the said bond and disposition in security ought to have been granted in favour of Ballantyne's trustees, from whom, through Scarth and Scott as their agents, the pursuer obtained the loan at Whitsunday 1870, and for the whole amount of which the pursuer was, and still is, indebted to them: Therefore reduces, decerns, and declares in terms of the reductive conclusions of the summons: Sustains the defences for the defender, Ballantyne's trustee, and assoilzies him from the conclusions of the summons directed against him: And decerns and ordains the defenders, Smith's trustees, to repay to the pursuer the sums set forth in the petitory conclusions of the summons, together with interest on the several sums at the rate of four per cent per annum during the non-payment: Finds Smith's trustees liable in expenses to the other parties in the cause subsequent to the date of closing the record," &c.*

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* "OPINION.—When I allowed a proof in this case I expressed a hope that the real competitors in the case (as I thought), namely, Ballantyne's trustees and Smith's trustees, would so arrange that the pursuer, Dr Traill, should have no occasion to appear in the litigation, but that they would conduct the case between themselves upon the question which of them was entitled to his bond. I am not surprised that the parties did not see their way to do this, and that Dr Traill has accordingly been under the necessity of attending to his interest in the case down to the present time.

"My opinion is that the pursuer is only liable in single payment of the £1000 which he got, with any interest that may be due thereon, and that the question in the cause is truly between Ballantyne's trustees and Smith's trustees. The question is, which of the trusts is entitled to hold Dr Traill's bond for £1000? Now, the bond which was actually granted upon the 9th of May 1873 is in name of Smith's trustees as creditors; and it is incumbent, in the first instance, upon Ballantyne's trustees, who seek to displace Smith's trustees from their position as creditors in the bond, to shew and establish cause why they should be so displaced. Smith's trustees aver—and this may be taken as their case—that in the year 1867 Messrs Scarth and Scott held funds belonging to that trust-estate to the amount of about £1200, and that they informed their constituents, the trustees, that they had lent the money to their client, Dr Traill, the present pursuer. The trustees do not distinctly aver when Scarth and Scott gave them this information, the averment being in article 3 that Scarth and Scott having in their possession at Whitsunday 1867 the amount of money which I have mentioned belonging to the trust, and being instructed to look out for an investment for the funds, they subsequently informed the trustees that they had lent the money to Dr Traill; and in the same article they aver that in the account of Scarth and Scott to the trust this entry occurs—'1867, May 15. To loan to Dr Traill of Woodwick, over subjects in St Andrews and Kirkwall, £1000.' With proper caution Mr Beveridge, one of the trustees, desired to see the trust securities in the hands of Scarth and Scott, the agents for the trust; and he accordingly had a meeting with Scarth and Scott in their chambers in the month of April 1873, at which meeting all the securities which ought to have been in their hands were exhibited, with the exception of that which they ought to have had corresponding to the entry I have just read in

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Smith's trustees reclaimed, and argued;—(1) The £1000 which Dr Traill received was not identified as belonging to Ballantyne's trust. There was no contract between Dr Traill and Ballantyne's trustees. Dr Traill's only contract was with Scarth and Scott, who acted as cashiers for both trusts. There was nothing which legally disabled Scarth and Scott from ultimately crediting the loan to Smith's trustees, as they had done by getting the bond executed in their favour. (2) The Lord Ordinary was in error in assuming that Dr Traill was necessarily only liable in single

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their account under date 15th May 1867—'To loan to Dr Traill of Woodwick over subjects in St Andrews and Kirkwall, £1000.' They had not that bond to exhibit, and accordingly none such was exhibited; they could have none corresponding to such a loan, for in point of fact no such loan was ever made; but they informed Mr Beveridge that there had been an accidental omission to take the bond from Dr Traill, which would be immediately supplied. They accordingly, in pursuance of this assurance, proceeded to apply to Dr Traill to give them a bond. They could not ask him to give a bond for a loan made to him out of Smith's estate in May 1867, for no such loan had ever been made, but they represented to him falsely, in their letter of 7th May 1873, that a loan which had been in fact made to him through them at Whitsunday 1870, was made for Smith's trustees, or at least that Smith's trustees had acquired right to that loan, and were entitled to the security. I regard this as a false and fraudulent statement on the part of Scarth and Scott to Dr Traill for the purpose of inducing him—as it had the effect of inducing him—to grant his bond for the loan which he had obtained at Whitsunday 1870 in name of Smith's trustees as creditors, that they might be able to represent to Smith's trustees that this was the bond and security for the loan which they falsely represented they had made out of these funds at Whitsunday 1867. Smith's trustees are now quite innocently in possession of the fruits of this fraud; but the bond is the fruits of the fraud, and however innocent—and I hold they are quite innocent—they are in possession of the fruits of a fraud committed by their agent in order to satisfy them, the fraud consisting, as I have stated, in representing to Dr Traill that Smith's trustees had a right to the loan which they had made to him at Whitsunday 1870, in order that obtaining his bond upon that footing, but without any mention of the date of the loan, they might represent it to Smith's trustees as the bond which they had got for the pretended loan of 1867. If that fraud had not been committed, Smith's trustees would not have been in possession of the bond; being in possession of that bond, they are in possession of the fruits of the fraud; and whatever hardship there may be—and there is great hardship—in having been swindled, and in discovering now that the bond is the fruits of a fraud, I must nevertheless apply the law, and deprive them of the fruits of that fraud.

"Then, with regard to the rights of Ballantyne's trustees, I am of opinion that the loan which was certainly made by Scarth and Scott to Dr Traill at Whitsunday 1870, was a loan on account of the funds, and under the authority of the trustees having the management of that trust-estate. An application was made to these trustees to lend the money to Dr Traill in the month of March 1870. The proposal was considered and agreed to, and Messrs Scarth and Scott were instructed accordingly, and trust money to the amount of £1300 was put into their hands to enable them, with funds which they then represented to be in their hands of sufficient amount for the purpose, to make that loan and other two which were authorised at the same meeting; and the loan was made. I hold that the funds of that trust, in pursuance of the authority and directions of the trust, were so given and so dealt with by all the parties, until Scarth and Scott being pressed to do something to cover the gross swindle that they had committed six years before, deceived Dr Traill into granting this bond in 1873. Having this opinion, I must determine, whatever the proper form of it may be, that Dr Traill is liable only to pay once, and that Ballantyne's trustees, and not Smith's trustees, are entitled to hold the bond for £1000."

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payment. Whatever Dr Traill's liability to Ballantyne's trust might be, he was liable to Smith's trustees under the bond. Assuming that there was fraud on the part of Scarth and Scott in obtaining the bond, they were acting in the capacity of Dr Traill's agents, and therefore Dr Traill must bear any loss arising from their misconduct. Further, in any view, Dr Traill could not reduce the bond unless he was in a position to replace Smith's trustees in the position in which they stood before the bond was granted. If he had refused to sign the bond, Smith's trustees would at once have demanded payment of the sum from Scarth and Scott, who, it must be assumed in the absence of any averment or evidence to the contrary, were then solvent. By his negligence in signing the bond and in paying interest on it for two years he had led them to believe that everything was correct. Now that Scarth and Scott were bankrupt, and recourse against them was of little or no value, Dr Traill was not entitled to repudiate the bond.

Argued for Ballantyne's trustee;—The proof shewed that £1000 of the funds of Ballantyne's trust had been lent to Dr Traill under an obligation to grant heritable security therefor. Whatever became of the claim of Smith's trustees that debt remained due.

Argued for the pursuer;—He had only got one sum of £1000, and could not be made to pay twice. Smith's trustees had given no value for the bond, which was obtained by the fraud of Scarth and Scott, acting as their agents and on their behalf. It was absurd to contend that in getting the bond signed by the pursuer they were acting as his agents. It was the interest of the creditors, not of the debtor, to see that the bond was signed. Alternatively, as against Ballantyne's trustee, if Smith's trustees were right in their contention that Scarth and Scott were entitled to ascribe the loan to them (Smith's trustees), then it followed that Ballantyne's trustees had not advanced the money, and the pursuer was entitled to decree of declarator against the latter as concluded for.

At advising,—

Lord Justice-Clerk.—In this case, undoubtedly, as presented at the bar, and as it appears upon record, there is a good deal of perplexity and complication. What, between the fraud of one of the four parties involved in the matter, and the extraordinary carelessness of the others, an apparent coil of cross-purposes has been established which it requires some care to unravel. The form of Dr Traill's action also contributes to the general confusion and difficulty. The summons is divided into two parts—(1) a conclusion for reduction of the bond, and (2) a conclusion for declarator that the pursuer is not under obligation to one set of defenders. The conclusions are called alternative, but the first is truly destructive of the second. Dr Traill would have been better advised if he had tried separately the validity of the bond against Smith's trustees. But he seems to have been under the impression that although he has granted the same rights to different persons, he is only liable in once and single payment, because he only received payment once himself, which certainly does not follow.

I shall first consider the question of the reduction of the bond as if that were the only question in issue. Dr Traill says, in effect, that in 1870 he borrowed through Messrs Scarth and Scott, W.S., Leith, the sum of £1000 upon the security of certain heritable property he held in Orkney and St Andrews, that he paid interest on £1000 for two-and-half years, and received receipts therefor from Scarth and Scott as agents for and in the name of Ballantyne's trustees. He says that in 1873 Scarth and Scott fraudulently obtained from him a bond and disposition in security over this property, in the name of Smith's trustees,

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on the false representation that they had acquired right to the debt. He states that Smith's trustees never paid £1000 to him, or any part of it, but that the sum was truly advanced solely by Ballantyne's trustees. He now seeks to reduce the bond so obtained. That is the case as set forth by the pursuer. On the other hand, the defence for Smith's trustees is that the above statement is untrue in point of fact: That it is not true that Ballantyne's trustees advanced £1000 to Dr Traill, and that these trustees never were creditors in the transaction: That Scarth and Scott were the real lenders, advancing the £1000 out of their own funds, and they were therefore entitled to take the bond from the debtor in any name they chose.

There are thus three questions to be solved: 1. Did Ballantyne's trustees, at the Whitsunday term 1870, lend Dr Traill £1000 on the security of his heritable property at Kirkwall and St Andrews, and were they at the date of this bond creditors in the debt and in the heritable security in question? 2. If Ballantyne's trustees did lend the money, and were the creditors in this debt and security at the date of the bond, was the bond taken in the name of Smith's trustees and put on record through the fraud of Scarth and Scott as agents of Smith's trustees? 3. If these two questions are answered in the affirmative, the third seems to be,—Can Smith's trustees retain a benefit procured by the fraud of their own agents, and for which they gave Dr Traill no consideration?

Now, on these propositions, as far as they depend on fact, I am unable to find any room for doubt.

As to the first of them, I can hardly think that it can be maintained that Ballantyne's trustees did not lend this money to Traill, or that Scarth and Scott were the true creditors. All the evidence points in the first direction, and none of it in the second. But as the whole case turns on this matter, and it has been very earnestly argued, I shall inquire into the facts with an amount of care which I should not otherwise have thought it deserved.

In 1869 Dr Traill bought a house in St Andrews, and required £1000 to pay for it. His factor, Robert Scarth, applied to his relative's firm of Scarth and Scott in Leith to ascertain if they could find the money, explaining for whom and why it was wanted. Scarth and Scott undertook to find the money; but in the meantime Robert Scarth made a temporary advance of the amount to Dr Traill, it being arranged that he should be repaid when the loan was received. Some delay occurred in completing Dr Traill's title to the property in St Andrews, in regard to which Scarth and Scott acted as Traill's agents, and on the 19th of March 1870 a meeting of Ballantyne's trustees was held in the chambers of Scarth and Scott, at which Mr Scott was present, and at which the following loans were agreed to, viz., "To Dr Traill of Woodwick the sum of £1000 over subjects belonging to him in St Andrews and Kirkwall," in addition to two other loans to other parties of £500 and £600 each. On the 6th of May it appears that two deposit-receipts, amounting to £535 and £539 each with £261 of interest are credited in the cash ledger of Scarth and Scott to Ballantyne's trustees. On the 9th of May Scarth and Scott sent Robert Scarth a note of the payments on his account falling due at the term of Whitsunday 1870, amounting to £640, 12s. 10d. This letter is acknowledged by Robert Scarth on the 11th by a letter in which he says,—"Please on 16th credit me with the £1000 loan obtained for Dr Traill of Woodwick, less the expense, of which send me an account discharged. . . . Please pay in the balance of the £1000 to my credit with the Union Bank in Edinburgh." Under date 16th of May the ac-

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count of Ballantyne's trustees in Scarth and Scott's cash ledger is debited with £1000 by this entry,—"To paid Dr Traill amount of loan, £1000;" and the same entry appears in the cash book of the same date,—"Ballantyne's trust.—To paid Dr Traill amount of loan £1000;" with this *notandum*—"£341, 7s. 2d. paid to Mr S. S." (it should be R. S.) "credit with Union Bank." The meaning of this note is that on the same day, in compliance with Robert Scarth's desire, Scarth and Scott applied £659 to extinguish the sum of £640 owing to them by Robert Scarth, and to meet the expense of the bond to Ballantyne's trustees, and paid the balance into Robert Scarth's account with the Union Bank, as appears from a letter and state sent by them to Mr Robert Scarth on 8th June. And so the transaction was closed, as far as the advance and receipt of the money were concerned. Under date 15th May 1870, Robert Scarth, in his account rendered afterwards to Dr Traill, enters "on bond over house property in Kirkwall and St Andrews, now remitted for Dr Traill's credit, £1000." As to the security, it appears from Robert Scarth's letter of 8th July 1870 that Scarth and Scott were then in possession of Dr Traill's titles for the purpose of preparing the bond.

Up to this time the case has no mystery about it. It is an ordinary Whitsunday transaction, in which a Leith firm act as agents both for a client who wishes to lend and a client who wishes to borrow. Ballantyne's trustees, having £1000 to lend, put Scarth and Scott in funds to enable them to pay that amount to Dr Traill. Scarth and Scott credit them in their books with the amount when received, and debit them with the amount as having been paid to Dr Traill, and the very mode in which the settlement with Robert Scarth is made shews beyond all question how and in what capacity the payment to Dr Traill was made. There is not an element of any kind to indicate that Scarth and Scott acted as principals in the matter. On the contrary, they had power to bind, and did bind, Dr Traill to Ballantyne's trustees to grant the stipulated security, and could have done nothing to liberate him from that obligation after the money was paid.

It appears, no doubt, that up to this time Dr Traill did not know who the lender was. But this is immaterial, for Dr Traill knew that whoever the persons were who advanced the money he had authorised Scarth and Scott to undertake for him to the lender that he would execute a conveyance in security in their favour. Scarth and Scott did so undertake to Ballantyne's trustees, and received their money on that footing, and paid it to Dr Traill; and Dr Traill is as much bound to fulfil his agents' undertaking as if he had made it personally. Scarth and Scott held Dr Traill's title-deeds on Ballantyne's trustees' account for the purpose of preparing a bond in their favour, and for no other; and that duty they were bound to perform whether Dr Traill knew the name of the lenders or not.

I attach no weight whatever to the argument, so sedulously pressed, about there being no specific appropriation or separation of the money as that of Ballantyne's trustees. There is no case of specific appropriation raised here; nor can I see how there could be. If it be certain that Scarth and Scott were indebted to Ballantyne's trustees in £1000, and that Ballantyne's trustees instructed Scarth and Scott to pay £1000 on their account to Dr Traill, and they do so, Scarth and Scott are discharged of the £1000, and the relation of debtor and creditor between Dr Traill and Ballantyne's trustees is as clearly established as if the money had been paid in bags of sovereigns with unbroken seals.

So stood the transaction in July 1870. The security had not been granted,

but Scarth and Scott held the titles of Dr Traill's property for the purpose of preparing it on the part of the lenders. But for three years the contract was expressly acted on by Dr Traill paying the interest on the loan to Scarth and Scott, and receiving receipts granted by them in the name and for the account of Ballantyne's trustees. It is hopeless to contend that after this Scarth and Scott were principals in the transaction, or that either they or Dr Traill could have pretended that Ballantyne's trustees were not the only creditors entitled to the security.

Therefore, at the date of the bond, Ballantyne's trustees were the creditors in this loan. The transaction was entirely honest throughout, and whatever other frauds Scarth and Scott were guilty of, they had not embezzled this £1000 belonging to Ballantyne's trustees.

The second proposition is that the bond was obtained by the fraud of Scarth and Scott as agents of Smith's trustees. It was of course a fraud on the part of Scarth and Scott to take any bond from Dr Traill but one in favour of Ballantyne's trustees, from whom they had obtained the loan on the undertaking that Traill should grant it. But the fraud went deeper.

Up to this time, Dr Traill had no more concern with Smith's trustees than with any other client of Scarth and Scott. They had given him no money on this security, and he had no communication with them, or with any one on their behalf, directly or indirectly. But six years before, Scarth and Scott had £1000 belonging to Smith's trustees in their hands, which they were directed to invest, but which they embezzled.

In May 1873, Scarth and Scott suddenly wrote to Dr Traill the letter which was so strongly founded on, although they had not been for some time in correspondence with Dr Traill. That letter is in these terms—"With reference to the loan of £1000 which we negotiated for you through Mr Robert Scarth over your property in Kirkwall and St Andrews, we find that from the matter being overlooked at the time, the bond was never executed; it now falls to be taken in favour of the trustees of the late Mr Smith, and we send it herewith for execution. We will feel obliged by your signing it according to the printed directions prefixed, and returning it to us at your convenience." The plain meaning of this letter was that Smith's trustees were then in right of Ballantyne's debt, which was false. Dr Traill accordingly executed the bond and returned it, and it was put upon record. The question then is, whether the obtaining of this bond, taking delivery of it, and putting it on record, were fraudulent acts on the part of Scarth and Scott. I cannot doubt that they were. The proposal to make out the bond in favour of Smith's trustees was simply to cheat Ballantyne's trustees. Scarth and Scott never thought that they had a right to do as they liked with the bond; what they did was caused simply by a demand which had been made recently before, by Smith's trustees, for £1000 they had been entrusted with to invest six years before; and Scarth and Scott thought they would get out of their difficulty by inducing Dr Traill to execute this bond in their favour. It is clear that the £1000 which Dr Traill got was not the money of Smith's trustees, not only because it was the money of Ballantyne's trustees, but because the money of Smith's trustees had been embezzled three years before by Scarth and Scott. But whenever Smith's trustees demanded a voucher for their £1000 this fraud was perpetrated. It does appear that, in order to cover their own dishonesty, interest was paid by Scarth and

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Scott to Smith's trustees upon a supposed investment in 1867, but there is no trace of such interest or of any such investment in Scarth and Scott's books.

It is thus clear (1) that Ballantyne's trustees are the real creditors in this debt and security; and (2) the obtaining of this bond was a fraud both on them and on Dr Traill.

The third question is, can Smith's trustees take benefit by this fraud? They never gave value for this bond. There might be a question for whom Scarth and Scott were acting when they sent the bond to Dr Traill for execution, but there can be no doubt that in taking delivery of it, and in recording it, they acted for Smith's trustees.

None of the parties appear to have been very vigilant, but I apprehend that if a party gets benefit by a fraud, even though it were not that of his own agent, he cannot retain the benefit if he gave no consideration for it. But here Scarth and Scott committed the fraud as their agent, and for their behoof, although of course without their knowledge. If they had given the money to Dr Traill the case would then be that Dr Traill had received the money twice, and the creditor who obtained the security might prevail. But there is no such case here.

This bond cannot stand (1) because it was obtained by fraud, and (2) because Smith's trustees cannot reap benefit from the fraud of their agents, and gave no consideration for it.

Upon the alternative conclusion of the summons directed against Ballantyne's trustee, which is based on the supposition that the bond in favour of Smith's trustees is perfectly good, it is enough to say that the statements of the pursuer in support of this part of his case are inconsistent with fact.

I propose that we should adhere to the interlocutor of the Lord Ordinary.

LORD NEAVES, LORD ORMIDALE, and LORD GIFFORD concurred.

THIS interlocutor was pronounced:—"Having heard counsel on the reclaiming note for Smith's trustees against Lord Young's interlocutor of 19th November 1875, refuse said note, and adhere to the interlocutor complained of: Find the expenses incurred since the date of the Lord Ordinary's interlocutor payable as follows:—The expenses incurred by Dr Traill to be paid by Smith's trustees, and the expenses incurred by Ballantyne's trustee to be paid by Dr Traill," &c.

MAITLAND & LYON, W.S.—GIBSON-CRAIG, DALZIEL, & BRODIES, W.S.—W. & J. COOK, W.S.—Agents.

No. 125. June 6, 1876. Clark v. M'Allister.

JOHN CLARK, Pursuer.—*Strachan.*
ALEXANDER M'ALLISTER AND HIS TRUSTEE, Defenders.—*Pearson.*

Process—Review—Reclaiming—Court of Session Act, 1868 (31 *and* 32 *Vict. c.* 100), *sec.* 28—*A. S.* 10*th March* 1870, *secs.* 1, 2.—*Held* that an interlocutor renewing an order for proof was an allowance of proof, and might be reclaimed against without leave within six days.

1ST DIVISION. Ld. Craighill. M.

IN an action by John Clark, writer in Glasgow, against Alexander M'Allister, fishmonger there, and J. D. Kirkwood, the trustee on his sequestrated estate, for payment of business accounts, the Lord Ordinary, on 15th March 1876, pronounced this interlocutor:—"Allows to the pursuer a proof of his averments relative to the accounts sued for, and to the

balance alleged to be due thereon, for which decree is now sought; in the second place, allows to the defender, Mr Kirkwood, a proof of his averments—(1) as to the sums said to have been received from or on account of the other defender, other than those credited by the pursuer, for which, as alleged, the defender is entitled to credit; and (2) as to the account for furnishings supplied by the other defender to the pursuer, and for which, in whole or in part, credit is claimed; and, in the third place, allows to each party a conjunct probation: Further, appoints the cause to be enrolled, that a diet of proof may be fixed."

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On 18th March his Lordship pronounced this interlocutor:—"Upon the motion of the defender, remits to the Auditor to tax the accounts sued for, and to report, and this of consent of the pursuer."

A note of objections to the Auditor's report was lodged by the pursuer.

On 30th May the Lord Ordinary pronounced this interlocutor:—"Having heard parties' procurators on the objections to the Auditor's taxation of the account sued for, finds that the necessity for a proof is not obviated by said taxation, there being a dispute between the parties as to the facts with reference to which, in the case of many of the items, the right of the pursuer to make the charges struck off by the Auditor must be determined: Therefore renews the order for proof in so far as disputed items in said accounts are concerned; and appoints the proof to proceed," &c.

The defender, Kirkwood, moved for leave to reclaim, which was refused. He presented a reclaiming note on 3d June.

The pursuer objected to the competency, on the ground that the interlocutor of 15th March ordering proof was final, not having been reclaimed against. The present interlocutor was only an interlocutory judgment carrying out the previous interlocutor, and could not be reclaimed against without leave.

The defender maintained that the interlocutor of 15th March was superseded by the interlocutor pronounced of consent three days afterwards, remitting the disputed accounts to the Auditor. The defender was then entitled to believe that there would be no proof, and that was the intention of the remit. The last interlocutor was therefore an independent order.

LORD PRESIDENT.—The Lord Ordinary pronounced an interlocutor on 15th March 1876 allowing a proof. That interlocutor was not reclaimed against. If the interlocutor of 30th May had merely appointed the proof to proceed it would clearly not have been what is called a six days' interlocutor, reviewable under the 28th section of the statute and the Act of Sederunt. But what his Lordship has done is this: He renews the order for proof, in so far as disputed items in the account are concerned, and then appoints the proof to proceed. It appears to the Court that the renewal of the order is an allowance of proof, and so within the meaning of the statute and the Act of Sederunt, and therefore that this interlocutor may be reclaimed against.

GEORGE BEGG, S.S.C.—RHIND & LINDSAY, W.S.—Agents.

JOHN NISBET, Pursuer.—*Balfour—Rhind.*
ALEXANDER SMITH, Defender.—*Asher—Alison.*

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Nisbet v. Smith.

Sale—Advertisement—Feu-Duty—Warrandice.—A villa was advertised for sale. After a description of the subjects, the advertisement contained the following words, "Feu-duty £9," and concluded, "For further particulars apply to A B, writer, 112 West Regent Street, Glasgow, in whose hands are the title-

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deeds and articles of roup." An intending purchaser, without applying to the agent named, addressed to the seller a written offer for the villa "as advertised," which was accepted. The titles shewed that the payment of £9 formed part of *cumulo* prestations amounting to £46, 19s., which affected a larger area of which the subjects formed part, and which had never been allocated. The seller offered to cancel the contract of sale, but the purchaser refused to agree to this, and insisted that the seller should either procure an allocation of the burdens or should insert in the disposition to be granted a clause warranting the purchaser against liability for a larger sum than £9 a year. In an action at the instance of the seller, *held* (*rev.* judgment of Lord Curriehill) that the purchaser was wrong in the position which he had taken, and was bound to accept a disposition in ordinary form, (1) because by the terms of the advertisement and relative offer and acceptance the titles were imported into the contract of sale, and the purchaser must be held to have acquired the subjects under all the conditions which the titles alone could accurately disclose; (2) because the advertisement only held out that the seller in point of fact paid £9 of feu-duty, which was true.

2D DIVISION. Ld. Curriehill. I.

IN March 1875 a villa near Glasgow, belonging to Mr John Nisbet, salt and whiting merchant, was advertised for sale,—"To be sold by public roup, in the Faculty Hall, St George's Place, Glasgow, on Wednesday, 31st March 1875, that villa known as Jane Villa, Kinnishead, near Glasgow." (The house and ground, consisting of one acre, were here described in popular language.) "Everything in the best order. Feu-duty £9. For further particulars apply to W. R. Buchan, writer, 112 West Regent Street, Glasgow, in whose hands are the title-deeds and articles of roup."*

Shortly after the advertisement appeared Mr Alexander Smith, commission agent, Glasgow, communicated directly with Mr Nisbet, and, after some verbal communing, addressed to him this offer:—"Glasgow, 24th March 1875.—Mr John Nisbet, Turner's Court.—Dear Sir,—I hereby make you the offer of £1200 for 'Jane Villa,' at Kinnishead, as advertised —possession at Whitsunday 1875.—I am, yours truly. ALEX. SMITH."

Nisbet returned this answer:—"Glasgow, 24th March 1875.—Mr Alex. Smith, 20 Dixon Street.—Dear Sir,—Your offer of £1200 for 'Jane Villa,' &c., as advertised by me, I hereby accept.—I am, yours truly. JOHN NISBET."

The titles of the property were then sent, at Smith's request, to his agents, for the purpose of satisfying themselves as to the title, and preparing the disposition in his favour.

When the titles came to be examined they disclosed the following state of matters:—The villa and ground in question, which extended to about an acre, formed part of an area of somewhat over 6½ acres feued out in 1853 by Sir John Maxwell of Pollok to one James Connell, for a feu-duty of £32, 19s. (being at the rate of £5 per acre), with a duplicand of the feu-duty every nineteenth year. Connell subsequently disponed 3½ acres of the 6½ acres to Peter Thomson, under a ground-annual of £14 (or £4 per acre) with a duplicand every nineteenth year. The disponee and his successors were also taken bound in payment of a proportion of the *cumulo* feu-duty corresponding to the extent of the subjects disponed. Thomson disponed an acre of his ground, under similar conditions, to William

* A discrepancy existed between the terms of the copy of the advertisement produced by the pursuer in the present action, which is given in the text, and the terms of the advertisement as stated by the pursuer in his condescendence, according to which the last clause ran thus:—"For further particulars apply to John Nisbet, Turner's Court, Dunlop Street, Glasgow, or to W. R. Buchan, 112 West Regent Street, there, who is in possession of the title-deeds." As no proof was taken it, did not appear whether there were two versions of the advertisement, and if there were, which was the one referred to in the missives of sale.

Menzies, which ultimately in 1866 came into the hands of Nisbet, and formed the subject of the present transaction.

No allocation of the feu-duty or ground-annual had been made by the persons in right of these prestations.

Smith refused to pay the price unless Nisbet obtained an allocation of the *cumulo* feu-duty and ground-annual, or inserted in the disposition a clause limiting the annual sum ultimately affecting the property to £9.

To this Nisbet would not consent, but he offered to relieve Smith of the contract of sale. Smith declined this proposal, and was allowed to enter into possession of the subjects at Whitsunday 1875.

Upon 9th July 1875 Nisbet raised the present action against Smith concluding that the defender should be ordained to implement the contract of sale, by paying the price, with interest from 15th May 1875, and taking a disposition containing all usual and necessary clauses so as to vest the defender therein, and in the whole right thereto held by the pursuer, and that within fourteen days after decree, and in the event of the defender failing so to implement the contract, for declarator that the contract was at an end in so far as regarded any right on the part of the defender to enforce it, but reserving the pursuer's claim of damages for the defender's non-implement thereof.

The parties were agreed as to the facts above narrated.

The pursuer averred, that since he had been in possession he had paid annually £5 in name of feu-duty, and £4 in name of ground-annual, amounting together to £9. The defender's answer was "Not known, and not admitted," but the correctness of the pursuer's statement on this point was assumed.

The pursuer pleaded;—(1) The defender having entered into a contract for the purchase of the subjects above mentioned, he is bound to implement and fulfil the same by making payment of the price, and accepting of a disposition from the pursuer. (2) The defender having, on the faith of his implementing the said contract, been allowed to enter into possession of said subjects, he is bound to pay the price with interest and accept the disposition. (3) In the event of the defender failing so to do within such time as the Court shall direct, the pursuer will be entitled to decree of declarator that the contract is no longer operative or binding on the pursuer, and otherwise, as concluded for.

The defender pleaded;—(2) The pursuer is bound in the circumstances stated to obtain an allocation of the gross feu-duty and ground-annual, or to insert a clause in the disposition in such terms as to limit the annual sum ultimately affecting the property in question to £9, and to get the deed referred to sufficiently stamped. (3) The defender having always been ready to fulfil his part of the contract on the pursuer's implementing the obligations incumbent on him, the defender ought to be assoilzied.

The Lord Ordinary, on 5th January 1876, pronounced the following interlocutor:—"Having heard the counsel for the parties, and considered the closed record and whole proceedings, *Primo*, finds that it is admitted (1) that the plot or area of ground libelled, which belongs to the pursuer, is part of subjects of greater extent which are burdened with a *cumulo* feu-duty of £32, 19s. per annum, and a duplicand thereof every nineteenth year, payable to the superior, and with a ground-annual of £14 per annum, with a duplication of the like amount every nineteenth year; (2) that there has been no allocation by the superior or the party in right of said ground-annual of any proportion of said feu-duty and ground-annual upon the plot or area of ground libelled; (3) that the pursuer in March 1875 advertised for sale the said plot or area of ground which is now known as 'Jane Villa,' and in his advertisement stated the feu-duty to be £9; (4)

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that by missive offer and acceptance, both dated 24th March 1875, the defender offered to purchase, and the pursuer agreed to sell to the defender, the said subjects as advertised by the pursuer at the price of £1200 sterling, with entry at Whitsunday 1875: *Secundo*, Finds that the said offer and acceptance imply that the defender as purchaser should for the said price to be paid by him acquire and hold the said plot or area of ground subject to no feu-duty or ground-annual payable to any person, greater than the said annual sum of £9, and, therefore, that the pursuer is bound to convey the same to the defender freed from the burden of all feu-duties and ground-annuals in excess of said annual sum of £9, or secured against the effect of liability for such feu-duties and ground-annuals: *Tertio*, Finds that the defender is willing to implement his part of the transaction, provided the said *cumulo* feu-duty and ground-annual are to the extent of £9 allocated upon said area or plot of ground by the superior and party in right of the ground-annual, or provided the pursuer shall in the disposition to be granted by him warrant the defender against the ultimate payment of a larger sum than £9 per annum; and before further answer appoints the cause to be enrolled that the pursuer may state in what manner he proposes to implement his obligation in reference to said feu-duty and ground-annual; meantime reserves all questions of expenses." *

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* "NOTE.—The circumstances in which this action has been raised are fully explained by the findings in the first branch of the foregoing interlocutor. The defender in purchasing the subjects plainly relied on the pursuer's statement in the advertisement that the feu-duty was £9; and he is not said to have known that this was an unallocated part of a *cumulo* feu-duty and ground-annual of £46, 19s. which affected the entire subjects of which the plot or area purchased forms a part. Indeed, the pursuer himself avers that the defender made his offer without either seeing the titles or applying for information to the pursuer's agents, to whom reference was made in the advertisement. The pursuer, however, maintains that the defender is bound to accept a disposition of the lands without any allocation of the feu-duty and ground-annual being made, or without any obligation being granted by the pursuer to relieve him of the surplus feu-duty and ground-annual, and that if the defender refuses to accept such a disposition the bargain must be cancelled. I am of opinion that none of the pursuer's contentions can be sustained. The statement in the advertisement was, in my opinion, a warranty by the pursuer either that the subjects were free from all annual prestation, such as feu-duty or ground-annual, except to the extent of £9 per annum, or that he (the pursuer) would free them of all such liability beyond that sum. And I am farther of opinion that the pursuer is not entitled to have the contract cancelled. He has not stated any relevant case to support such a demand, and his own statement of the transaction between him and the defender implies that by the offer and acceptance he became bound to hand over to the defender 'Jane Villa' free from all feu-duty, &c., beyond £9. And the pursuer is bound to implement that obligation either by obtaining a proper allocation of the feu-duty and ground-annual before the defender pays the price, or by inserting in the disposition a proper clause of relief. The defender is willing to settle the transaction on either footing, and if an allocation cannot be procured he will be content with the insertion in the disposition of a clause binding the pursuer and his representatives in warrandice against the ultimate payment of a larger sum than £9 per annum. This I think a most reasonable proposal—and the case is ordered to be enrolled that the pursuer may state which alternative he proposes to adopt. The present case is in all material points ruled by the decision in Paton v. Steuart, 11th March 1825, 3 Sh. 457. No question has been raised by the parties, or can, in my opinion, properly arise between them, in reference to the duplication of the *cumulo* feu-duty and ground-annual. The defender must be held to have purchased the subjects on the footing that they were liable to the casualty of composition either taxed or untaxed, and it

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The pursuer obtained leave to reclaim.

Argued for him;—The advertisement was merely descriptive; there was no warrandice that the purchaser should in no case be called on to pay more than £9. Although not technically correct, the statement in the advertisement was substantially true. All that the seller undertook to do was to place the purchaser in the same position as himself. In point of fact the seller did pay £9 of what, in popular language, was known as feu-duty, and he had never paid more. The advertisement expressly referred intending offerers to the title-deeds in the hands of the seller's agent. A glance at the titles would have shewn the precise state of matters. The titles must be held to be imported into the offer and acceptance. If the purchaser did not choose to examine the titles he must take the consequences. Even if there was misrepresentation on the part of the seller it was unquestionably innocent misrepresentation, and the purchaser's remedy was *restitutio in integrum*. The seller had done all that could be required of him in any view by offering to relieve the purchaser of his bargain. The Court could not re-form the contract for the parties.[1]

Argued for the defender;—There was an implied warranty that the purchaser was not to be subjected to liability beyond £9 a-year, whereas the property was primarily liable in a yearly burden of £46, 19s. The case could not be dealt with as one of mutual error, as the pursuer must be held to have been acquainted with his own titles. The case was ruled by Paton v. Steuart.[2]

LORD JUSTICE-CLERK.—This case has been ably argued, and my opinion varied during the course of the discussion, but I have now come to the conclusion that the interlocutor of the Lord Ordinary is wrong, and ought to be recalled.

It has been assumed by the purchaser here, too confidently, that the offer, acceptance, and advertisement not only made a concluded contract, but contained all the conditions of it. I think differently. The advertisement contains a description of the house and offices in popular language, and then it adds these words:—"For further particulars apply to Mr Buchan," the seller's agent, "in whose hands are the title-deeds and articles of roup." I cannot take it off the purchaser's hands that he never looked at the titles. He must be held to have accepted the property under all the conditions which the titles alone could accurately disclose. Now, here, if the titles had been consulted a single glance would have shewn either the purchaser or his agent the true state of matters as to the feudal burdens. They would have seen that the feu-duty could not be in any sense £9—the feu-duty was £32, 19s., and there was also a ground-annual of £14 per annum. The state of the titles was this,—Sir John Maxwell of Pollok feued out a piece of ground to James Connell for a *cumulo* feu-duty of £32, 19s. Connell entered into a contract of ground-annual with Peter Thomson, whereby he disponed to Thomson 3 acres 2 roods of his feu for a ground-annual of £14 per annum, Thomson and his heirs and successors being taken bound to pay also a proportion of the feu-duty exigible from the whole subject corresponding to the extent of the subjects disponed. Thomson disponed an acre of his ground to Menzies under similar obligations, and Menzies disponed it to Robertson, who in his turn disponed it to Nisbet, and that is the piece of ground which, along

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will remain for himself to arrange, after the disposition is finally completed and delivered, for the allocation of the said duplications, if he can prevail upon the superior and party in right of the ground-annual to make the same."

[1] Steuart's Trustees v. Hart, Dec. 2, 1875, *ante*, p. 192.

[2] March 11, 1825, 3 S. 653, N. E. 457.

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with the house, &c., thereon, forms the subject of the present dispute. On the face of the title, then, it appears that the subjects may be held primarily liable for a *cumulo* feu-duty of £32, 19s. and a ground-annual of £14, which are exigible proportionally from the whole piece of ground originally conveyed. The question comes to be, was there any intention to make this sale take place under any other conditions? When the party advertising his property says in his advertisement that the titles are in the hands of his agent, and gives that agent's address, the purchaser is bound either to look at these titles or to accept the feudal conditions which they express. An advertisement is usually popularly expressed, and must not be strictly construed as if it were a legal document.

But even if the titles did not enter the contract, the construction attempted to be put upon the contract by the defender is far from being clear. When, in the advertisement, we find the words "Feu-duty £9," that may mean nothing more than that "the seller pays £9," and so he did—£5 of feu-duty and £4 of ground-annual. The seller says that he never meant to put the purchaser into a better position than himself, and the words may not imply more. It is usual for a superior, when he feus out a piece of ground which is to be again separated into different stances, to retain a right to hold any one of the stances liable for the whole, with proportional relief. The seller here actually did pay £9 of feu-duty in the ordinary and popular sense. If he had paid more the case would have been quite different.

The seller alleges that in putting £9 into the advertisement he meant to say that he paid only £9. The purchaser says he understood him to mean that no more could be exacted. But the advertisement does not say so. There seems to me to be an innocent mistake on each side, which might entitle parties to rescind the contract, but the purchaser will not do this.

On the whole matter, I think, (1) that the titles were imported into the bargain, and (2) that the advertisement held out only that the proportion effeiring to the lands was £9, which was true.

Lord Neaves.—The Lord Ordinary's views in this case appear to me to be a great deal too strict, and not in accordance with the natural construction of the transaction. The advertisement, as far as I can see, is *bona fide;* it gives a short-hand description of various things. Thus, among others, we have "feu-duty £9." That is not a complete sentence; it is a mere indication of what is meant. And when the titles are referred to in the same advertisement as to be found in the agent's office, I think a party appealing to the advertisement and building a claim on it is straining the law too far when he construes it as the buyer here proposes. No doubt ground-annual is not feu-duty, but is it to be held that the purchaser, who perhaps does not like ground-annuals, could insist on its being converted into feu-duty? That seems out of the question.

A reference in an advertisement like this to title-deeds in the hands of an agent residing in the same town with the parties seems quite sufficient to discharge the seller from being more minute in his description than he was here, and puts it on the purchaser to go and see the titles for himself.

But what does the defender here say was his understanding of the statement in the advertisement? He says he took it for a statement of the existing condition of the property as burdened with £9, and no more. If it turned out that that statement was not true I can understand the buyer might refuse to go on, and in certain circumstances there might be a good deal to say for him. But he

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does not do that; he says the advertisement brings the seller under an obligation to make the land liable for only £9 in all time coming. We cannot compel a seller to enter into such an arrangement, which is not within his individual power, but depends on the will of the superior. Such a change indeed would have the effect of making this a new property altogether, because the seller would need to purchase an exemption for it from the superior, otherwise we are to insert in the disposition a personal obligation on the seller and his heirs for ever to relieve this purchaser and his heirs. Where the seller is at least equally innocent with the purchaser I am not prepared to subject the seller to such serious consequences. I would rather consent to set aside the contract altogether if that were desired, but I cannot approve of ordering anything so serious and complicated as is here demanded, and which, in its proper form, is not simply or naturally within the seller's power.

LORD ORMIDALE concurred.

LORD GIFFORD.—I have felt some difficulty in this case, and although I concur in the result reached by your Lordships I do not do so without some difficulty, and I prefer to rest my judgment, not on the general ground relied on in argument, but on the special circumstances of this case.

My difficulty is increased or confirmed by the case of Paton v. Steuart, because if it turned out that the £9 stated by the seller as the feu-duty of the subject sold were less (and it might be greatly less) than the purchaser would have to pay if these burdens, both of feu-duty and ground-annual were allocated, then the decision of Paton v. Steuart would apply, and the purchaser would be entitled to insist that the seller shall relieve him of all ultimate feu-duty and ground-annual in excess of the declared sum of £9. But I do not think that this specialty arises here. The case is not a complicated one. It is quite common in the case of suburban feus that the whole ground on which many villas or many tenements are erected is liable or subject to a *cumulo* feu-duty as regards the superior, which *cumulo* feu-duty is secured over the whole ground and leviable from any part of it, but the proprietor who pays is entitled to rateable and proportional relief against the other parts of the *cumulo* subject. Sometimes there may be an allocation *inter se* among the feuars which is not binding on the superior, who cannot be compelled, without some special contract, to give up any part of his *cumulo* security. This catholic liability for a *cumulo* feu-duty is a very common incident of villa or suburban property. I do not think the purchaser is entitled to be relieved from this incident; all he can ask is, that ultimately, and after all relief is had, he shall not pay more than £9. Now, the whole subjects here are as nearly as possible liable for £5 per acre of feu-duty. £14 of ground-annual was laid on about 3 acres odds, which is about £4 per acre. The ground in dispute is one acre in size, so the whole burden on it, both of feu-duty and ground-annual, is £9, which is what has been actually paid hitherto by the seller, and so if there was an allocation by the superior and holder of the ground-annual the share falling on this villa would be just £9, being the exact sum mentioned in the advertisement and missive of sale. Now, I think the purchaser can ask no personal guarantee from the seller. He must just take the seller's position, and have the relief which the seller had. If the purchaser could say, as happened in Paton v. Steuart, that after all claims of relief are exhausted he will remain finally and ultimately liable for far more

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than £9, the case would be different, and I am not prepared to say that the purchaser would have no relief except giving up his purchase.

But no question of this kind arises here. The statement in the advertisement that the feu-duty is £9 is true, for if an allocation were entered into and sanctioned by the superior and ground-annual renter £9 sterling and no more would be all the proprietor would have to pay.

All that the seller here can be asked to do is to put the purchaser in his place. I cannot hold that in every sale of a house where the feu-duty is part of a *cumulo* feu-duty affecting the ground on which many houses are built, and where the *cumulo* feu-duty on the whole subjects has not been allocated or apportioned, that a personal guarantee on the part of the seller should be necessary which may endure for ever.

I put the case, then, on this ground, that the advertisement here only represented that the ultimate burden on the subjects will be £9 after all other subjects have paid their share, and after claims of relief are made good; and this representation being strictly true, the agreement cannot be set aside, and the purchaser can only claim a disposition in the usual terms without any special and permanent guarantee.

THIS interlocutor was pronounced:—"Recall the said interlocutor: Repel the defences, and decern in terms of the first conclusion of the summons: Find the defender liable in expenses."

R. P. STEVENSON, S.S.C.—J. W. & J. MACKENZIE, W.S.—Agents.

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Brown v. M'Connell.
2D DIVISION.
Sheriff of Ayrshire.
I.

WILLIAM BROWN, Petitioner and Appellant.—*Kinnear—A. J. Young.*
ADAM M'CONNELL, Respondent.—*Asher—Goudy.*

Proof—Custom—Proof of what generally happens is not necessarily proof of custom.—On 19th February 1875 William Brown, an innkeeper at Dalmellington, presented a petition to the Sheriff of Ayrshire against Adam M'Connell, a neighbouring farmer, for the delivery of a horse, alleging that in December previous M'Connell had got the horse from him on the footing of M'Connell having the benefit of the animal's services for his keep, and restoring the horse when required, and that M'Connell refused to deliver up the horse although requested to do so.

M'Connell stated in defence that there was an express contract between him and the petitioner that the horse should not be taken back till the end of April, and he further alleged that it was a recognised custom in the district for hotel keepers and coach proprietors to send out horses to farmers about the beginning of winter, to be kept during the winter and spring, and to be used only for farm purposes, the farmer feeding and keeping them in consideration of the work got out of them; that the respondent had got scarcely any work out of the horse in question; and that he would not have taken the horse except on the footing of getting his work in spring in return for his keep in winter. He offered to return the horse on payment of his keep for the period which had elapsed.

The Sheriff-substitute (Orr Paterson) sustained the defence, and the Sheriff (N. C. Campbell) adhered.

Brown having appealed to the Court of Session, the Second Division were of opinion that M'Connell had failed to prove either the express agreement or the custom alleged by him, and that the contract was terminable at the pleasure of either party, and recalled the Sheriff's interlocutor, Lord Gifford observing,—"A proof of what generally happens is

not necessarily a proof of usage. It may be that a horse sent in November or December is often not taken back till the end of April, but what I desiderate is some proof to the effect that horses have been demanded back at an earlier period and refused, or that parties giving out horses have been obliged to hire instead of sending to the farmers for their own horses, and so to fix a custom that the owner of the horse in such a case has no right to re-demand it sooner than April."

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FYFE, MILLER, FYFE, & IRELAND, S.S.C.—MILLAR, ALLARDICE, ROBSON, & INNES, W.S.—Agents.

LEITH HERITAGES COMPANY (LIMITED), Pursuers.—*Asher—Begg.*
EDINBURGH AND LEITH GLASS COMPANY, Defenders.—*D.-F. Watson—Balfour—Low.*

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Leith Heritages Co. v. Edinburgh and Leith Glass Co.

Property—Disposition—Warrandice.—A having sold to B in 1874 certain subjects under a minute of agreement, granted a disposition in which he disponed "all and sundry those parts of the property" of the seller, "situated on the north side of S. Street, . . . with the whole privileges and immunities, parts, pendicles, and pertinents thereof, as the said subjects and others are described in the title-deeds thereof as follows, viz.—First, All and whole, &c. Seventh, All and whole that piece of ground, . . . with all right, title, and interest I . . . have therein, in virtue of an Act of Council of the Lord Provost and Magistrates of Edinburgh, bearing date the 3d day of September 1788, or otherwise, but that under the burden and conditions therein mentioned, my said disponees being to stand in my place; together with all right, title, and interest which I . . . had, have, or could anyways claim or pretend to the said whole subjects." The deed contained a clause of absolute warrandice. B's title to the seventh subject having been disputed, and the magistrates having refused to grant a charter, he raised an action against A for payment of £10,000 as the estimated value of this seventh subject to him. It appeared that the dispositive clause used by A was the same as that in two previous conveyances of the subjects,—that in the one case the clause of warrandice had been restricted as regarded the subject in dispute, and in the other it had been expressly excluded from the obligation to infeft. B's agent admitted that when preparing the disposition he had become aware that A had no feudal title to the subject. *Held* that A had only undertaken to put B in his place, and had neither disponed nor warranted the subject to B.

Warrandice—Reparation.—Opinions, That, in considering a claim of damages for breach of warrandice, the Court is entitled to look beyond the technicalities of conveyancing language, and to refuse the claim if it shall appear that the bargain, as the parties understood and intended it, was fulfilled.

IN February 1874, by missives of offer and acceptance* and confirma-

2D DIVISION. Lord Young. I.

* The important parts of these writs were as follows:—Offer—"We are instructed, on behalf of clients, to make offer to purchase from your company, at the price of £52,000 sterling, the property belonging to them situated in Salamander Street, Leith, and which is bounded, we understand, as follows—*videlicet*, on the north by the property of the North British Railway Company; on the south by Salamander Street, Leith; on the east by a road leading from Salamander Street to the shore; and on the west by a road separating your property from that of the Edinburgh and Leith Gas-Works." Acceptance—"We are instructed by the directors of the Edinburgh and Leith Glass Company to accept your offer addressed to them, dated 13th curt., of £52,000 for the property belonging to them in Salamander Street, Leith, on the terms therein stated. . . We ought to mention that as regards the boundaries of the property given by you it is to be kept in view that there is a public road or street between the east and west works of the company which is not their property, and of course is not included in the sale." The acceptance, containing this exception, was approved of.

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tion, the Leith Heritages Company (Limited) purchased from the Edinburgh and Leith Glass Company certain subjects in Salamander Street, Leith, for the price of £52,000. The missives were, in October 1874, embodied in a minute of agreement, of which the following were the most important provisions:—"First, The first parties agreed to sell and the second parties agreed to purchase, at the price of £52,000 sterling, the whole ground and buildings thereon belonging to the first parties, situated on the north side of Salamander Street, Leith, being the whole subjects disponed in a disposition dated 24th December 1852, granted by James Hill, merchant in Edinburgh, as trustee for the society or company established under the firm of the Edinburgh and Leith Glass Company, in favour of . . . as trustees of the said society or company, with the exception of the subjects lying to the south of the said Salamander Street. . . Third, Upon payment of the price, the first parties shall deliver to the second parties a formal and valid disposition of the subjects, subject to the conditions contained in the titles and in any current leases, and which disposition shall contain all the usual clauses, including a clause of absolute warrandice, and the first parties shall also deliver to the second parties a search. . . . Fourth, . . . And it is agreed that the second parties shall accept the title as it now stands, and shall not be entitled to require the first parties to enter with the superiors of the said subjects, nor to make up any further titles to the same, without prejudice to the second parties, at their own expense, having right to make up further or other titles in the person of the first parties, if the second parties think proper to do so."

On 10th November 1875 Dr Combe, the sole surviving trustee of the Glass Company under the disposition of 1852 referred to in the minute of agreement, on the narrative of that minute of agreement, conveyed the subjects as follows:—"I, as sole surviving trustee foresaid, and as authorised as aforesaid, do hereby sell and dispone to the said The Leith Heritages Company (Limited) and their assignees, heritably and irredeemably, All and Sundry those parts of the property of the said Edinburgh and Leith Glass Company situated on the north side of Salamander Street, Leith, with the buildings and others thereon, and with the whole privileges and immunities, parts, pendicles, and pertinents thereof, as the said subjects and others are described in the title-deeds thereof as follows, viz.," (here follows descriptions of six subjects). . . . . "Seventh, All and Whole that piece of ground lying betwixt David Stewart's feu on the east and the road on the east side of the property in the fourth and fifth places hereinbefore disponed, with power to alter said road so as to be immediately to the west of David Stewart's feu, with all right, title, and interest I, as sole surviving trustee foresaid, have therein, in virtue of an Act of Council of the Lord Provost and Magistrates of Edinburgh, bearing date the 3d day of September 1788, or otherwise, but that under the burdens and conditions therein mentioned, my said disponees being to stand in my place; together with all right, title, and interest which I, as trustee foresaid, or the said Edinburgh and Leith Glass Company, had, have, or could anyways claim or pretend to the said whole subjects hereinbefore disponed."

The warrandice clause was as follows:—"And I, as trustee foresaid, grant warrandice from my own facts and deeds only; and I, as trustee foresaid, and as authorised as aforesaid, bind the said Edinburgh and Leith Glass Company in absolute warrandice."

This disposition was prepared by the purchasers' agents.

The Heritages Company, on looking into the title to the seventh lot, discovered that the Glass Company had no other claim or title to it than

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was contained in a minute of the town-council of Edinburgh,* dated 3d September 1788, but upon which no steps had followed, nor had any charter been granted.

The Heritages Company then applied to the town-council of Edinburgh to grant them a charter in terms of the minute of 1788, but this the town-council refused to do. The company proceeded to enclose the subjects in dispute, but were interrupted by the local authority of Leith, who claimed the subject as their property for behoof of the public. The extent of the ground in dispute was 118 feet frontage to Salamander Street, and about 166 feet of depth; a causewayed road 16 feet wide ran through the space giving access to the shore of Leith, but otherwise the ground was waste. The Heritages Company intimated to the Glass Company that they had not been allowed to take possession of the ground, and the Heritages Company raised this action against them, concluding for "£10,000."

In their condescendence the pursuers stated;—The whole of the subjects sold to the pursuers extend to about 5 acres, so that the value of the said portion, taken rateably, would be £4203. But as the western portion of the ground is much more valuable than the eastern portion, in consequence of its position being immediately contiguous to the new docks, its value cannot be stated at a lower sum than £10,000.

The pursuers pleaded;—The pursuers having purchased the said piece of ground from the defenders under a disposition containing absolute warrandice, and having been evicted therefrom, they are entitled to decree for the sum concluded for as the value thereof.

The Glass Company defended the action, and maintained that they had conveyed all that they possessed, and that they had warranted nothing more. They averred;—(1) During the last century two glass-works were established. The works were separated by an open piece of ground, which formed an access from the Leith and Musselburgh Road (now called

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* This minute was as follows:—"Approved of report from the shore-dues committee on petition for the Edinburgh Glass-house Company, which petition and report are of the following tenor,—'Unto the Right Honourable the Lord Provost, Magistrates, and Council of the city of Edinburgh,' the petition of the Edinburgh Glass-house Company, humbly sheweth that 'your petitioners being very much straitened at their works at Leith for space to lay coals and other materials, and their stables, together with the hay necessary to be laid up for the horses being also in great danger from standing so near their furnaces and other fires, they humbly request the Right Honourable the Lord Provost, Magistrates, and Council will be pleased to grant them a feu of that piece of ground lying immediately east of their present property betwixt and Mr David Stewart's enclosure, and also liberty to add to the north part of their works that part of the sands where their ashes and rubbish, &c., are now laid for the Edinburgh Glass-house Company. (Signed) ARCHD. GEDDES. Dated, Leith Glass Works, 29th February 1788.'

"REPORT.—Edinburgh, 3d September 1788.—The shore-dues committee report that they, having considered the petition, and visited the ground, are of opinion that upon the petitioners relieving the council of any claim of the present possessors, or any others deriving right from Mrs Waddel, that the council should feu to them all the ground lying betwixt Mr Stewart's feu on the east and the road on the east side of the petitioners' property, to commence from and after the term of Martinmas next, they paying therefor in proportion as David Stewart, Esq., paid for the ground feued to him, and in that event that the said road should be altered so as to be immediately to the west of Mr Stewart's feu, to lay the whole of the petitioners' ground together.

"And authorised a charter to be made out in favour of the Edinburgh Glass-house Company upon the conditions mentioned in the said report."

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Salamander Street) to the sands. The ground on which the said works were built, as well as the ground between them, prior to the granting of the feu-rights applicable to the said ground, belonged to the magistrates of Edinburgh. (2 and 3) On 29th February 1788 the said Edinburgh Glass-house Company presented a petition to the city, setting forth—(The petition and Act of Council here narrated are quoted *supra*, p. 791). (4) The Edinburgh Glass-house Company never obtained any charter applicable to the said piece of ground, nor was any feu-duty ever paid in respect thereof, nor any exclusive possession obtained of it, the whole vacant space between the two glass-works having remained open as before, while the glass-works were both enclosed on all sides with walls, by gates in which (or at all events by a gate in the wall at the east of the Edinburgh Glass-house Company's property) access was obtained to the said open space of ground. (9) As this description (in the pursuers' offer) comprehended the vacant space between the said glass-works, to which the defenders' company had no feudal title, and of which they were not in possession, the directors instructed their agents, in accepting the said offer, to intimate to the pursuers' agents that the said ground was not included in the sale; and the defenders' agents, Messrs Gillespie and Paterson, W.S., in their acceptance, dated 16th February 1874, of the said offer, wrote as follows:—"We ought to mention that as regards the boundaries of the property given by you it is to be kept in view that there is a public road or street between the east and west works of the company, which is not their property, and of course is not included in the sale." The whole of the said vacant space was at the said date open and subjected to the uses of a public road or street, and was the ground referred to in the said letter. (10) Before the transaction was closed the pursuers were thus distinctly made aware that the defenders did not profess to sell to them the said piece of vacant ground, and after this knowledge had been distinctly conveyed to them (if they had it not before), the pursuers, by their agents, of this date (Feb. 17, 1874), by indorsation upon the defenders' agents' letter of the previous day, agreed to the terms therein expressed, as follows:—"On behalf of the offerers we accept the conditions within mentioned."

The Glass Company produced conveyances of 1826 and 1852 of the same subjects, in which words identical with those in the disposition of 1875 under consideration were used with regard to the disponing of the subjects in dispute, the clause of warrandice in the conveyance of 1826 being as follows:—"We, the said John Geddes, John Arthur Borron, and John Hyslop and Charles Ferrier, bind and oblige ourselves, as trustees foresaid, to warrant from our own proper facts and deeds allenarly, and we, the said John Geddes, John Arthur Borron, and John Hyslop, as trustees foresaid, bind and oblige the heirs and representatives of the said William Geddes to warrant the same at all hands and against all mortals as law will, with the exception of the area of ground last above disponed contained in the said Act of Council, 3d September 1788, which is hereby warranted from the facts and deeds of us and our predecessors only." In the disposition of 1852 the obligation to infeft was in the following terms:—"And I oblige myself to infeft the said William Henry Brown, James Scarth Combe, and John Mackie, and their foresaids, as trustees foresaid, in the several subjects hereinbefore disponed, excepting the piece of ground last hereinbefore described, in which I am not myself infeft,"—the piece of ground there referred to being the subjects in dispute. The warrandice clause bore—"And I grant warrandice from fact and deed."

The defenders pleaded;—(2) The action cannot be maintained, in respect that upon a sound construction of the disposition in favour of the

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pursuers no absolute right to the ground in question is disponed, but only any right which the defenders' company had, and the clause of warrandice does not warrant an absolute title to the said ground. (3) *Separatim*, the action cannot be maintained, in respect that prior to the completion of the contract of sale the pursuers were made distinctly aware that the defenders did not profess to sell the said ground, and that the pursuers concluded the contract of purchase and sale in this knowledge.

The Lord Ordinary allowed a proof, in the course of which the defenders adduced some evidence to the effect that the whole piece of ground in dispute had been for a long period used as an access from Salamander Street to the shore. The pursuers' agent (Mr Neilson, W.S.) admitted that before the execution of the disposition he was aware that the defenders had no feudal title to the subjects in question.

On 24th November 1875 the Lord Ordinary assoilzied the defenders.*

The Heritages Company reclaimed, and argued;—The true question in dispute was the legal effect of the dispositive words, and of the clause of warrandice. Under the words in the deed the defenders gave a disposition to the land itself, and not merely to any right they might have to it. The clause of warrandice was quite general, and came into operation as soon as it was found out that there was no title to any part of the subjects warranted. It was incompetent to look at the missives, now that they had been embodied in a final deed, such as this disposition,[1] and if that were so, parole evidence as to the knowledge and intention of the parties was still more incompetent.[2] But even if it was competent,

* "NOTE.—The question is, whether the piece of ground referred to in condescendence 4, and marked on the plan as No. 7, was sold to the pursuers by the defenders under a warrandice of title, and I am of opinion that it was not. The ground, which is situated between the east and west works of the defenders, has always been open ground—part being used as a road and part left waste. The defenders had no right to it, other than the minute of council of 3d September 1788, quoted in statement 3, and never professed to have any other. This was of course no title; but such precarious right (and it was literally a precarious right) as this minute gave they passed to the pursuers exactly as it had been passed to them. I do not assent to the argument by which the conveyance under the 7th head of the disposition is otherwise construed, and am of opinion that to construe it as an ordinary absolute conveyance of the ground, subject to the warrandice, would be unjust and contrary to the meaning and intention of the parties. Taking the contract of sale as it stood on the offer and acceptance prior to the disposition, I am of opinion that there was no contract for a sale of this ground with warranty of title, and the purchasers' agent admits that when he prepared the disposition he knew that the sellers had no title to it, or other right than the minute of council. Whether at this stage (prior to the disposition), the buyers might have resiled from the bargain because of no title to this piece of ground I have not to consider; but to take the disposition (so peculiarly expressed) in the knowledge that there was none, and with an undisclosed view to an action of damages founded on the terms of the disposition as warranting a title, is a proceeding I am unable to approve of. The pursuers knew (their agent certainly did) that the disposition was not executed in that view of its meaning and effect. The striking peculiarity in the terms of the deed as regards this piece of ground relieves me of any difficulty which I might otherwise have felt in rejecting the pursuers' claim, but I desire to say that, in considering a claim of damages, the Court is, in my opinion, entitled and bound to look beyond the technicalities of conveyancing language, and to refuse the claim if it shall appear that the bargain, as the parties understood and intended it, was fulfilled."

[1] Hughes v. Gordon, May 29, 1819, 1 Bligh, 287.

[2] Stewart's Trustees v. Hart, Dec. 2, 1875, *ante*, p. 192.

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the defenders took no benefit from the reservation of the road in the acceptance, because there was a road to which the pursuers did not lay claim, and also the titles could not disclose that there had been no prescriptive possession on the Act of Council of 1788. With regard to the Lord Ordinary's observations as to the peculiarity of the words used being such as should have put the purchasers on their inquiry, these expressions had been used in every conveyance of the subjects, and were thus, so far from peculiar, the ordinary words with regard to these subjects.

Argued for the defenders;—The whole dispositive words were qualified by the words "my disponees being to stand in my place." All that the sellers undertook to do was to put the purchasers in their place, and this they had done. All that was conveyed and warranted was the foundation of a claim. It was competent to look behind a final deed in such an action as this, not to make a different bargain, but to ascertain facts.[1] The ground in dispute was clearly proved to have been waste ground, and used as an access to the shore. It had been intended to be excluded from the conveyance, except in so far as the purchaser might care to attempt to acquire it by getting a title.

At advising,—

LORD GIFFORD.—I have felt this case to be attended with very great nicety and difficulty, but ultimately, and with some hesitation, I have come to concur in the opinion expressed by the Lord Ordinary in his note to the interlocutor under review.

It appears to me that neither by the minute or agreement of sale of October 1874, nor by the disposition granted in implement thereof on 10th November 1875, did the defenders warrant and guarantee to the pursuers that the subject specially described as "seventh" in the dispositive clause, and marked upon the plan No. 10 of process as No. 7, should be the absolute property of the defenders, so as to give the defenders a claim of damage if, from any cause not imputable to the pursuers, the defenders should be unable to vindicate a title to that special subject or piece of ground.

The minute of agreement of sale is referred to and embodied in the final disposition, and must be read along with it. It is not superseded, as frequently happens, by the final deed, as preliminary correspondence is superseded by a written agreement ultimately executed. On the contrary, the agreement forms the narrative of the disposition, and the disposition bears to be implement of the agreement, and nothing more; and in order fairly to understand the true meaning and import of the disposition it must be read along with the agreement which it bears to carry out.

Now, by the agreement the defenders sell to the pursuers, not the seven specific subjects shewn upon the plan, putting each separate piece of ground upon the same footing, and warranting each and all alike to the purchasers. The property sold by the minute of agreement is quite differently specified. It is thus described:—"The whole grounds and buildings thereon belonging to the first parties" (that is, the Glass Company) "situated on the north side of Salamander Street, Leith," being the whole subjects disponed in a certain disposition of 1852, "with the exception of the subjects lying to the south of the said Salamander Street." In short, the defenders agree to sell to the pursuers all their ground and property on the north of Salamander Street, but not their property

[1] Forlong v. Taylor's Executors, April 3, 1838, 3 S. & M'L. 177, Lord Chan. 210.

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to the south of Salamander Street, and reference is made to the disposition of 1852 as the last title under which the sellers hold the subjects.

The final disposition in favour of the pursuers, in exact accordance with the minute of sale, dispones, not seven specific subjects specially described, but only "those parts" of the pursuers' property lying on the north side of Salamander Street, as "the same are described in the title-deeds thereof as follows," and then follow the descriptions of seven lots, virtually quoted from the old titles.

Now, on turning to the old titles, to the disposition of 1852 and to the previous disposition of 1826, and to the previous titles to the property, all of which were before the pursuers' agents when the final disposition was prepared, it is at once apparent that the defenders' title to the different lots or pieces of ground stood in different positions. In particular, it became apparent that the sellers, the Glass Company, had no feudal or heritable title at all to the open or waste piece of ground marked No. 7. That piece of ground had never been conveyed to the sellers, the Glass Company. It was not their property, in the strict sense of the word. The only right to or in that waste piece of ground, including the roadway, which was part thereof, was a minute of the town-council of Edinburgh, dated 3d September 1788, by which minute it appears that the town-council of that date agreed to feu to the Glass Company's predecessors that piece of ground upon certain conditions. No feu-charter, however, and no conveyance of any kind, had ever been granted by the town-council.

In these circumstances this piece of waste ground and roadway was in the defenders' titles, and in particular in the disposition of 1852, referred to in the agreement, dealt with quite differently from the other plots of land marked upon the plan. It was not conveyed simply as the property of the Glass Company, but was described by its boundaries, with this descriptive addition,—"With all right, title, and interest I, as sole surviving trustee foresaid, have therein, in virtue of an Act of Council of the Lord Provost and Magistrates of Edinburgh, bearing date the 3d day of September 1788, or otherwise, but that under the burdens and conditions therein mentioned, my said disponees being to stand in my place." I cannot read this very special clause as a mere conveyance of the granter's right, title, and interest in a subject absolutely conveyed. There is a general clause of right, title, and interest following the description of the whole subjects, and applicable to all of them, and this special clause must be something different. It seems to me to give the purchasers special warning that this minute of council of 1788 is the only title which the sellers hold to, or in virtue of which they have any claim upon the piece of waste ground in question, and it contains an express declaration that as to this piece of waste ground the purchasers are to stand in the seller's place, and to use their rights, but that nothing more is given. The sellers virtually say,—Our right to No. 7 is a mere minute of council, not a disposition—not an infeftment—and you, the purchasers, are simply to stand in our place. In short, I think, reading minute and disposition together, the thing given under the seventh head of description is not property, warranted at all hands, but a mere claim or right of action against the town-council of Edinburgh to implement their minute of 1788; and if, on any grounds not imputable to the sellers, it should turn out that, either on the ground of the long prescription, or on the ground of Sir William Rae's Act,[1] or on any other ground, the town-council are not now bound to grant a feu-charter

[1] 3 Geo. IV. c. 91.

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of this piece of waste land, the purchasers must take their chance of this, for I do not think that the absolute warrandice, either in the minute of sale or in the disposition, warrants or guarantees to the purchaser that the claim for a charter shall be successful.

In an action of damages for breach of warrandice, or for breach of contract (and breach of warrandice is just breach of contract), I agree with the Lord Ordinary that the Court is not bound by any technical words in the final deed of conveyance, but are entitled to look to the whole contract, and to the circumstances in which it was entered into, in order to reach the real meaning and understanding of the parties, and to determine what the true bargain was, for breach of which damages are now claimed; and I concur in the result which the Lord Ordinary has reached.

LORD NEAVES.—I am of the same opinion. This case is a very peculiar one as to lot No. 7. The pursuers' case is founded upon the fact that absolute warrandice appears to be given in a certain part of the deed, and therefore they say it is in the same situation as if they got a conveyance to the subjects in the ordinary way, and that they must come against the sellers and warranters of the right in an action of damages. But I think we must look behind that, and I agree with the opinion which has just been delivered by Lord Gifford. The pursuers are taking no steps, such as their authors must have taken, in order to secure the title. There have been no proceedings against the town-council. A demand has been made, and a refusal or declinature has come, the town-council apparently deciding very much on the principle that Lord Mansfield advised the colonial Judge to act on—give your judgment, but never give any reasons. But it is quite plain that it was the duty of the pursuers to bring the town-council to the point on that subject, and if it then turned out that they were not getting this subject in consequence of some fault in the conduct of their authors,—the parties with whom they dealt,—they might have some claim. I say nothing about that just now. But it is quite plain that the proceedings must originate with that, because it is expressly declared that they are to stand in the place of these parties; and that means, that they must take the steps which they would have taken. But it has not been shewn to us that there has been any breach of contract, which is the foundation of the action, and consequently it does not appear that there can be any claim of damage.

LORD ORMIDALE.—I have come to the same conclusion, but I have felt even greater difficulty than Lord Gifford in arriving at that conclusion, more especially in consequence of the very absolute terms of the clause of warrandice. But before coming to that part of the case, I should like to say a word or two upon a point that was mooted in the course of the discussion,—I mean the matter of eviction. To say that there was eviction here, is, I think, altogether untenable. It is impossible to say so looking at the authorities on the subject, and at the understanding of lawyers. One cannot read the passage in Mr Erskine, ii. 3, 30, and in Bell's Principles, sec. 121, without seeing that. But I am satisfied that it is not necessary that there should be eviction, and, at all events, the question has not been raised, and it is not necessary for us to determine it. The defenders did not raise the question, and I can quite understand that this was for a very good reason, because they deny that they ever granted a disposition of lot 7. They say they never gave any absolute warrandice at all, because they never disponed the subject. In that view I think they were right not to raise

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the question of eviction, and I have only referred to it because I think there was a good deal of loose statement and argument on the subject. It is important to keep in view that this is an action of damages, and the first question is, what was the nature of the conveyance of lot 7, because when we have seen that, I think the difficulty in regard to the clause of warrandice may be overcome. Looking to the manner in which the dispositive clause applicable to lot 7 is expressed, I think it is in vain to say that there is not doubt and ambiguity as to its true meaning; and if so, we are entitled, on the authority of the Lord Chancellor in the case of Forlong v. Taylor's Executors, 3 Shaw and M'Lean, 210, to look beyond the dispositive clause, not for the purpose of controlling or altering it, but in order to ascertain its true meaning, it being in itself ambiguous. There are two things which we are entitled to look at for that purpose. We are entitled, in the first place, to look at the minute of agreement which preceded the disposition, the disposition having been granted in pursuance of that agreement. There is a very important clause in that minute of agreement which makes it quite clear that the subjects in lot 7 were not intended to be disponed as all the other subjects were disponed, and the title to that lot is expressly stated to consist of the minute of council, and nothing more was to be done in regard to that lot so far as the sellers were concerned. It is expressly stated that it was to be left to the pursuers to make up their title in any way they pleased. Mr Neilson gave explanations as to the word "title" which were to my mind quite satisfactory; and it might be very fairly said that all that was meant by Mr Neilson was, as he explains it, a feudal title, and nothing more. But he alludes to it in the second paragraph of his evidence as being a mere claim which he understood was to be conveyed so far as lot 7 was concerned. Now, that is exactly the conclusion to which Lord Gifford has come, and I concur with him, looking at the very peculiar way in which it is expressed, that there never was anything else but a mere claim, and that what was described by the sellers was the claim which was intended to be conveyed so far as that lot was concerned, and not the subject absolutely. I come next to deal with the clause of warrandice, and it is here that I feel the greatest difficulty, because, beyond doubt, the clause of warrandice is absolute. Nothing can be more complete or unqualified. And what creates the difficulty in regard to that clause all the more is that it necessarily must be absolute, because it covers and was intended to cover not only lot 7, but the other six lots about which there is no dispute, and in regard to which it must be conceded that absolute warrandice was given. But I can quite understand that in a construction of the disposition we must try to give a meaning to the clause; and I get over the difficulty chiefly by the consideration that the clause of warrandice never can of itself be looked at as giving anything that the clauses of disposition have not given. We do not find a conveyance in the clause of warrandice here in terms, nor could we expect to find a conveyance of anything in the clause of warrandice. It has reference to the other preceding clauses. Therefore, by the clause of warrandice, nothing more has been given than has been previously disponed. If I am right in my view of the dispositive clause as applicable to lot 7, we must necessarily give a qualified meaning to the warrandice clause so far as that lot is concerned. In that way, with very great difficulty, I have come to the conclusion that, in consistency with the whole tenor of the deed, we must hold that the warrandice was not intended to be greater than has been explained by my brother Judges. I had a doubt, but I do not know that there was much in it, whether the sellers

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here had not undertaken by the warrandice to guarantee the purchasers that they had at least taken action of some kind upon the minute of council of 1788 to prevent its falling by prescription,—to keep it alive in short. But that point was not stated in argument, and therefore we need not deal with it. On the whole case, I am disposed to concur with your Lordships in thinking that the judgment of the Lord Ordinary is well founded in the circumstances, this being an action of damages, and that he has rightly assoilzied the defenders.

LORD JUSTICE-CLERK.—I have found this case one of great difficulty, and have not arrived at a conclusion without hesitation. But, on the whole, I concur in the result, and for the most part in the reasoning also, of the Lord Ordinary's interlocutor and opinion.

Had this been an action on the part of the purchasers to rescind the whole transaction on the ground of mutual error, they would have stood in a more favourable position. But they decline, as they are entitled to do, to surrender their bargain, for very obvious reasons, and this action is simply one for damages for breach of contract—for the loss suffered by reason of a sufficient title to one part of the property purchased not being delivered to the purchasers, in terms of the obligation of absolute warrandice contained in the disposition by the sellers. The questions are,—First, Have the sellers broken their contract? and, Secondly, if they have, what damage have the pursuers thereby sustained? In this, as in every action of damages, we are entitled, as a jury would be entitled, to look all round the circumstances in which the demand is made, and ascertain the truth and substance of the pursuers' complaint.

The property, the want of which the pursuers complain of, is a plot of ground about 100 feet in breadth, partially occupied by a public road of uncertain width and position, and for the rest entirely waste. It lies between two larger blocks of ground on the north side of Salamander Street, in the town of Leith, to both of which the defenders have a feudal title, and on which their glass-works are built. This intermediate space belonged to the city of Edinburgh, and now belongs to the corporation of Leith as feudal proprietors; no one else ever had a feudal title to it; it never was occupied or possessed by the defenders, or any one else, as private property; and the only right which the defenders had to it was an Act or minute of the town-council of Edinburgh, dated in 1788, which at the date of the sale was 86 years old, and never had been acted on. All this was matter of notoriety, and was specially known to the purchasers when they accepted the title.

The agreement, which was the foundation of and warrant for the formal disposition, makes no mention of this ground. The property, which is the subject of it, is simply described as the whole ground and buildings belonging to the Glass Company, situated on the north side of Salamander Street, and this is what they agreed to sell with absolute warrandice. But the agreement does not specify of what this property consists; and if the ground in dispute was not the property of the defenders, there is nothing in the agreement which binds them to convey it.

Now, if the disposition ultimately executed, which was prepared as usual by the purchasers' agent, had simply contained a transcript of the title by which the defenders held this stripe of ground, as appearing from the conveyance to them, of which the purchasers' agent admits that he was fully aware, this question could not have arisen. There had been two transmissions of the right

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under the Act of Council since 1788,—one in 1826, and the other in 1852. The first, and by much the most important, was a conveyance by a trustee for a former Glass Company to trustees for the present defenders; and the terms of the conveyance are very material. It contains (first) a specific disposition of the other parts of the property under one dispositive clause; and then (secondly) under a separate clause of conveyance, it dispones and assigns the plot in dispute with all right, title, and interest, which the granter had under the minute of council of 1788, the purchaser being taken expressly bound to stand in the sellers' place. That this conveyance was only intended to give, and only gave, such right as the granter had, is made quite certain by the fact that this portion of the property is specially excepted from the obligation of warrandice in this deed of 1826, and no conveyancer could have read it without knowing that the right was imperfect. The second transmission in 1852 is immaterial. It merely hands on the right from one trustee for the defenders to another.

Thus, the sellers in the present transmission had no title but what the conveyance of 1826 gave them; and that conveyance gave them only such right as the granter of it had, and gave them no warrandice at all. In preparing the disposition on which the pursuers now found, the agent for the purchaser inserts *verbatim* the clause contained in the conveyance of 1826, but neglects to except this plot from the warrandice, and the pursuers now contend that the effect of this manifest blunder is to compel the sellers to give them an absolute title, which they knew the defenders could not give, and to pay them damages for the want of it.

I am of opinion that the demand is inconsistent alike with the true construction of the conveyance and with the good faith of the transaction.

As to the first, I am of opinion that, technically read, the clause of warrandice in the disposition only extends to such right as the disponers had under the 7th head of the description. It will be observed that the dispositive words of the conveyance do not apply directly to the property described under that 7th head. This description is only said *narrativé* in the deed to be the description in the older titles; and this statement is quite correct. But then the description in the old titles only described, as I have shewn, an imperfect, or, at least, incomplete right under an informal grant, the effect of which was known to be doubtful; and I imagine it imports no more in the present disposition. The sellers, therefore, only warranted that the purchasers should stand in their place, and to this they were bound absolutely, and to no more.

But, in the second place, on the good faith of the contract, which may, I think, rightly enter into our estimate of this demand for damages, the conclusive element to my mind is that the purchasers knew that the sellers held the incomplete right which they transferred without any warrandice of any kind from their own author, and on a title which shewed its nature on the face of it, and it would require very explicit words indeed to satisfy me that, with these title-deeds before them, and the manifest indications contained therein of the doubts to which this Act of Council was exposed, the sellers ever intended to give, or the purchasers ever supposed they were to receive, an absolute and warranted right to this ground. I am quite satisfied that the truth is the reverse, and must on both grounds repel this claim.

THE COURT adhered.

MORTON, NEILSON, & SMART, W.S.—JOHN T. MOWBRAY, W.S.—Agents.

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Pearson v. Ferguson, Davidson, and Co.

GEORGE PEARSON (M'All's Trustee), Pursuer.—*Balfour—Keir.*
FERGUSON, DAVIDSON, AND COMPANY, Defenders.—*Trayner—MacLean.*

Bankrupt—Bill—Security—Bankruptcy Act, 1856 (19 *and* 20 *Vict. c.* 79), *sec.* 111.—The 111th section of the Bankruptcy Act enacts that "all payments . . . by the bankrupt after the date of the sequestration . . . shall . . . be null and void; and the trustees shall be entitled to . . . any money so paid; . . . but if . . . the possessor of any bill or promissory-note which is payable by the bankrupt shall have received payment of his debt from the bankrupt in ignorance of the sequestration, and given up such bill, promissory-note, or security to the bankrupt, such person shall not be liable to repay to the trustee the amount so received unless the trustee shall replace him in the situation in which he stood, or reimburse him for any loss or damage."

The holder of a bill accepted by the bankrupt along with six other co-acceptors, and of a letter of guarantee of the debt granted by another person, received payment from the bankrupt after his sequestration on delivery of these documents. In an action for repayment by the trustee some months afterwards, *held* (*rev.* judgment of Lord Craighill) that an offer by the trustee to return the documents did not necessarily replace the defender in the situation in which he formerly stood so as to entitle the trustee to decree, but that inquiry must be made into the solvency of the co-acceptors and the guarantor at the date of the payment, and at the date of the offer, in order to discover whether the documents were of the same value at the latter date as at the former.

1st DIVISION. Ld. Craighill. M.

THIS was an action by George Pearson, trustee on the sequestrated estate of J. R. M'All, Edinburgh, against Ferguson, Davidson, and Company, timber merchants, Leith, for payment of £294, 1s. 2d.

The pursuer averred that M'All's estate was sequestrated on 5th February 1875. He further averred;—"On 8th February the bankrupt called, along with Mr William Ross Garson, S.S.C., on Mr P S Beveridge, S.S.C., Leith, and paid to Mr Beveridge, as agent for Messrs Ferguson, Davidson, and Company, timber merchants, Leith, the defenders, the sum of £294, 1s. 2d., being the sum of £289 contained in a bill drawn by William Brodie, accepted by the bankrupt and others, and endorsed to the defenders, with expenses. The said bill fell due on 3d November 1874. A receipt herewith produced* was granted by Mr Beveridge for the said sum. The money was paid to Mr Beveridge through the hands of Mr Garson, to whom the money was handed at the time by the bankrupt for that purpose. The said sum was part of the bankrupt's estate, and was illegally paid by him to the defenders."

He pleaded;—The sum libelled having been paid by the bankrupt to the defenders after the date of sequestration the pursuer is entitled to decree.

The defenders averred that the debt was guaranteed by a letter of

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* The receipt was in these terms:—"Leith, 8th February 1875.—Received from George Mill, residing in Leven, Fife, the sum of £289, being amount contained in bill drawn by William Brodie upon Joseph R. M'All and others, dated 31st July last, at three months' date, with the further sum of £3, 12s. 3d. sterling of interest, and £1, 8s. 11d. of expenses of the diligence on said bill; and my clients, Messrs Ferguson, Davidson, and Co., shall be bound to grant an assignation of said debt to the said George Mill, or any one on his behalf, at his expense, and without recourse upon the said Ferguson, Davidson, and Co.,—the said payment having been made by Mr W. R. Garson, S.S.C.

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guarantee by Brydon, a law-agent, and that, when "proceedings were about to be taken against Brydon on his letter of guarantee the defenders' agent was waited on at his chambers by M'All and William Ross Garson, S.S.C., who was then Brydon's partner in business. Mr Garson stated that he had come to retire said bill, and he paid the amount thereof to the defenders' agent, as also the amount of interest and expenses, all as set forth in said receipt. It is not the case, as stated by the pursuer, that on this occasion the money so paid was handed by M'All to Garson. Mr Garson took the money from his own pocket, and no money passed from M'All to Garson in presence of the defenders' agent. The defenders' agent understood at the time that the money was being paid as much in the interest of Mr Brydon as of M'All, but he knew nothing of the source from which the money had come, or who had provided it. The receipt for said sum was granted in the terms in which it is expressed at the request of Mr Garson, who stated that he wished the receipt to bear that the money was paid by a client of his, a Mr Mill." (Stat. 4) "The defenders have since ascertained that the estates of M'All were sequestrated on his own petition on 5th February 1875. The defenders knew nothing of this when said money was paid. No notice of said petition for sequestration or of the deliverance thereon had appeared in the 'Edinburgh Gazette' or any public print; and no notice of said sequestration did appear until the month of March, when such notices appeared under the authority of an interlocutor pronounced by the Second Division of the Court upon a petition, a copy of which is herewith produced and referred to." (Stat. 5) "The defenders, on said payment being made, delivered up said bill and extract registered protest thereon to Mr Garson, along with Mr Brydon's letter of guarantee for the same, and also subsequently, at the request of Mr Garson, revised an assignation of said debt, bill, and diligence, in favour of the said Mr Mill."

They pleaded;—(1) The pursuer's statements are irrelevant. (2) The defenders having acted in perfect *bona fides* in the transaction in question, and having delivered up their said documents of debt in return for said payment, cannot now be called upon to make restitution of said sum. (3) The pursuer's statements so far as material being unfounded, the defenders are entitled to be assoilzied.

A proof was led. Besides the points more specially noticed in the Judges' opinions, there was evidence that Brydon was solvent at the time of the settlement, and had left the country since, and that two or three of the co-acceptors of the bill (six in number) had become bankrupt since the settlement, but no proof was led as to the solvency of any of the six at that time.

The Lord Ordinary pronounced this interlocutor:—"In the first place, finds as matters of fact (1) that the estates of Joseph Robertson M'All, upon which the pursuer is trustee for the creditors, were sequestrated on 5th February 1875; (2) that the sum of £294, 1s. 2d., being the £289 contained in the bill referred to in the record and the relative expenses, was paid to the defenders through Mr J. B. Sutherland, of the firm of P. S. Beveridge, S.S.C., Leith, the law-agents of the defenders, on 8th February 1875; (3) that the said sum of £294, 1s. 2d. was so paid by the hands of Mr W. R. Garson, S.S.C., the agent of the bankrupt, in the presence of the bankrupt, and with the money of the bankrupt; (4) that at the time when the said payment was received as aforesaid the sequestration of the estates of the said Joseph M'All had not been gazetted, and both the defenders and their said agents were ignorant that it had been awarded; (5) that in exchange for the said payment there were delivered up by the said J. B. Sutherland the said bill, as well as the relative letter of

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guarantee and the receipt, both likewise referred to on the record; (6) that the said bill, letter of guarantee, and receipt, have been produced in the present process, and should the said sum of £294, 1s. 2d. be repaid to the pursuer, these documents, *simul ac semel*, will, according to the offer made by the pursuer at the debate, be returned by the pursuer to the defenders, that the defenders may be replaced in the situation in which they stood when the said sum, of which repetition is sued for, was received; and (7) that it has not been proved that any loss or damage which the defenders would have escaped had the said payment not been received, and the said documents not been delivered as aforesaid, has been, or, in case decree as concluded for be pronounced, will be sustained by the defenders: In the second place, finds as matter of law that the facts being as above set forth, the pursuer is entitled to recover the sum sued for, on condition that the said bill, the said letter of guarantee, and the said receipt shall, *simul ac semel*, be returned: Therefore repels the defences, and decerns the defenders to make payment to the pursuer of the said sum of £294, 1s. 2d., with interest at the rate of 5 per cent per annum from the date of citation, being the 3d day of July 1875, until payment, the pursuer upon receiving payment returning the said bill, relative letter of guarantee, and receipt to the defenders as their own proper documents: Finds the pursuer entitled to expenses," &c.*

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* "NOTE.—The present action is raised by the pursuer, as trustee in the sequestration of Joseph Robertson M'All, for repetition of the sum of £294, 1s. 2d., the contents of a bill and relative expenses due by the bankrupt, paid after his sequestration. The record has not been satisfactorily framed on the part either of the pursuer or of the defenders. The action really is rested on the 111th section of the Bankruptcy (Scotland) Act, 1856;* but on the one hand the pursuer, in stating his case, overlooked the provision that a person in the position said to be occupied by the defenders 'shall not be liable to repay to the trustee the amount so received, unless the trustee shall replace him in the situation in which he stood;' and on the other hand, the defenders, in stating their case, omitted to refer to the condition that, even should they be so replaced, they are not liable in repayment, unless they shall be reimbursed 'for any loss or damage.' Things, however, were so far put right at the proof, and the cause must consequently be decided on the assumption that all the provisions of this section of the Act were in the view of the parties, and are to be taken into account in the decision. Three questions were raised at the debate. The first is, whether the sum received by the defenders was the money of the bankrupt? the second, Whether the defenders when they received the payment were ignorant of the sequestration? and the third, Whether the conditions on which alone the defenders can be held liable in repetition have been or can be fulfilled.

"As to the first of these questions, the Lord Ordinary entertains no doubt.

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* 19 and 20 Vict. c. 79, sec. 111,—"All payments and preferences or securities obtained by or granted to prior creditors, and all acts done or deeds granted by the bankrupt after the date of the sequestration and before his discharge out of or in relation to the estate (unless with the consent of the trustee) shall in the event of sequestration being awarded be null and void; and the trustee shall be entitled to such preference or security, and to any money so paid, deducting any expense *bona fide* incurred; but . . . if the possessor of any bill or promissory-note, which is payable by the bankrupt with recourse on other parties, or of a security for a debt due by the bankrupt, shall have received payment of his debt from the bankrupt in ignorance of the sequestration, and given up such bill, promissory-note, or security to the bankrupt, such person shall not be liable to repay to the trustee the amount so received, unless the trustee shall replace him in the situation in which he stood, or to reimburse him for any loss or damage."

The defenders reclaimed, and argued (1) on the proof, That the money paid was not proved to have come from the funds of the bankrupt. (2)

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He thinks it proved that the money received by the defenders was the money of the bankrupt. All which was suggested in opposition to this view was a conjecture that the money might have come from Brydon, by whom payment of the bill had been guaranteed to Brodie, the drawer. But none of the facts which have been proved is corroborative of this supposition; and the way in which the settlement was effected is, in the opinion of the Lord Ordinary, real evidence that the sum received by the defenders did not come from Brydon. There is, as the Lord Ordinary thinks, only one conclusion for which there is warrant in the evidence, and this conclusion is, that the money was the money of the bankrupt.

"On the second question there was no controversy at the debate. The evidence indeed rendered controversy on this point almost impossible, and the consequence was that the counsel for the pursuer conceded that the cause must be decided on the footing that the defenders, as well as their agents, when they received payment of the sum of which repetition is sued for, were in ignorance of the sequestration of the estates of the bankrupt.

"The third question presents two points for consideration. The first is, whether by restoration of the documents to be returned, the defenders will be replaced in the situation in which they stood? and the second is, whether loss or damage of which they must be reimbursed has been proved? With reference to the former, the fact is, that the documents delivered up when the money was received by the defenders are to be returned, and this the Lord Ordinary thinks is all which, in this case, is necessary to replace the defenders 'in the situation in which they stood,'—taking these words in what the Lord Ordinary thinks their true acceptation. The counsel for the defenders indeed argued that inasmuch as Brydon, the granter of the letter of guarantee, had left this country in the interval, the defenders could not and would not be replaced in their former situation. But what was thus urged is, as the Lord Ordinary thinks, an argument misapplied. The facts relied on may or may not afford evidence that there is loss or damage which must be reimbursed, but they have no bearing on the question whether the defenders will, when repossessed of the documents which are to be returned, be replaced in the situation in which they stood. The defenders were creditors before; they are by virtue of the restitution of the documents which were the vouchers of their debt to become creditors again; and this the Lord Ordinary considers is all which is required to replace them in the situation to which, before they can be held liable in repetition, they must be restored.

"As to the condition relative to reimbursement of loss or damage, the Lord Ordinary thinks that loss or damage has not been proved, and consequently that the relative provision of the statute is not in this case brought into operation. The view upon this subject presented for the defenders was that recourse upon Brydon, which in February 1875 was open, is now cut off, and a consequence that the debt in question, which but for the payment received by the defenders might have been, cannot now be recovered from Brydon. The error which is here committed, as the Lord Ordinary thinks, lies in assuming that the adoption of proceedings against Brydon in February 1875 would have resulted in his payment of the debt. The facts of the case do not lead to this conclusion. His circumstances were, and for a time had been, embarrassed. Many of his obligations, events have shewn, were of a peculiarly embarrassing character. Day by day his creditors were becoming more urgent, and to escape from demands which he could not meet, and from proceedings which in consequence were about to be taken against him, he, about the middle of March, secretly left this country for America. The counsel for the defenders argued as if the defenders' diligence against him was at the beginning of February already ripe for execution. But this is a misapprehension. In the first place, the guarantee from Brydon had not at the time in question been assigned, though the letter containing the guarantee had been delivered to the defenders. And in the second place, the

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On the 111th section of the Bankruptcy Act, That as they received the money in ignorance of the sequestration they were not bound to refund it unless they were replaced in the same situation in which they stood, or reimbursed for their loss and damage. There was no offer to reimburse them, and the re-delivery of the documents would not replace them in the same situation.

The pursuer argued that the re-delivery of the documents did, within the meaning of the Act, "replace" the defenders. Clearly it did so *prima facie*, and the defenders had led no evidence to shew that their position would be any worse.

At advising,—

LORD PRESIDENT.—It is no doubt a general rule that if a bankrupt pays a debt to a creditor after his sequestration the payment is invalid, and the trustee is entitled to recover it. But some exceptions are introduced by the 111th section of the Bankruptcy Act. The last of these is expressed in the following terms:—"If the possessor of any bill or promissory-note, which is payable by the bankrupt, with recourse on other parties, or of a security for a debt due by the bankrupt, shall have received payment of his debt from the bankrupt in ignorance of the sequestration, and given up such bill, promissory-note, or security to the bankrupt, such person shall not be held liable to repay to the trustee the amount so received, unless the trustee shall replace him in the situation in which he stood, or reimburse him for any loss or damage."

In the present case the pursuer has brought his action for repayment of this money simply on the footing that it was paid by the bankrupt in extinction of a debt after his sequestration. He was quite entitled to do so, if the case does not fall within the exceptions of the 111th section. But the allegations of the defenders introduce a new element. They explain the circumstances in which the payment was made. They point out that the discharge bears to be not to the bankrupt but to another person, and that the money was paid not by the bankrupt but by his agent, who, as they say, seemed to represent that it was another person who paid the money. They also aver that they did not know of

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guarantee did not render Brydon liable to summary diligence. An ordinary action was indispensable; and it seems to the Lord Ordinary to be certain that, in the natural course of events, decree would not have been obtained by the defenders in time for his incarceration upon it before the time at which he absconded. Things, therefore, so far as the defenders are concerned, appear to be in the same situation now as that in which they were at the time when the sum of which repetition is claimed was received by the defenders. In other words, this payment has not been shewn to be the cause of loss or damage which must be reimbursed.

"Brodie, the drawer of the bill, it may be added, and several of the acceptors, have become bankrupt since the beginning of February, but upon this circumstance little or no stress was laid by the counsel for the defenders. The fact is, that the persons referred to were as unable to pay their debts at the period in question as they were when their insolvency was avowed; and whatever may now be recoverable from their estates is as much as could have been recovered, if the defenders had continued in possession of the bill, upon which they were debtors.

"These are the views upon which the Lord Ordinary has come to the conclusion that there is no loss or damage of which the defenders must be reimbursed under the concluding words of the 111th section of the Bankruptcy (Scotland) Act, 1856, before being forced to repay the sum sued for in the present action."

the sequestration when the money was paid, no notice of it having appeared in the "Gazette" or any newspaper.

Now, payment having been made in return for the delivery of a bill on which not only the bankrupt but several other persons were liable, and also of a letter of guarantee, these allegations seem to bring the case within the operation of the 111th section, because the defenders were in possession of a bill payable by the bankrupt, with recourse on other parties, and also of a security, and they allege that they received payment in ignorance of the sequestration. They have also denied that the money came out of the bankrupt's funds. Though there are probable grounds for that denial, I think we may take it as proved that it did. But if the defenders' allegation that they received the payment in ignorance is proved, that is a good defence, unless the trustee should offer to replace them in the same situation as before, or reimburse them. He has made no such offer on record, and the clause of the Act does not appear to have been noticed till the case was debated on the proof. The defenders have averred that they were in ignorance of the sequestration, and I think that averment is sufficiently sustained by the evidence. There is no reason to doubt that they acted in perfect good faith.

In these circumstances we might, in strict justice, hold the defence to be established, and find that the pursuer cannot recover. But I am unwilling to take that course, and would rather desire that we should adjudicate between these parties according to their real rights. But unfortunately we are not in possession of the materials for the ultimate disposal of the case. I cannot agree with the Lord Ordinary that the trustee sufficiently complies with the condition of the statute when he offers to return the documents. It is too obvious for argument that documents which, at the date of the payment, were of considerable value, may be worthless now. There could be no better illustration of this than the letter of guarantee. The granter of it was a solvent party open to the diligence of the defenders. But when they had received payment the debt was extinguished, their hands were tied, and they could take no recourse against anybody. The granter of the letter is said to have subsequently absconded. But it is not said that he was insolvent. This seems conclusively to shew that returning the documents does not place the defenders in the same position, still less reimburse them; and besides, there were several co-acceptors who were not discussed, and whose solvency, either now or at the time of payment, is not cleared up.

It rather appears to me that the defenders having had these parties bound, are entitled to take their stand on the privilege conferred by section 111, and to say,—"You cannot replace me in the situation I was in by giving me the documents; you must do something more." It lies on the trustee to shew that the defenders were then in no better position, and could make no more of the documents than they can now. That would be a difficult matter to prove. I am not inclined to lay down any very absolute rule as to the *onus probandi*, but that there must be some inquiry is perfectly clear.

I shall be glad, if your Lordships agree with me, to hear what the parties propose as to the mode of inquiry, or whether they can ascertain the facts by arrangement without formal proof.

LORD DEAS and LORD ARDMILLAN concurred.

LORD MURE.—I concur in the exposition which has been given by your Lord-

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ship in the chair of the meaning of the 111th section of the Bankrupt Act. It would therefore, I think, be premature now to give decree in this action for repayment of money which was received from the bankrupt in payment of the bill by creditors, who are admitted to have been in entire ignorance of the sequestration when the money was paid to them, because the trustee, in respect of the express words of the statute, is only entitled to recover in such a case if it is shewn that the creditor has been restored to the same position with a view to the recovery of his debt as he was in at the time when the payment was made. At present this has not, I think, been done, and in the circumstances, as disclosed in evidence, the presumptions seem to be rather the other way. I agree, therefore, in thinking that there should be some inquiry.

T. W. & A. M'Laren, W.S.—P. S. Beveridge, S.S.C.—Agents.

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Moon v. Caledonian Railway Co.

George Moon and Others, Pursuers.—*Asher—Innes.*
The Caledonian Railway Company, Defenders.—*D.-F. Watson—R. Johnstone.*

Harbour—Usage—Notice—Bye-laws.—A practice had existed for four years at a harbour by which steamships coming to load coals had a preference over sailing vessels in getting the use of the cranes. The owners of the harbour altered this practice (which was not fixed by the bye-laws of the harbour) without notice, putting all vessels on an equality according to their arrival. In an action of damages by the owner of a steamship for detention, *held* that the owners of the harbour were entitled, as a matter of management, to alter the practice, and that without notice.

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This action was raised by George Moon and others, owners of the steamship "Nellie," of West Hartlepool, against the Caledonian Railway Company, as owners of Grangemouth Harbour, for damage caused by the detention of the vessel at the harbour in the following circumstances:—

For some years prior to October 1874 it had been the practice at Grangemouth Harbour to allow steam vessels a preference over sailing vessels at the cranes at which coals were shipped. On 12th October 1874 the defenders resolved that this practice should be discontinued, and on and after 13th October steam vessels were put on an equality with sailing vessels in the use of cranes.

The pursuers' vessel arrived at Grangemouth on 17th October 1874, and in consequence of the number of other vessels in the harbour, and of the change of practice, was detained till 28th October.

The pursuers averred (Cond. 3) that the "Caledonian Railway and Forth and Clyde Navigation Companies Act, 1867," had transferred the Forth and Clyde Canal with, *inter alia*, Grangemouth Harbour, to the defenders, they being bound to keep the same open to the public subject to the conditions of the Act 4th and 5th Vict. c. 55, an Act to consolidate the Acts relating to the Forth and Clyde Navigation. (Cond. 5) "By section 229 of the said Act 4th and 5th Vict. cap. 55, it is enacted,—'That it shall and may be lawful to and for the company, from time to time, to make such bye-laws as they shall think fit, for all or any of the following purposes (that is to say):—For governing or regulating the use of the said navigation, and of the harbours, basins, and other works belonging thereto or connected therewith; . . . for regulating the exercise of the several powers hereby vested in the harbour-masters, shore-masters, wharfingers, and other persons employed by the said company; for regulating the admission of vessels into the said navigation and harbour or basins thereto belonging, and their removal out of the same,' and for other purposes."

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(Cond. 6) " By the 231st and following sections of the said Act it was provided that no such bye-laws should be valid and binding unless confirmed by the Sheriff of Lanark; that they should not be confirmed unless notice of the intended application to him were first given in the newspapers a month before application; that during the said month, at least, a copy of the proposed bye-laws should be kept at the principal office of the company, open to the inspection of all persons; that such bye-laws, when confirmed, should be printed and hung up, *inter alia*, on some conspicuous part of the works of the harbour or basin at Grangemouth, when such bye-laws related to the said harbour or basin; and that such bye-laws, when so confirmed, should be binding upon and be observed by all parties, and should be sufficient to justify all parties acting under the same." (Cond. 7) " The defenders, in respect of the authority given by the said Act, have printed and published bye-laws (a printed copy of which was produced), bearing to be confirmed by the Sheriff of Lanarkshire, of date 21st January 1873. *Inter alia*, the said bye-laws provide,—' 15. Parties desirous of using the steam cranes must give notice at docks office two hours beforehand. 16. Vessels to be put on turn for steam cranes, when ready to use them, and load as ordered. 17. Application shall be made for a berth by the master of each vessel on arrival to the harbour-master (who shall assign to the different descriptions of vessels such berths as may appear to him proper in the circumstances), and from which berth the vessel is not to be moved without his permission. 21. No vessel shall be allowed to keep her berth in consequence of having taken in or discharged a portion of her cargo, but must give place to the next in turn, or to the vessel ordered by harbour-master.' " (Cond. 8) " For many years before the publication and confirmation of said bye-laws it was the rule and custom of the harbour of Grangemouth, acted upon and held forth as such by the defenders and their officers, that in arranging the turn at the steam cranes of vessels arriving in order to load a distinction should be made between steam vessels and sailing vessels. According to said rule and custom every steam vessel had a priority at the steam cranes over sailing vessels, even though these sailing vessels should have arrived and applied for their turn before it (unless they had actually commenced loading). When the said bye-laws were published and confirmed this rule and custom was understood by all parties concerned to be continued under them, and in particular to be implied and intended under the said 16th bye-law. Accordingly, the said custom and rule continued unbroken after the said bye-laws were published, as before, down to the day when the steamship ' Nellie ' entered the harbour as aforesaid. On or about that day the said rule and custom was, in the case of the ' Nellie,' innovated upon, violated, and set aside by the defenders, as aftermentioned, illegally, and without any previous advertisement or notice, or judicial authority or confirmation whatever."

The pursuers pleaded;—The pursuers having suffered loss and damage to the extent concluded for, in consequence of the unfair and illegal detention of their vessel by the defenders, or those for whom they are responsible, are entitled to decree, with expenses.

The defenders pleaded;—(2) Under the Acts of Parliament and bye-laws foresaid, the harbour-master was entitled to regulate the traffic of the harbour and to assign berths to the vessels arriving thereat, and the vessels so arriving were bound to enter the docks and to " load as ordered,"—at least so long as the harbour-master's orders were in conformity with said Acts of Parliament and bye-laws. (3) No undue preference having been given to any vessel over the " Nellie," the defenders are entitled to absolvitor.

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The Lord Ordinary, after proof, pronounced this interlocutor, which fully brings out the facts and nature of the case:—"In the first place, finds as matter of fact (1) that the defenders are now, and since 1867 have been, the owners of the harbour of Grangemouth; . . . . (2) that for four years or thereby prior to October 1874 steamers were allowed a preference over sailing vessels at the cranes at which coals are shipped in the said harbour, but, irrespective of this preference, steam vessels arriving at the dock gates had not 'a preference in entering them over vessels already arrived;' (3) that on 12th October 1874 the defenders resolved that the preference over sailing vessels at the cranes, which, as aforesaid, had previously been allowed, should not be continued, and on and after the 13th October 1874 all steamers not already 'upon turn,' or not regular traders, were in consequence put on an equality with sailing vessels requiring the use of the cranes; (4) that the intention of the defenders to change the existing usage was not communicated, nor was there any publication of the order by which this change was effected before it was brought into operation; (5) that this change of usage was not an act of capricious administration, but, on the contrary, was resolved on and ordered in good faith, and in the belief that it would operate beneficially upon the trade of the port; (6) that the screw steamer 'Nellie,' of which the pursuers are the owners, was, on the 9th of the said month of October 1874, chartered to Messrs Hugh MacLean and Company, of Glasgow, by the charter-party, No. 6 of process, whereby it is, *inter alia*, provided that she should, 'with all convenient speed, sail and proceed to a loading berth at steam crane at Grangemouth, or as near thereunto as she may safely get,' and there take in a cargo of steam coal; (7) that, in terms of this charter-party, the 'Nellie' was subsequently taken to Grangemouth, where she arrived after five o'clock, and after custom-hours, on 17th October 1874; (8) that, on arrival, the master desired to take his vessel into the wet-dock, on the quays of which the coal cranes are placed, but his request to be allowed to enter at that time was refused by the harbour-master, on the ground that, as alleged, the space available for vessels in which coals were to be loaded was already filled with vessels, which, under the new regulations, were entitled to a preference over the 'Nellie' at the cranes; (9) that the reason thus assigned was true in point of fact; (10) that the 'Nellie' lay at the entrance to the dock till the morning of the Monday, 19th October 1874, when she was taken to and moored at the ballast quay, where, though put on turn for a crane berth on said 19th October, she was kept till the afternoon of the 28th of October, when her turn for the crane arrived, and when accordingly she was taken into dock and berthed at the crane No. 2, which is the larger of the two steam cranes in the harbour of Grangemouth, and that at which vessels of the size of the 'Nellie' are in use to be loaded; (11) that the 'Nellie' was, by the operation of the new regulations, detained at Grangemouth, and outside the dock, for eight days longer than she would have been so detained had her turn at the crane been regulated by the usage which was thereby changed; and (12) that this detention was the cause of loss or damage to the pursuers: In the second place, finds as matter of law that the defenders were entitled to fix the conditions on which the cranes in question were to be used, and the change made as aforesaid on the order or turn in which vessels were to be served having been resolved on and carried out in good faith, and, as the defenders believed, for the benefit of the trade of the port of Grangemouth, the loss and damage for which reparation is now sued for is not loss or damage resulting from fault on the part of the defenders, and consequently is not loss or damage for reparation of which the defenders are liable: Therefore sustains the defences, as-

soilzies the defenders, and decerns: Finds the defenders entitled to expenses," &c.*

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* "NOTE.— . . . . The real question, as the Lord Ordinary thinks, is whether the change of usage, which had the effect both of keeping the 'Nellie' out of the dock and from the crane for eight days longer than what, but for this alteration, would have been the period of her detention for her cargo, affords to the pursuers, in the circumstances of the case, a good ground of action.

"The affirmative of this question is maintained by the pursuers, in the first place, because, as they say, the usage which existed prior to 12th October 1874 was the subject of a bye-law sanctioned by the Sheriff of Lanarkshire, and which, therefore, according to the 231st section of the 4th and 5th Vict. c. 55, being 'an Act to consolidate, amend, and enlarge the powers and provisions of the several Acts relating to the Forth and Clyde Navigation,' could not be altered without his authority. Undoubtedly, if the usage was the subject of a bye-law, it could not be altered without the authority of the Sheriff; but the Lord Ordinary is of opinion that the usage relied on was not sanctioned by the bye-law to which the pursuers refer or by any bye-laws relative to the use of the harbour of Grangemouth. The bye-law on which the pursuers rely is No. 16 of the bye-laws, No. 31 of process, 'to be obeyed and observed by the masters of vessels and other persons resorting to and using the harbour of Grangemouth,' which were sanctioned by the Sheriff of Lanarkshire on 21st January 1873. The title shews that these bye-laws were intended not to bind the defenders to any existing usage, but to ensure, by the penalties, the recovery of which was authorised, the observance by the masters of vessels and others resorting to and using the harbour of the regulations sanctioned by the Sheriff. Apart from this, the words of the 16th bye-law are not reasonably susceptible of the pursuers' interpretation. It provides that vessels shall 'be put on turn for steam cranes when ready to use them, and load as ordered.' What vessels? Steamers or sailing vessels, or both? This question cannot be answered by a reference to the bye-laws. Something else must be referred to; and the pursuers argue that what is to be referred to is the usage which was in operation at the time when the bye-laws were sanctioned. The Lord Ordinary cannot, however, adopt this view of the matter. He thinks that the thing to be referred to is the rule which is in force at the time when vessels as alleged ought to have been put on turn for steam cranes. The power of the defenders to regulate the business of the harbour, and, in particular, to issue orders relative to the use of the cranes, is left unimpaired, and, as well after as before the passing of these bye-laws, such orders as were necessary for the good order of the harbour, or to increase the trade of the port, might, for anything in the bye-laws to the contrary, be from time to time given by the defenders. The Lord Ordinary therefore considers that the alterations in the usage which, for some time prior to October 1874, had been observed, was within their powers.

"The pursuers contend, in the second place, that even if the alteration was within the powers of the defenders, they were not entitled to bring the new rule into operation without reasonable notice. What is involved in this proposition cannot easily be defined or even conjectured. Reasonable notice to whom? To merchants or shipowners in Grangemouth, or to traders in Leith, Glasgow, London, or in Continental, or even in transatlantic ports? What would suffice for these in one place might not, and, indeed, probably would not, be 'reasonable notice' to others elsewhere. Nor is this all; vessels are chartered not for a voyage merely, but for a series of voyages, or for a specified period. Must all such cases be provided for before a change in the rule under which vessels shall be taken to the crane could be uniformly enforced? These questions are suggested merely to point out the difficulty, if not the impossibility, of fixing what would be reasonable notice. But, as the Lord Ordinary thinks, it is unnecessary to deal with, or at any rate to decide, this point. The statutes under which the administration of the harbour of Grangemouth is conducted create no duty, and impose no obligation, as to the giving of notice before new orders relative to the use of the harbour or its appurtenances may be put into operation. The discre-

No. 130. The pursuers reclaimed. At advising,—

June 9, 1876. Moon v. Caledonian Railway Co.

LORD PRESIDENT.—There can be no dispute as to the right of the defenders to alter the practice, and there is no reason to doubt that they acted in the interests of the harbour, and those who frequented it. The suggestion that there ought to have been notice is at first sight plausible. But, when examined, it is found to be most unreasonable. Notice to whom? It would be quite impracticable to give notice to all the world, unless the defenders were to wait for years before bringing the change into operation. In my opinion this was a mere matter of management, quite within the powers of the owners, and, I should say, even of the harbour-master, unless he was precluded by the terms of his appointment.

LORD DEAS, LORD ARDMILLAN, and LORD MURE concurred.

THE COURT adhered.

BOYD, MACDONALD, & LOWSON, S.S.C.—HOPE, MACKAY, & MANN, W.S.—Agents.

No. 131. NELSON, DONKIN, AND COMPANY, Pursuers.—*Guthrie Smith—Young.*
ROBERT BENNET BROWNE AND OTHERS, Defenders.—*Trayner.*

June 10, 1876. Nelson, Donkin, & Co. v. Browne, &c.

Process—Competency—Value of the Cause—Stat. 50 *Geo. III. c.* 112 (*Judicature Act*, 1810), *sec.* 28.—The owners of a vessel sued fifty underwriters under a policy of assurance on their vessel for £60, 13s. 1d. "according to the several proportions for which the policy was underwritten by them, viz. £1, 4s. 3½d.

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tion of the defenders is left untrammelled, and if their conduct is neither partial nor capricious, but, on the contrary, was dictated by a desire for the benefit of the harbour, want of previous notice will not invalidate their orders. Nor is this a hardship to any one concerned. Shipowners presumably know the rights and the duties of the defenders in the premises, and consequently must be held to provide in their calculations for changes in the rules regulating the use of the harbour which may from time to time be adopted.

"The Lord Ordinary has observed that previous notice has not been rendered necessary by any of the statutes under which the harbour of Grangemouth was formed, or its administration is conducted. He thinks it right now to add, that some of the enactments seem to him to be inconsistent with the idea that such notice as that for which the pursuers insist was or could be contemplated. Take, for instance, the enactment in section 135 of the 4 and 5 Vict. c. 55, we find 'that it shall be lawful for the said company, when, and as often as they shall think proper, to run off the water from the said navigation for the purpose of repairing the same, or any part thereof.' Thus the canal or the harbour might be closed, traders possibly, if not probably, be put to inconvenience, or even subjected to loss, and yet there is no provision that any previous notice should be published. The only provision, it may be added, relative to notice rendered necessary before acts of ordinary administration by the owners of the harbour can be accomplished to be found in any of the statutes with which the Lord Ordinary is familiar is what is contained in the 64th section of 'The Harbours, Piers, and Docks Clauses Act, 1847.' It is there enacted, that 'whenever the undertakers shall deem it necessary, for the purpose of repairing, scouring, or cleansing the harbour, docks, or piers, that any vessel therein or thereat shall be removed therefrom, the master of such vessel shall, within three days after such notice in writing, signed by the harbour-master, given to him, remove such vessel according to such notice.' Notice to those interested in vessels outside the harbour is not required, and even to those in harbour the notice to be given is a premonition of only three days. From all which the inference, as the Lord Ordinary thinks, necessarily is, that the order issued by the defenders, of which the pursuers complain, was one which might lawfully be enforced when the pursuers' vessel arrived at Grangemouth on the evening of the 17th October 1874."

each." *Held* that the action was competent in the Court of Session, as the sum which the pursuers sued for exceeded £25. No. 131.

June 10, 1876
Nelson, Donkin, & Co v. Browne, &c
1ST DIVISION
Lord Young. B.

THIS was an action by Nelson, Donkin, and Company, shipowners, Newcastle-on-Tyne, against Robert Bennet Browne and forty-nine others, all designed as underwriters in Glasgow. The conclusions of the summons were:—"The whole defenders above named and designed ought and should be decerned and ordained, by decree of the Lords of our Council and Session, to make payment of £60, 13s. 1d. sterling, being the sum due on a policy of insurance on the steamer 'Menzaleh,' executed at Glasgow the 14th day of February 1874, and that according to the several proportions for which the said policy was underwritten by them, viz. the sum of £1, 4s. 3½d. sterling each, together with the interest due thereon from 8th May 1875 till payment."

The defenders pleaded, *inter alia;*—(1) The pursuers have no title to sue. (2) The present action is incompetent before the Court of Session, in respect the defenders have no joint liability in the premises, and the sum concluded for against each defender is less than £25 sterling.

The Lord Ordinary pronounced this interlocutor:—"Repels the first and second pleas in law for the defenders: Allows the parties a proof of their respective averments, so far as not admitted: Appoints the proof," &c.

The defenders, having obtained leave of the Lord Ordinary, reclaimed, and argued;—There was no community of interest between the different defenders. They were each liable for £1, 4s. 3½d. if the pursuers succeeded in establishing their claim. Community of interest might enable parties to sue in the same action, but it would not make the action competent in the Court of Session.[1]

At advising,—

LORD PRESIDENT.—This is a question not without some difficulty. I have had some doubt in the course of the discussion, but I have now come to be of opinion that this action is competent, and that the plea of the defenders is not well founded. It was undoubtedly competent for the pursuer to convene all the defenders in one action irrespective of the value of the cause. If each defender were liable for a sum exceeding the amount of £25 it would not admit of dispute that the action was competent against the whole of the defenders, because they are all convened as being obligants in one contract, and as all defenders in one single issue of fact.

That first point goes a long way to solve the question whether the circumstance of the liability of each individual defender being under £25 renders the action incompetent on the ground that it is for the recovery of a sum which is under the value of £25 as regards each defender separately. To make the action incompetent under the statute the sum involved in the cause must not exceed £25, and the question is, whether this case, inasmuch as it involves a sum which amounts only to £1, 4s. 3½d. to each of the defenders, is a case which is so excluded from this Court.

I am of opinion that this is not a case to which the statute applies. I think the value of the sum involved in the action is £60, 13s. 1d., because that is the amount of money which the pursuers will be entitled to recover if they are successful.

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[1] *Defenders' Authorities.*—Gifford v. Traill, July 8, 1829, 7 S. 854; Gibson, Thomson, and Co. v. Cameron, June 9, 1827, 5 S. 784.

Pursuers' Authorities.—The Liquidators of the Western Bank v. Douglas, &c., Jan. 21, 1860, 22 D. 447, 32 Scot. Jur. 212; Dykes v. Merry and Cuninghame, March 4, 1869, 7 Macph. 603, 41 Scot. Jur. 355; Dove Wilson's Sheriff Court Practice, pp. 91 and 487.

No. 131.
June 10, 1876.
Nelson, Donkin, & Co. v. Browne, &c.

This is a question which has already been decided in the other Division of the Court in the case of Dykes v. Merry and Cuninghame, and if I had entertained any doubt as to the soundness of that decision I should have thought it proper to consult our brethren; but I have come to think that case well decided, and that we ought to hold in conformity with it that this action is competently brought in this Court.

LORD DEAS.—I am clearly of the same opinion. The conclusions of the summons are consistent with the pursuers' contention, and they must be looked at in the first instance. They are not conclusive of the question, but taken along with the fact which your Lordship has pointed out, that the defenders have a common interest, I think there is enough to leave no doubt upon the point.

As regards the position of pursuers suing together in one libel, the rubric in the old case of Gray (M. 11,986) is as follows:—"Found that different parties could not accumulate their actions in one libel unless they had connection with one another in the matters pursued for, or had been aggrieved by the same act." It has always, in my experience, been recognised as a rule, that if there is a community of interest or connection between several parties, they can sue together for a sum due to them all in their common capacity. In the same way, it is sufficient that a number of parties called as defenders shall all be connected together in reference to the defence. The present is the clearest possible case of that kind. The whole subject-matter of the action involves one single question of fact affecting the whole of the defenders. Nor are the consequences of our giving effect to the contention of the defenders, and the amount of litigation which would ensue, to be left out of view in this question of procedure. The action could not be laid in the Small Debt Court in one summons against the whole of the defenders, and the only alternative would be to bring an action against each, as a decision against one of the defenders would not be *res judicata* as against any of the others.

The decision in the case of Dykes v. Merry and Cuninghame, which was quoted to us, laid down the law quite accurately, and its soundness has not been doubted in the subsequent practice of the Court.

LORD ARDMILLAN.—There is no presumption against the jurisdiction of this Court, which must be sustained unless it be excluded by statutory law. The statute excludes from our jurisdiction certain cases in which the amount at stake is under a certain value. The question how that is to be ascertained is matter for adjudication by this Court, and the decision of this Court on the question of the ascertainment of value is no encroachment on the statute.

Here the value to the pursuers is something above £60. The next important consideration is that the parties called are all united as obligants in one contract, which, *ex concessu*, is binding on all if on any. There is nothing here to raise a doubt that the pursuer can recover the whole sum of £60, 13s. 1d. if he recover anything at all. Apart altogether from the case of Dykes v. Merry and Cuninghame, to which we have been referred, I should be of opinion that, looking to the contract and the sum concluded for, the pursuer had rightly brought this action in the Court of Session; but looking to the case of Dykes, I think it is an authority applicable to the matter in dispute.

LORD MURE concurred.

THE COURT adhered.

PATRICK S. BEVERIDGE, S.S.C.—THOMAS DOWIE, S.S.C.—Agents.

MRS GRACE MACDONALD OR KENNEDY AND HUSBAND, Pursuers.—*M'Laren.*
MRS EUPHEMIA MENZIES OR MACDONALD AND OTHERS (Macdonald's Trustees), Defenders.—*Rhind.*

No. 132.
June 12, 187
Kennedy v. Macdonald.
1ST DIVISIO
Ld. Curriehil
M.

Lis alibi pendens.—In an action raised by Mrs Kennedy and her husband against Mrs Euphemia Macdonald and others, David Macdonald's trustees, the Lord Ordinary, on 27th January 1876, pronounced an interlocutor finding that the summons was informal, dismissing the action, finding the defenders entitled to expenses, and remitting their account to the Auditor for taxation. The account was taxed on 22d February 1876. Before this date a second summons was signeted, executed, and called at the instance of the same pursuers against the same defenders, with the same conclusions.

The defenders pleaded *lis alibi pendens.*

The Lord Ordinary and the First Division *held* that the plea fell to be sustained, in accordance with the rule laid down by the Court in Aitken v. Dick, July 7, 1863, 1 Macph. 1038, 35 Scot. Jur. 596.

LINDSAY, PATERSON, & Co., W.S.—ROBERT MENZIES, S.S.C.—Agents.

JOHN SHAW, Pursuer.—*R. V. Campbell.*
ROBERT WALKINSHAW YOUNG AND OTHERS (Shaw's Trustees), Defenders.—*Asher—M'Kechnie.*

No. 133.
June 13, 187
Shaw v. Shaw's Trustees.

Title to Sue—Proving of the Tenor—Process—Proof.—Where a pursuer was unable to recover deeds constituting his title to sue, *held* that it was necessary for him to bring an action of proving of the tenor before the action could proceed.

1ST DIVISIO
Lord Shand.
B.

THIS was an action of accounting brought by John Shaw against the testamentary trustees of his father, the late Thomas Shaw. The conclusions of the summons were for an accounting of the intromissions of the late Thomas Shaw and his wife in the business of Thomas Shaw and Company, confectioners, Glasgow, of which firm the pursuer alleged that he was a partner.

The pursuer averred that a contract of copartnery was executed on 25th June 1847 between Mrs Susan Shaw, sometime widow of James Scott, confectioner, Glasgow, and her second husband, Thomas Shaw, on the one part, and Margaret, Janet, Susan, and Hannah Scott, children of the said James Scott, on the other part, to carry on Scott's business under the name of Thomas Shaw and Company. That by this contract the four Scotts were to have one-half of the profits in equal shares. That by the contract books were to be kept and balanced in January in each year, crediting each partner with a due share of profits. That by marrying Susan Scott the pursuer acquired her share, and by an assignation dated in February 1856, Janet Scott and Hannah Scott assigned, with consent of the other partners, their shares to the pursuer and the said Thomas Shaw. That by an assignation dated in December 1858, Margaret Scott assigned her share to the pursuer, and to Thomas Shaw and his wife equally.

The defenders, the testamentary trustees of Thomas Shaw, in their answers, referred to the deeds founded on by the pursuer for their terms, and stated,—(Stat. 4) "The defenders believe and aver that the pursuer was not a partner, at all events, ultimately, with the said deceased Thomas Shaw. If he ever was a partner the partnership must have ceased many years ago." (Stat. 5) "The defenders have not found in the repositories of Mr Shaw any books or documents, or indeed any materials from which

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they can make up an account of the profits of the business of Thomas Shaw and Company. So far as known to the defenders the profits of the said business, if any, were regularly distributed to those interested therein. The defenders also believe and aver that even if the pursuer was at any time a partner he duly received, at least, his share of the profits, and that upon an accounting they are not due him any sum whatever. His father, as already explained, for a great number of years, the precise time being to the defenders unknown, had to support the pursuer, and frequently to pay debts of his. This was owing to the pursuer's habits and mode of life. The defenders are not able to say beyond the terms of the writings produced whether the pursuer ever was a partner, but they believe and aver that if he ever was he ceased to be a partner many years ago, and that on a footing which disentitles him to have any claim against his father's trust-estate. The defenders would have recognised his claims if they could find evidence of them." (Stat. 6) "The defenders are merely trustees without personal knowledge in the premises, and have not since the action was raised been able to ascertain more precisely than is set forth in these defences the relation in which the pursuer stood to his father as to the alleged partnership."

The defenders, *inter alia*, pleaded;—(3) The pursuer's whole statements, so far as material, being unfounded in fact, the defenders are entitled to absolvitor.

The Lord Ordinary granted a diligence to recover the writings mentioned on record. No originals of these were recovered, but drafts of the assignations were produced. The original contract of copartnery had been produced and printed in an action Shaw's Trustees v. Shaw, Jan. 19, 1870, 8 Macph. 419, 42 Scot. Jur. 195, and was then admitted to be correct by the late Thomas Shaw. The receipt of the late Thomas Shaw was produced for this contract, and also for the two assignations.

The Lord Ordinary pronounced this interlocutor:—"Remits to Mr William Brown, chartered accountant in Glasgow, to inquire into the facts set forth in the record, and to report; and in particular to report a state of the profits of the copartnery business for the period referred to in the record, in so far as he may obtain materials enabling him to do so, and also the particulars of any sums paid to the pursuer or his wife by his late father, with power to the accountant to recover all books and documents bearing on the subject of the remit, and for that purpose grants diligence at the instance of the parties against havers, said report to be made *quam primum*.*

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* "NOTE.—The record in this case, particularly the defenders' record, is in a very unsatisfactory state, and the defenders say they cannot make their statements more precise. In the circumstances, it appears to me that a remit to an accountant, with power to recover books and documents, which is the course appropriate to actions of this class, is the best means that can be adopted for ascertainment of the facts, or for putting the case in shape for a proof to be taken on certain specified points, if that shall be found necessary.

"The defenders maintain that the case should be sisted till the pursuer, in a formal action of proving the tenor, shall set up the deeds founded on; but, in the circumstances, I think this is unnecessary, and would impose a hardship and injustice on the pursuer. In a former litigation in this Court the contract of copartnery was produced, and printed for the use of the Court, and admitted by the late Mr Shaw. Mr Shaw's receipt for the two assignations founded on by the pursuer is produced, and no account is given as to what has become of these deeds; and in the circumstances, and having regard to the terms of the defenders' record, which does not deny either the existence or the alleged terms of the deeds, I think the action should be allowed to proceed, at least to the extent of

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The defenders reclaimed, and argued;—The partnership was not admitted, and it was necessary for the pursuer to instruct his title to sue by an action of proving the tenor of the deeds on which his title rested.

The pursuer answered;—A proving of the tenor was not necessary, as the documents had been traced to the hands of the defenders' author, Thomas Shaw, the truster. If the truster had been alive he would have been required to produce the document which had been traced to him. His trustees could be in no better position. Therefore, secondary evidence was competent.[1]

LORD PRESIDENT.—I agree with the Lord Ordinary in saying that this is a very unsatisfactory record. But one thing is clear that the contract of copartnery is a fundamental part of the pursuer's title to sue. It does not constitute his whole title, but it is just as essential a part of his case as the two assignations. None of these documents having been produced, the question comes to be whether the case can be allowed to proceed without a proving of the tenor of these documents which are assumed to have been lost. I think that a proving of the tenor is indispensable. None of the authorities which have been quoted have the least application. Many documents may be proven in the course of a trial by secondary evidence, but never when they are the documents which constitute the title of the pursuer. I am, therefore, of opinion that the interlocutor of the Lord Ordinary must be recalled, and the case sisted until a proving of the tenor is brought.

LORD DEAS.—The documents on which the action is founded are a contract of copartnery and several assignations. It is not doubted that these documents once existed, and there is ample means of proving their tenor. If the pursuer's counsel had shewn us that the documents were never in existence, that might have been a very good reason for not requiring a proving of the tenor. We might have been landed in this position, that there were no means of finding out what was the state of this copartnery. It is no matter who was to blame for the loss. I am clearly of opinion that the pursuer must bring a proving of the tenor. I would only add, that he ought to prove the whole documents, as the expense will not thereby be much increased.

LORD ARDMILLAN.—I concur. It will not do for a pursuer to say that because a case involves an accounting it must necessarily be sent to an accountant. This is indeed an action of accounting, but it is on the basis of there being a contract of copartnery. None of the deeds founded on have been produced, and there is no means of finding out what they are, or what is their nature and import. The only way of finding out what they are is by an action of proving the tenor, and apparently there are some adminicles which will be of use in the proof. The record is very unsatisfactory, but I concur in the opinion that the action cannot proceed without a proving of the tenor.

LORD MURE concurred.

THE COURT pronounced this interlocutor:—"Recall the interlocutor, and remit to the Lord Ordinary to sist process in order to afford

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obtaining the accountant's report. The deeds may yet be recovered in the procedure before him; and, failing production of the originals, his report will state the grounds on which the copies produced are presented as authentic."

[1] Strachan v. Steuart, Nov. 10, 1870, 9 Macph. 116, 43 Scot. Jur. 47; Stair, 4, 32, 2; Clark v. Clark's Trustees, Nov. 30, 1860, 23 D. 74, 33 Scot. Jur. 44.

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the pursuer an opportunity to institute a proving of the tenor of the writs on which he relies as constituting his title to sue: Find the pursuer liable in expenses," &c.

HILL & FERGUSSON, W.S.—JOHN CARMENT, S.S.C.—Agents.

No. 134.

June 14, 1876. Scott's Executors v. Hepburn.

MRS ISABEL SCOTT OR HADDEN AND OTHERS (Scott's Executors), Complainers.—*Guthrie Smith—M'Kechnie.*

SIR THOMAS BUCHAN HEPBURN, Baronet, Respondent.—*D.-F. Watson—Gloag.*

MRS ISABEL SCOTT OR HADDEN AND OTHERS (Scott's Executors), Pursuers.—*Guthrie Smith—M'Kechnie.*

SIR THOMAS BUCHAN HEPBURN, Baronet, Defender.—*D.-F. Watson—Gloag.*

Landlord and Tenant—Lease—Meliorations—Compensation.—An agricultural tenant died during the fifth year of a nineteen years' lease. The *curator bonis* of his heir, who was a lunatic, declined to take up the lease, and the landlord refused to accept the executors as tenants. The landlord obtained decree in the Sheriff Court against the executors for the expense of repairing fences and buildings which the tenant was bound to keep up. The executors in a suspension stated as a set off *pro tanto* against the landlord's claim the value of unexhausted manures and improvements by which the landlord had been *lucratus* in consequence of the premature termination of the lease, for which they also raised an action. *Held* (*dub.* Lord Ardmillan) that the tenant's meliorations could not found a claim against the landlord, and therefore could not be pleaded in compensation, *rev.* judgment of Lord Curriehill, who held that in equity the landlord's claim of damages fell to be diminished in so far as he had been *lucratus* by the tenant's meliorations in excess of his legal obligations, although such meliorations could not found a claim enforceable against the landlord.

Process—Review—Suspension—Court of Session Act, 1850 (13 *and* 14 *Vict. c.* 36, *secs.* 9, 32.—The 9th section of the Court of Session Act provides that "where answers are lodged by a respondent in any process of suspension or advocation, the record shall thereafter be made up therein in the same way and manner in all respects as is directed by this Act in regard to any ordinary action in which defences have been lodged." Sec. 32 provides that "in all cases of advocation or suspension . . . . where a record has been made up and closed and a proof led and concluded before the inferior Judge, the Lord Ordinary . . . . shall, ... if a motion to that effect be made by either of the parties, appoint such record and proof . . . . to be printed and boxed for the Judges of the Inner-House, and shall report the cause to the Inner-House, who shall thereupon proceed to dispose of it in the same way and manner as if it had been reported by the Lord Ordinary upon a closed record prepared in the Court of Session." *Held* that the 32d section did not override sec. 9, and was not applicable to cases covered by sec. 9, viz. cases in which answers have been lodged.

1ST DIVISION. Ld. Curriehill. M.

DAVID SCOTT was tenant of the farms of Spittalrigg and Ugstonrigg on lease from Sir Thomas Buchan Hepburn, of Smeaton-Hepburn and Letham, for nineteen years from 1866. The lease contained an assignation to Scott of an obligation by the previous tenant to leave buildings and fences in good order and repair, in respect whereof Scott accepted them as in good order and repair, and bound himself to keep and leave them in like order. Scott died in November 1871. His heir was his brother John, a lunatic. A *curator bonis* was appointed to him, who renounced the lease. The executors were willing to carry on the lease, but the landlord refused to accept them as tenants. He then raised an action against them in the Sheriff Court of Haddington, concluding for £202 as the expense of putting the buildings, fences, &c. in a proper state of

No. 134.
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Scott's Executors v. Hepburn.

repair. The action was defended, but the defenders did not appear at the proof, and the Sheriff-substitute (Shirreff), after hearing evidence for the pursuer, gave decree as concluded for.

Scott's executors brought a suspension. They averred (in conds. 12, 13, 14, 15, 16, 21) that the buildings and fences were in bad repair at Scott's entry, and that the previous tenant's obligation to keep them up had never been delivered to him; that the landlord had not discussed the heir-at-law; that decree was pronounced against the complainers without proper inquiry into the facts; that during the most important stages of the cause they had no law-agent, and that all the witnesses who knew the facts were not adduced, and those who were adduced were not skilfully examined.

They pleaded;—(2) The whole material averments of the respondent, in the action in which he procured the decree sought to be suspended, being false and unfounded in fact, the prayer of the note ought to be granted. (4) The respondent having obtained a renunciation of the said lease without consideration, in the knowledge that the same was of a value far in excess of any rights competent to him under the lease against the late tenant or his representatives, is not now entitled to insist in his present claims.

The Lord Ordinary on 5th June 1875 passed the note, and on 30th June pronounced this interlocutor:—"On the motion of the respondent to have the record in the inferior Court and the proof therein printed and boxed to the Judges of the Inner-House, refuses the motion; and in respect the note of suspension, with articulate reasons annexed thereto, has been passed after answers have been lodged thereto by an interlocutor now final, finds that the record must be closed, and thereafter proceeded with in the Outer-House: Therefore appoints the cause to be put to the roll for the 6th day of July next for the adjustment of the record."*

* "NOTE.—This is a suspension of a decree *in foro* for £202, 3s. 8d., with £56, 5s. 6½d. of expenses, pronounced against the present complainers by the Sheriff of the sheriffdom of Haddington and Berwick, in a petition presented against them at the instance of the present respondent, Sir Thomas Buchan Hepburn, Baronet. A record was closed and a proof was led in the Sheriff Court.

"The time within which the judgment might have been appealed elapsed, and the decree was extracted. The complainers, in order to have the judgment reviewed, both on its merits and in respect of certain alleged irregularities in the procedure, brought the present process of suspension. The note was originally presented on caution with an articulate statement of facts and note of pleas in law annexed, and answers were ordered. Before answers were lodged, the complainers lodged a minute offering consignation in place of caution, and, of this date (8th May 1875), the Lord Ordinary on the Bills (Lord Gifford) allowed the complainers to make consignation of the sums charged for, together with the sum of £50 sterling to meet the expenses of process, amounting in all to £334 sterling.

"Consignation having been accordingly made, answers were lodged for Sir Thomas Buchan Hepburn, and after a full hearing the competency of the suspension was sustained, and the note was passed on 3d June 1875 by an interlocutor which is now final, and the cause has now been enrolled in the ordinary motion-roll for further procedure. The note having been passed with articulate reasons annexed and answers thereto, the record would apparently fall to be closed, and the cause proceeded with in the Outer-House in terms of section 9 of the Act 13 and 14 Vict. c. 36, which provides that where answers are lodged by any respondent in a process of advocation or suspension the record shall thereafter be made up in the same way as in ordinary actions in which defences have been lodged. But the respondent maintains that as in the inferior Court a record had been ordered and a proof led he is entitled, under section 32 of

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After the record in the suspension was closed, Scott's executors raised an action in the Court of Session against Sir T. Hepburn, concluding for the same Act, to have that record and proof at once printed and boxed for the Judges of the Inner-House, and reported to the Inner-House, and to have the cause disposed of as if it had been reported by the Lord Ordinary upon a closed record prepared in the Court of Session.

"The question now to be decided is whether section 32 overrides section 9, or whether it does not rather apply to advocations and suspensions other than those with which section 9 deals?

"The question is not free from difficulty, but as the complainers resist the respondent's motion it is necessary to decide the point.

"To understand the question aright, reference must be made to the practice of the Bill-Chamber and of the Court as regulated by the various statutes and Acts of Sederunt which preceded the Act of 13 and 14 Vict. c. 36.

"The earliest to which it is necessary to refer is the 50 Geo. III. c. 112.

"By the 38th section of that statute bills of advocation and suspension of final judgments of inferior Judges are to be passed on caution without answers, unless it shall appear on the face of the bill that it ought to be refused, in which case it is to be refused; and by section 40 it is enacted that bills of advocation and suspension when so passed are to be enrolled in the roll of advocations and suspensions in the Outer-House, and proceeded with before the Lord Ordinary.

"The next statute is the Judicature Act, by the 41st section of which it is enacted that bills of advocation of final judgments are to contain a copy of the summons or petition and defences or answers with the interlocutors and without any other narrative and without argument, and such bills are to be at once passed by the Lord Ordinary on the Bills on caution for expenses both in the inferior Courts and in the Court of Session, or on juratory caution.

"By the Act of Sederunt following on that statute it is ordered that, in advocations of interlocutory judgments and in every suspension at the lodging of the letters for calling, articulate reasons of suspension or advocation shall be lodged, and the answers are to be in corresponding form.

"The next statute to be noticed is the Advocations and Suspensions Act of 1838, which enacts that advocations of interlocutory judgments are to be by note in the Bill-Chamber prefixing the interlocutor, and praying for relief or remedy, with articulate statements of reasons of advocation and note of pleas in law; answers may be ordered, and the note, if passed, is to be called, and the record closed on note and reasons, or on revised reasons and answers, or on condescendence and answers, and the cause is thereafter to proceed before the Lord Ordinary and the Court of Session in common form; and by the next section it is enacted that in suspensions of inferior Court decrees *in foro*, except removings, the procedure is to be by note reciting the import and effect of the decree, and praying for relief, and on caution for implement of the decree and expenses in the Court of Session the note is to be passed, but 'where a party is desirous to have such decree of any inferior Court pronounced *in forn* suspended without caution, or on juratory caution, and also in suspensions of decrees of removing, there shall be annexed to such note of suspension an articulate statement of the facts on which the suspension is founded, and a note of pleas in law, and such note shall be laid before the Lord Ordinary on the Bills, who may pronounce such order as shall be just; and where answers shall be ordered, such answers shall be in a similar form to the reasons of suspension; and in case the Lord Ordinary shall pass the note, the same procedure shall take place as is hereinbefore provided in the case of advocations of interlocutory judgments,'—that is to say, the record is to be made up by the Lord Ordinary, and the cause proceeded with as an ordinary action in the Outer-House.

"By the Act of Sederunt following on that statute it is provided that suspensions shall still be competent on consignation, and that the same procedure is to be observed in such suspensions as in suspensions without caution, or on juratory caution,—in other words, as in advocations of interlocutory judgments.

"The next statute is the Act 11 and 12 Vict. c. 36, the 9th and 33d sections of which have been already recited.

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payment of £400. They averred that Scott had laid out large sums in draining, trenching, and otherwise making improvements on the farms, of which he did not live to reap the benefit, and that the value of the improvements to the proprietor or his incoming tenant was at least £400.

They pleaded;—(3) The said deceased David Scott having expended large sums on the improvement of said farms, of which he did not live to reap the benefit, and the defender being, through his death before the expiry of the lease and the inability of the heir to take it up, *lucratus* as condescended on, the pursuers, as representing the said David Scott, are entitled to decree for the sum sued for.

The defenders denied the averments, and pleaded, *inter alia*, that they were irrelevant.

On 13th December 1875 the Lord Ordinary pronounced interlocutors in both processes.

In the suspension, after findings in fact, the substance of which is embodied in the foregoing narrative, the interlocutor proceeded,—"Finds that the complainers, as general disponees and executors of David Scott, are bound to implement the obligations incumbent on their author under the lease, to maintain and leave the buildings, fences, ditches, &c., in proper repair, as aforesaid; but finds that they are entitled to set off against the respondent's claim for such repairs *pro tanto* the value, if any, of such improvements or meliorations as may have been executed by the said David Scott, whereby the respondent shall be proved to have been *lucratus*, and for the ascertainment of which an action has been raised by the complainers against the respondent, and is now depending before the present Lord Ordinary: Finds that the complainers allege that the sum for which the respondent obtained decree against them in the Sheriff Court in name of repairs is excessive, and that the same was pronounced without proper inquiry or investigation into the facts, and that they were not represented at the proof: Finds in these circumstances that the complainers ought, in the present suspension, to be allowed a farther proof of their averments,

"By the Act of Sederunt 5th February 1861 it is provided that where by the existing practice notes of advocation or suspension require to be lodged in the Bill-Chamber containing an articulate statement of facts and pleas in law, and are followed by answers prepared in a similar form, and such notes are passed by the Lord Ordinary, the complainer shall lodge revised reasons of advocation or revised reasons of suspension, as the case may be, when the cause is called, either in time of session or on any box-day in vacation or recess, and on the other hand the respondent or charger shall lodge revised answers when he returns the process as aforesaid; and by sec. 7 it is provided that every record which is closed in the Outer-House shall, unless the Lord Ordinary otherwise appoint, be printed, and the interlocutor closing the record or holding the same to be closed, shall in all cases be held to be an appointment to print the same, unless the contrary be expressed in the interlocutor.

"By the Court of Session Act, 1868, it is enacted that in all proceedings in the Bill-Chamber, as soon as an interlocutor passing the note has become final, and caution has been found or consignation has been made when ordered, the cause shall become for all purposes an action depending in the Court of Session, and may immediately be enrolled by either party in the motion-roll of the Lord Ordinary to whom it is marked.

"It appears to me that by the minute lodged by the complainers before the answers were lodged the present process became a note of suspension on consignation, which requires an articulate statement of reasons of suspension and note of pleas in law, and as it contained these when presented, and as answers were ordered and lodged, and as the note has been passed by interlocutor now final, the record must be closed, and the case proceeded with in the Outer-House. I have therefore refused the motion of the respondent to report the cause to the Inner-House."

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so far as relevant, but only on condition of paying to the respondent the expenses incurred by him in the inferior Court from and after 6th August 1874, which amount, as taxed, to the sum of £25, 11s. 11d.: Therefore finds that, on payment of the said sum, the complainers are entitled to be allowed a proof of the averments contained in articles 12, 13, 14, 15, 16, and 21 of their statement of facts in the present process, the respondent being entitled in that event to a proof of his averments; but finds that, before any proof is formally allowed or led, it is expedient that this process of suspension, and the other action already referred to at the instance of the complainers against the respondent, should be conjoined: Therefore appoints this cause to be put to the roll along with said other process for conjunction; meanwhile reserves all questions of expenses not already disposed of by this interlocutor."

In the petitory action, after the same findings in fact, the interlocutor proceeded,—"Finds that, in respect that the defender is thus enforcing against the pursuers, as the executors of the said David Scott, the obligations as to repairs incumbent on him as tenant under the foresaid lease, the pursuers are entitled to set off *pro tanto* against their liability for said repairs the amount, if any, which they shall establish to have been expended by the said David Scott in improvements and meliorations upon said farm by draining and trenching the land, and applying foreign manures in excess of his obligations under said lease in so far as these were unexhausted at the time of his death, and in so far as by them the defender has been *lucratus*: . . . Finds that the pursuers ought to be allowed, before farther answer, a proof of their averments that the defender has been *lucratus* by the said David Scott's expenditure in draining, trenching, and manuring the said farms, as above set forth, and that the defender ought to be allowed a proof of his averments, and the pursuers a conjunct probation: But finds that it is expedient that, before a proof is formally allowed, this action should be conjoined with the foresaid process of suspension: Therefore appoints this cause, and the said process of suspension, to be enrolled, in order that the actions may be conjoined, and thereafter proceeded with, and reserves all questions of expenses."*

* "NOTE.—In this action a question of novelty and importance is raised as to the right of executors of a deceased tenant, when sued by the landlord for implement of the tenant's obligation to repair buildings, fences, and the like, to meet that claim by a counter action for meliorations made by the tenant upon the farm, by which the landlord is said to have been *lucratus*, and the benefit of which the tenant has not reaped in consequence of his death soon after the commencement of the lease, and of his heir declining to take up the lease, and of the landlord having enforced the clause of the lease excluding assignees, and having refused to accept the tenant's general disponees and executors as tenants in his room. The circumstances under which the question arises are so fully set forth in the findings of the preceding interlocutor that it is unnecessary to recapitulate them.

"It is quite settled that in the general case a tenant is not entitled to recompense for meliorations made by him upon his farm. The rule of law is nowhere better stated than by Baron Hume in his report of the case of Officer v. Nicolson, 13th February 1807, p. 827, where he says,—'It is a settled point that a tenant has no claim *de jure* on his landlord for reimbursement of money expended in adding to or improving the houses on his farm. He is understood to have done so for his own convenience during his term, and to have had his recompense accordingly, nor is he entitled to pull down or dismantle the buildings at his removal.' Professor Bell, however (see Com. I. p. 82, and Prin. sec. 1255, founding on the case of Morton v. Lady Montgomerie, 22d Feb. 1822, 1 Sh. N. E. 322), seems to be of opinion that the rule is not applicable in cases where the lease has come to a premature termination by the death or bankruptcy of the

Sir T. Hepburn reclaimed, and argued;—

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tenant, and where a claim for meliorations by which the landlord is *lucratus* is made by the creditors or representatives of the tenant. And although the circumstances of the case of Morton were special, and the claim of the creditors of the tenant was not there sustained, it seems to have been assumed that where a landlord is truly *lucratus* by a tenant's outlay under a lease which is prematurely terminated, his creditors would be entitled to claim reimbursement from the landlord. And if so, it appears to me that on principle a tenant's general representatives ought in like manner to be so recompensed where a lease secluding assignees is terminated by the tenant's premature death. In the general case such questions do not often arise when the tenant dies, either because the heir takes up the lease and enters upon the farm in the state in which his predecessor has left it, or because the heir, if he renounces the lease, does so by arrangement with the landlord, in which the value of the meliorations is taken into account in fixing the amount, if any, which may be paid for the renunciation. It is thus only where the heir declines to take up the lease from which assignees and subtenants are excluded, and leaves the farm in the hands of the landlord without asking or receiving any consideration, that any claim for meliorations could be made by the tenant's executors or general disponees, and in an ordinary case of that kind I should have great difficulty in giving effect to any such claims. The claim for meliorations, if competent at all, would rather seem to be an accessory to the right of the heir than a claim competent to the tenant himself, and transmissible to his general representatives. And the heir, in abandoning the lease, abandons also the claim for recompense. The case, however, would appear to be different where, as here, the following circumstances exist:—(1) The heir has renounced the lease, or, which is the same thing, has declined to take it up, and the landlord has taken up the farm, and is alleged to be *lucratus* by the deceased tenant's extraordinary outlay; (2) the general disponees and executors of the tenant are desirous to carry on the farm as tenants under the lease, but the landlord has refused to accept them, and has removed them, and has himself taken possession of the farm; and (3) the landlord having thus taken benefit by the tenant's outlay, seeks, without allowance for that benefit, to enforce against the tenant's executors and general disponees an obligation in the lease which they are certainly not primarily liable to implement, viz., the obligation to keep and leave the buildings, fences, &c., in proper repair. I do not think it would be equitable to allow such a claim on the part of the landlord without allowing the executors to plead the meliorations as a counter claim, to the effect at least of liberating them *pro tanto* from their liability to implement the obligation as to repair.

"In the case of Bethune v. Morgan, 16th Dec. 1874, 2 Rettie, 186, and in a previous action between the same parties not reported, but referred to in the Lord President's opinion, p. 190, the question of the extent of the liability of executors, where the heir of the deceased tenant declines to take up the lease, was considered. There the landlord was willing that the executors should take up the lease, but they declined, and Lord Shand, in the first of the two actions, held the executors liable for the fulfilment of the obligations contained in the lease, and, *inter alia*, for the rents during the remainder of its currency, or for damages for breach thereof. In the second action, which depended before Lord Gifford, and in which the landlord sued for these damages, the liability of the tenant was, after a hearing in the Inner-House before seven Judges, held to be *res judicata*, no decision being pronounced upon the general question. Lord Gifford, however, in the note to his interlocutor dealing with the merits of the case, expressed his opinion that in justice and on principle the executor in that case was liable, but that 'probably, if the heir renounced the lease, and the landlord insisted against the executor, equity would require him, as a condition of so insisting, to receive the executor as tenant. But no question of this kind arises here; the landlord has all along been perfectly willing to receive the defender as tenant.' Now, while it is not necessary in the present case to hold

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had accepted the buildings and fences as in good repair, and bound himself to leave them so. It was not said that he had left them in good repair, or that the sum decerned for was excessive. As to the doctrine of compensation laid down by the Lord Ordinary, it would be a strange result that the claim for unexhausted improvements would have been bad if the tenant had kept up his fences and buildings, but could be made good because he had failed to do so.

2. In the action by Scott's executors for the value of improvements—It was true that the doctrine that the tenant has a claim for the value of such improvements when the lease comes to a premature termination was laid down by Professor Bell, as quoted by the Lord Ordinary, and by one or two other writers.[1] But the authority they rely on is the case of Morton v. Montgomerie,[2] and that was simply a case in which the tenant having implemented certain stipulations in the lease as to making improvements, it was unsuccessfully contended that when the lease came to a premature termination the landlord was bound to fulfil certain counter stipulations as to repayment. The principle contended for was unknown to the law.[3] In Pendreigh's Trustee v. Dewar[4] the rescission of the contract was the act of the landlord; there was an express stipulation in the lease that he should pay the tenant for the improvements. Death, and the refusal of an heir to

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that the defender is bound to accept the pursuers as his tenants, if he enforces against them the obligation for repairs, I think that if the defender really is *lucratus* by the operations of his deceased tenant he is bound in equity to allow the pursuers, as the tenant's general disponees and executors, to plead the amount of these meliorations in extinction *pro tanto* of his claim against them for repairs. I think that in principle the case is not materially different from what it would have been if the landlord had paid a sum of money to the heir to induce him to renounce the lease. In such a case, as the primary obligation to put the buildings, &c., in repair, undoubtedly lies with the heir, although the landlord may not be bound to discuss him before suing the executors, I think it would be inequitable to allow him to maintain that after paying money to the person primarily liable to induce him to abandon the lease, he is entitled to enforce the obligation for repairs against the persons liable therefor only in the second place. And if the fences which the heir is primarily bound to maintain and leave in good order are out of repair either the money which he gives to the heir for the renunciation ought, in common fairness, to be applied in implementing that obligation, or the landlord must be held as passing from the obligation altogether. But if this be sound reasoning, then when the landlord, instead of paying money to the heir for a renunciation of the farms, takes it in an improved condition without giving any consideration therefor, surely he ought to impute the value of these improvements *pro tanto* to extinction of the liabilities of the whole body of the tenant's representatives to implement the minor conditions of the lease.

"This being so, I think the pursuers are entitled to a proof of the extent to which the landlord has been *lucratus* by the deceased tenant's improvements in the way of draining, trenching, and applying an extraordinary quantity of foreign manures beyond the limited quantity which is provided for in the lease. . . . . But I do not think that they ought to obtain decree for payment of any sum of money in respect of these meliorations, or that they are entitled to more than to have the amount ascertained in this action, so as to enable them to set it off *pro tanto* against the cost of the repairs. For that purpose this action should, before proof is led, be conjoined with the suspension, in which the exact amount of the cost of these repairs is to be ascertained."

[1] Hunter's Landlord and Tenant, ii. 208; Bell on Leases, i. 198, note.

[2] February 22, 1822, 1 Sh. (N. E.) 322.

[3] Thomson v. Fowler, Feb. 8, 1859, 21 D. 453, 31 Scot. Jur. 246.

[4] July 19, 1871, 9 Macph. 1037, 43 Scot. Jur. 557.

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take up a lease, were events which must always be in the contemplation of parties. A claim by a liferenter might be in a different position, because he has a right analogous to a right of property. The tenant really undertook that he or his heir would work out the lease. As he had failed to do so, his executors had no claim for unexhausted improvements.

Scott's executors argued;—When the landlord refused to accept an executor there was an equitable principle by which he was entitled to claim for unexhausted improvements. Such a principle was applied in analogous cases.[1] The landlord ought not to reap benefit from having himself prevented the lease from being carried out. In Thomson v. Fowler the ground of judgment was that there was no lease at all.

At advising,—

LORD PRESIDENT.—We have to dispose of two reclaiming notes presented in the name of Sir Thomas Buchan Hepburn, one in a process of suspension brought against him by the executors of one of his tenants, and the other in an ordinary action at their instance. First, there is a suspension of a decree of the Sheriff of Haddington. The decree was pronounced *in foro*, and therefore the suspension is properly, and in every respect, a process of review. In processes of review it is not usual that a record should be made up in this Court. But, according to the Acts regulating this kind of procedure, I think the Lord Ordinary was right in the view upon which his interlocutor of 30th June last proceeds, and that it was indispensable that there should be a record made up and closed in this Court. But then what must the suspender's averments be in that record? They must be in substance reasons of appeal. They must assail the judgment on the merits, and shew that it is ill-founded. If the suspender is successful he will get the decree suspended, because the Sheriff has done injustice between the parties. I do not say that a suspension might not be brought on the ground of irregularity. But in the ordinary case this kind of suspension is brought, not for the purpose of quashing a decree vitiated by irregularity, but for the purpose of review on the merits.

The late David Scott was tenant of the farm of Ugstonrigg, under a lease of nineteen years from 1866. He died on 24th November 1871, after having possessed the farm for about five years. His heir was a lunatic, and the curator *ad litem* appointed to him renounced the succession. The landlord resumed possession of the farm after Scott's executors had reaped the waygoing crop and removed the stock. He then brought an action against the executors for the expense of putting the fences in tenantable condition, in terms of an obligation in the lease. It is necessary to attend particularly to its terms,—"Sir Thomas Buchan Hepburn assigns to the said David Scott the obligations on David and William Scott, the present tenants of Ugstonrigg, and on Alexander Henderson, the present tenant of Spittalrigg, contained in their respective leases, to leave the houses, offices, and fences, and in the case of Ugstonrigg, the thrashing-mill and machinery, dams and aqueducts, in the order and condition therein stipulated; and in respect thereof the said David Scott accepts of the whole houses, buildings, and fences on the lands hereby let, and the thrashing mill and machinery, dams and aqueducts on the farm of Ugstonrigg in good and sufficient order and repair, and binds himself during the currency thereof to keep, and at the expiry to leave the whole houses and buildings, erected or to be erected, and the whole fences except plantation fences, as after provided for,

[1] Dobie v. Lauder's Trustees, June 24, 1873, 11 Macph. 749, 45 Scot. Jur. 455.

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gates and ditches, and the thrashing mill and machinery, dams and aqueducts at Ugstonrigg, in the like order and repair."

The construction and effect of this clause are not doubtful. The previous tenant had undertaken an obligation to leave the fences in good tenantable condition. Whether he had performed that obligation or not it is unnecessary to inquire. If he had, Scott was bound to accept them as sufficient. If he had not, Scott had put into his hands the means of enforcing the obligation, and in consideration of obtaining the assignation he distinctly takes the fences as being in good order, and binds himself to keep and leave them so.

If the fences were out of order at the death of Scott it is clear that there was an obligation on his representatives to put them in repair, and it was for the purpose of enforcing this obligation that the action in the Sheriff Court was brought. The Sheriff decerned for payment of £202 as the expense of putting the fences in proper repair.

Now, it appears to me that there are only three grounds on which *prima facie* this decree can be assailed. First, that the obligation is not binding on the executors. It is not in terms made binding on executors, as such obligations in leases often are, but it is quite clear that the executors were bound as such to fulfil that obligation. Then it might be said, secondly, that the fences were not in point of fact in bad order; or, lastly, that the sum decerned for was excessive in amount. But what is alleged on record? The Lord Ordinary has found that the complainers ought to have a farther proof of their averments so far as relevant, and that they are entitled to a proof of their averments contained in articles 12, 13, 14, 15, 16, and 21 of their statement. We must examine these statements to see whether they are relevant. To begin with the last, statement 21: It is there said that the decree was "pronounced without proper inquiry into or investigation of the facts; that for some time the complainers had no agent, and that their case was misconducted." Supposing that statement to be true, an appeal was competent. That course was not adopted, but the case is now before us in the shape of a suspension. The suspender is entitled, on cause shewn, to avail himself of further evidence. We are entitled by the Judicature Act to allow additional proof, and even to send the case to a jury. But what is the use of saying that the case was misconducted if it is not disputed that the decree was just? If the complainers were subject to the obligation, if the fences were in disrepair and the sum decerned for not extravagant, what injustice has been done? Looking to the other statements, I cannot find anything which can be admitted to probation. In the 13th statement it is said that in January 1873 Peter Brown reported that it would take £142 to put the fences and building in a temporary or tenantable state of repair. I do not see that that is an averment of the smallest consequence. The complainers do not aver that £142 is enough to put them in repair, or anything short of £202. Then in the 14th statement it is said that Sir Thomas Hepburn at one time asked only £140, but that does not preclude him from asking more now. Then in the 15th statement it is said that there was never any inspection at which the complainers were present. It may be so, and if in consequence of that too much money has been spent, they may be entitled to redress, but they do not say that £202 is too much. Then the 16th article states that Sir Thomas raised the action in the Sheriff Court without first discussing the heir-at-law. I cannot see what that has to do with the merits of the case. In none of these articles is there a word impugning the justice of the decree. I have already adverted to the

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21st article. It is in vain merely to say that all the proof has not been led which might have been led, unless it were said that on leading the proof such and such a result would be found to be the justice of the case. There is not a word of that. Therefore, I think these several averments are entirely irrelevant, and that the process ought to be dismissed.

The other reclaiming note raises a question of a different kind. The executors of David Scott have raised an action against the landlord, concluding, *inter alia*, for a sum as the value of certain improvements, such as trenching and draining, the effect of which is not exhausted, and by which the landlord is alleged to be *lucratus*.

The Lord Ordinary has found, not that the action is in itself relevant, but "Finds that, in respect that the defender is thus enforcing against the pursuers as the executors of the said David Scott, the obligations as to repairs incumbent on him as tenant under the foresaid lease, the pursuers are entitled to set off *pro tanto* against their liability for said repairs the amount, if any, which they shall establish to have been expended by the said David Scott in improvements and meliorations upon said farm by draining and trenching the land, and applying foreign manures in excess of his obligations under said lease, in so far as these were unexhausted at the time of his death, and in so far as by them the defender has been *lucratus*. . . ." In his note he explains this part of his judgment in the following terms:—"It is thus only where the heir declines to take up the lease from which assignees and subtenants are excluded, and leaves the farm in the hands of the landlord without asking or receiving any consideration, that any claim for meliorations could be made by the tenant's executors or general disponees, and in an ordinary case of that kind I should have great difficulty in giving effect to any such claims. The claim for meliorations, if competent at all, would rather seem to be an accessory to the right of the heir than a claim competent to the tenant himself and transmissible to his general representatives. And the heir, in abandoning the lease, abandons also the claim for recompense. The case, however, would appear to be different where, as here, the following circumstances exist:—(1) The heir has renounced the lease, or, which is the same thing, has declined to take it up, and the landlord has taken up the farm, and is alleged to be *lucratus* by the deceased tenant's extraordinary outlay; (2) the general disponees and executors of the tenant are desirous to carry on the farm as tenants under the lease, but the landlord has refused to accept them, and has removed them, and has himself taken possession of the farm; (3) the landlord having thus taken benefit by the tenant's outlay, seeks, without allowance for that benefit, to enforce against the tenant's executors and general disponees an obligation in the lease which they are certainly not primarily liable to implement, viz., the obligation to keep and leave the buildings, fences, &c., in proper repair. I do not think it would be equitable to allow such a claim on the part of the landlord without allowing the executors to plead the meliorations as a counter claim, to the effect at least of liberating them *pro tanto* from their liability to implement the obligation as to repair."

Now, I understand from that passage that his Lordship was not prepared to give decree in this action (which was not conjoined with the suspension) for the sum representing the amount to which the landlord was *lucratus*. Indeed that is made quite clear by a subsequent passage in the note. But his Lordship thinks that though this is a claim which cannot be made in an ordinary action, it may be pleaded by way of compensation. Now, that is rather a puzzling

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idea. I confess I am not acquainted with a kind of claim which cannot be enforced by ordinary action, but may be pleaded in compensation. There are many claims which may be pleaded in an action but cannot be stated by way of set off. But I am not aware of the converse. And it would be a very singular thing, as Mr Gloag argued, that such a claim should arise indirectly to the tenant from his failure to put the fences in repair.

But putting that aside for the present, and assuming that such a claim could be enforced either by a summons or by way of compensation, let us see whether it is well-founded in law. There is, no doubt, a semblance of authority for such a doctrine in Bell's Commentaries and Principles, in Hunter on Landlord and Tenant, and in Bell on Leases, all respectable authorities, but these opinions are all founded on a single case, and that case these learned authors have misread and misunderstood. But the circumstance of this concurrence of very high authority among legal writers makes this a question of more than usual importance, and makes it necessary to examine the principle on which a right to claim compensation has been generally disallowed, but which it is said suffers an exception when the lease comes to a premature termination.

As to the general rule there cannot be the smallest doubt that the law has uniformly rejected such a claim,—and on this broad principle, that the title is temporary, and that the tenant must be held to have done what he has done exclusively with an eye to his own benefit during the subsistence of his right. Now, does that principle not apply when the lease comes to a premature termination? If the event was an altogether unexpected one, against which no provision could be made by anybody, the case might be different. But it is not so. Both landlord and tenant contemplate the possibility of a premature termination of the lease from various causes, and it is often provided that it shall come to what is called a premature termination in certain events,—such as bankruptcy. In the case of the death of the tenant it always comes to an end if the heir will not take up the succession. All these events are in the contemplation of the parties. Therefore, when the tenant spends his money, he knows that he is running certain risks. His improvements may still have value at the end of the nineteen years, and still more probably if the lease comes to a premature termination. Therefore the same principle applies whether the lease expires at its natural period or comes to a premature termination.

But it has been supposed by learned writers that a principle of a different kind is laid down in the case of Morton v. Montgomerie. That is the single decision on the strength of which this opinion has been ventilated. Now, what was that case? Lady Montgomerie let certain farms for twenty-one years from 1811. The lease excluded assignees and subtenants, and contained the following provision in regard to buildings:—"And the said tacksmen hereby bind and oblige themselves and their foresaids during the two first years of their lease to lay out, at the sight of the masters, the sum of £1100 in building and furnishing a steading of slated houses, which sum the masters are to repay the said tacksmen, or their foresaids, at the issue of the lease," &c. The tenant expended £600, and then in 1813 he became bankrupt. His trustee brought an action for repetition of the sum expended, alleging that Lady Montgomerie was *lucrata*. The claim was not sustained, which of itself takes away the authority of the case as a decision affirming the principle contended for. But it is said that the reason why it was not sustained was because the proprietrix was not proved to be *lucrata*, and that the opinions indicate that if she had been the decision would have been

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different. I do not so read them. But supposing it were so, and the proprietrix had been there proved to be *lucrata*, and decree given for that sum, would that have been an authority for the claim here maintained? Certainly not. The expenditure there was made under a clause in the lease authorising it, and providing for a claim for repayment at the expiry of the lease. The only question was whether, the lease having come to a premature end, and therefore the time fixed for repayment not having come, the trustee for the tenant's creditors was nevertheless entitled to repayment to the extent to which the proprietrix was *lucrata*.

The case is somewhat like that of Pendreigh's Trustee v. Dewar, in which a similar claim was made against the landlord as debtor in a sum of £200 which the tenant had agreed to expend, and had expended, and which was to be repaid to him at the end of the lease, if it had come to its natural termination. We held that as the whole sum had been expended, the relation of debtor and creditor subsisted, and we regulated the rights of parties on an equitable footing. A similar question might have arisen in Morton v. Montgomerie if the proprietrix had been found to be *lucrata*. But these cases give no countenance to a general rule that money expended by the tenant not under agreement can be claimed either at the expiry of the lease or at its premature termination.

The case of Morton v. Montgomerie has been explained before much in the same way as I have now done by Lord Wood in Thomson v. Fowler. Setting aside the case of Morton there is not a vestige of authority for what the Lord Ordinary has done here. It is a plain and clear violation of the general principle established by a series of decisions that a tenant spending money as is here averred does so entirely for his own behoof, and without recourse in any event against his landlord. Therefore I think the defender must be assoilzed.

LORD DEAS.—In the suspension, I am of opinion, with your Lordship, that it was incumbent on the suspenders to have made averments shewing why and in what respect the Sheriff's judgment was erroneous. They do not allege that the fences were left in a proper state of repair, or that the sum awarded was too large, and therefore I think there is no room for the proof which the Lord Ordinary has allowed.

Upon the question, whether the executors are liable for that claim, I have no doubt. The claim is clearly one which had emerged and might have been enforced against the tenant in his lifetime, and for which, therefore, his executors are liable.

As to repairs, the important question arises, whether, when a lease comes to a premature end, there is any claim competent to the tenant for meliorations. It is clear that if the lease had come to its natural termination there would have been no such claim. The contract of lease is very usually made on the footing that the lands are capable of improvement, at a cost for which the tenant will be able to remunerate himself by the end of the lease. The landlord agrees to accept a smaller rent than he would have done because he expects to get back his land in an improved condition. If the termination of the lease is premature, without fault on the part of the landlord, it lies on the tenant's representatives to shew why a claim should arise in that case any more than in the other. They have cited no precedent to that effect.

The executors are walking out,—it may be with profit or it may be with loss. There may be an advantage to the landlord, or there may be a disadvantage from the premature termination of the lease. Both parties, I think, have taken

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their chance of these results. It would be a novel proceeding if we were to enter into a proof whether the tenancy had been profitable or not, and, if unprofitable, whether this had arisen from the fault of the tenant or not. If the executors have a claim for meliorations on the one hand, the landlord must have a claim for loss on the other. The past seasons may have been highly favourable both in crops and prices, and the remaining seasons may be very unfavourable. The tenant may have realised a large profit during the past years, and the farm may have to be carried on at a loss, or a smaller rent may have to be accepted during the succeeding years. If the principle contended for were adopted in agricultural leases I do not well see why it should not be extended to mineral leases. These are seldom for less than thirty-one years. If the lease comes to an end long before that time by the heir being unwilling or unable to take up the lease of the deceased tenant, are the executors to have a claim against the landlord for sinking and fitting up the pits, although they succeed to a large fortune made by the tenant during the previous years of the lease? Where the lease is terminated by bankruptcy the presumption is that the landlord is a loser; and, on the whole, I know of no principle or authority for such a claim as the present, except the opinion of certain learned writers, which is not borne out by the case of Morton v. Montgomerie, on which alone it appears to be founded.

I likewise agree with your Lordship that if we could not give decree for this sum in a petitory action the claim cannot be made better by being stated as a set-off.

Lord Ardmillan.—In the process of suspension I have nothing to add.

The tenant's obligation under the lease to keep buildings and fences in repair has been explained by your Lordship. I agree in regard to the construction of the lease, and in the result, and in the grounds of your Lordship's opinion.

I think it is right to say, in order to avoid misunderstanding, that the question which arose in Bethune v. Morgan, Dec. 16, 1874 (*ante*, vol. ii. 186), has not arisen here.

In this case the obligation of the tenant was prestable on his death. The executry estate must meet it to the extent of the executry, and no more has been decided by the Sheriff.

In the action at the instance of the executors of the tenant for meliorations I have felt considerable difficulty. In refusing this claim without proof, or, in other words, in refusing it on the assumption of the truth of the pursuers' averments, I feel that we are very severely, and indeed inequitably, applying the rule of law. Still, if it be the rule of law, it must be applied.

I think it is quite settled on authority and decision that for improvements in the cultivation of a farm, such as are here set forth, made by a tenant spontaneously and for his own interest, he cannot, apart from special stipulation, claim recompense from the landlord at the expiry of his lease. He is understood to have made the expenditure on his farm in the course of his cultivation and for his own benefit, and in expectation of remunerating return during the currency of the lease. I do not advert to special cases where the express consent or the clearly implied consent of the landlord to an unusual expenditure may be held as creating an obligation to recompense for such unusual outlay. We have no such case here. But the general rule is, that where the course of the lease runs out the tenant cannot on its expiry claim recompense for expenditure made by him in expectation of remunerating return during the currency of the lease.

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Where the lease has come to premature termination by the death of the tenant early in the lease, I think that there may be some fair and equitable principle in support of the view that the claim of the tenant should be inquired into, and should be sustained in so far as by the tenant's expenditure in improvement the landlord has been *lucratus*. Where the lease is to the tenant and his heirs, excluding assignees, and where the heir of the tenant is, as in this case, a lunatic, and cannot take up the lease, and where the landlord will not permit the executors to take it up, but brings the lease to an end by removing them all from the farm, getting the benefit of the tenant's expenditure and improvements, I cannot help thinking that the claim for meliorations, in so far as the landlord is *lucratus*, would be equitable. The rule of pleading must not be forgotten. A proof is offered by the pursuers; and if the proof is refused the truth of the averments must be assumed. We are on relevancy at present; for the landlord, while resisting a proof, demands judgment on the relevancy—that is, assuming the truth of the pursuers' statements. The pursuers aver that the expenditure was fairly and judiciously made by the tenants; that the land has been improved, and that the landlord is *lucratus;* that if the lease had run to its termination remunerative return for the expenditure would have been obtained; and that the lease was abruptly and prematurely terminated, not by the death of the tenant—it is a mistake to say that—but by the act of the landlord—by the removal of the family at the instance of the landlord—who obtained a renunciation from the curator of the lunatic heir. If the facts are as stated, then I am impressed by the fairness and equity of this demand. The Lord Ordinary has allowed a proof, and a proof would have cleared up the facts. But your Lordships are prepared to refuse the claim of the tenant's executors without proof—without inquiry; to refuse it whether urged as a separate claim or as a claim of compensation or set-off against the landlord's demand for damages in respect of failure to maintain buildings and fences. If the law be so clear as to shut out his claim, it is better for the parties to declare and enforce it at once; and I quite admit that if the tenant's demand is not good as a separate claim, it cannot be sustained as a compensation.

I feel that the rule we are enforcing must often be severe in its application. Accordingly, I have endeavoured to find sufficient direct authority in the law to support the proposition that the premature termination of the lease by the landlord before its natural expiry gives to the tenant or his representatives a right to claim allowance for outlay on meliorations of which the landlord reaps the benefit, but which the tenant could not have claimed if the lease had run its full course. In that case—the case when the lease runs on to its expiry—I concur in holding that the law is settled. The tenant cannot make such a claim. There is no doubt that this is the general rule. An exception from the rule in such circumstances as have here arisen might, I think, have been most equitable and just (of course assuming the pursuers to succeed in their proof); and this is, I think, the opinion of Professor Bell, of Mr Robert Bell, and of Mr Hunter—(Bell's Prin. par. 1255; Bell on Leases; Hunter's Law of Landlord and Tenant); but I am afraid that in the case of Morton, the only case referred to, the point was not decided, and in the absence of direct decision, and indeed of any decision, I have not a sufficient foundation for pressing this exception from the rule as an exception supported by law. We must abide by decision; and recognising the rule, and in the absence of authority to support the exception, I cannot venture to differ from the conclusion at which your Lordships have arrived.

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Lord Mure.—I have little to add to what has fallen from your Lordships upon this case, and I have come to the same conclusion. There is no doubt that when a party brings a suspension of a decree *in foro* he requires to state very distinct and relevant grounds why the decision of the Sheriff should be set aside. In the present case there is a finding in the judgment of the Lord Ordinary to the effect "that the complainers allege that the sum for which the respondent obtained decree against them in the Sheriff Court in name of repairs is excessive, and that the same was pronounced without proper inquiry or investigation into the facts, and that they were not represented at the proof." Now, if that were the case, I should not be disposed to differ from his Lordship in thinking that farther proof should be allowed. But I am unable to find in the statements of facts for the complainers any distinct allegation that the sum claimed by the respondent, and decerned for, was excessive. With reference to the conduct of the cause, and statement 21, where it is said, *inter alia*, that, "during the most important stages of the cause the complainers had no law-agent," I do not think there is any sufficient relevancy in the averments to entitle a party to have the proof opened up; and upon examining the inferior Court proceedings I find that an agent was employed, and was acting on the part of the complainers, at the time when the questions of law were decided; and I also find that when that agent ceased to act due notice was given to the complainers, by order of the Sheriff, of the day when the proof was to be proceeded with, that they might either attend themselves, or appoint another agent, which they failed to do. Now, when a full opportunity has been given to an agent to attend, it requires, in my opinion, much more distinct averments than any which are to be found in this record to warrant us in holding that a decree *in foro* should be suspended.

On the important question raised in the petitory action, I agree with your Lordships that, in an ordinary lease, the tenant has no claim for reimbursement for improvements when it terminates. The opinion of Baron Hume in the case quoted in the Lord Ordinary's note is conclusive upon this point, and in practice it has always been acted upon. The question is, whether that rule of law does not apply in the case of a lease suddenly terminating by the death of the tenant. In principle I do not see why it should not apply in the one case as well as in the other; because such a result must in most cases be in the contemplation of parties as possible when the lease is entered into, and the only difficulty I have felt is in regard to the statements of several writers of eminence as to the rule of law applicable in the case of a premature termination of a lease. But the case of Morton v. Montgomerie, upon which they proceed, has plainly been misread to a considerable extent, for it proceeded upon an express stipulation that the tenant was to have repayment of sums expended in buildings. The only question, therefore, which could there arise, was whether the tenant in that particular case was entitled, upon equitable considerations, the lease having come to an unexpected termination, to get a less sum than £1100, the amount which it was stipulated the tenant was to expend during the lease, and which was to be repaid him at its termination. It was held that he was not so entitled, as the landlord had not been *lucratus*, and the case is therefore no authority for the present contention. It is, moreover, quite plain to me that the fact that the tenant did not during his lifetime put the fences, &c., in good condition, cannot give his representatives a better claim against the landlord to be reimbursed for meliorations made by the tenant than they would otherwise have had.

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THESE interlocutors were pronounced:—

In the suspension—"Recall the said interlocutor: Find that the suspenders have not made any relevant averments to support the prayer of the note of suspension: Find the decree and charge or charges orderly proceeded, and decern: Find the suspenders liable in expenses," &c.

In the action—"Recall the said interlocutor: Find that the pursuers' averments are irrelevant to support the conclusions of the summons: Therefore dismiss the action, and decern: Find the pursuers liable in expenses," &c.

J. DUNCAN SMITH, S.S.C.—MACKENZIE & KERMACK, W.S.—Agents.

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THE HONOURABLE MRS ELIZABETH BINNY OR MAULE AND ANOTHER, Petitioners.—*D.-F. Watson—H. Johnston.*

Entail—Disentail—Fee and Liferent—Fiduciary Fee—Entail Amendment Act, 1848 (11 *and* 12 *Vict. c.* 36), *sec.* 3.—In a marriage-contract the lady's father entailed an estate by procuratory of resignation in favour of himself in liferent, and after his death the spouses and the longest liver of them, also in liferent, but under certain restrictions and limitations, and the heir-male, whom failing, the heir-female of the marriage in fee.

There being no heir-male of the marriage, after the death of her father and husband the lady and her eldest daughter jointly presented a petition for authority to disentail under the 3d section of the Entail Amendment Act. *Held* (1) that it was necessary to determine which of the petitioners, if either, was heir in possession within the meaning of the Act; (2) on a construction of the deed, that the interest of the spouses was restricted to a liferent allenarly; (3) that the spouses had a fiduciary fee till the dissolution of the marriage by the husband's death, when the heir of the marriage was ascertained; (4) that on the dissolution of the marriage, the eldest daughter being ascertained to be the heir of the marriage became heir of entail in possession; and authority *granted* to her to disentail upon producing the necessary consents.

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THIS petition, for authority to disentail the estate of Fearn, in Forfarshire, was presented under the 3d section of the Entail Amendment Act, 11 and 12 Vict. c. 36, and the relative statutes 16 and 17 Vict. c. 94, sec. 4, 31 and 32 Vict. c. 84, 38 and 39 Vict. c. 61, sec. 12, by Mrs Maule, widow of the Honourable William Maule Maule, and her eldest daughter, Miss Elizabeth Patricia Maule.

The petition set forth that Mrs Maule was institute or heir of entail in possession of the estate under an entail executed by the deceased Thomas Binny, Mrs Maule's father, and contained in a contract of marriage dated 9th April 1844 between W. M. Maule and the petitioner Elizabeth Binny (Mrs Maule), to which Mr Binny was a party. The entail was in the form of a procuratory of resignation in favour of, and for new infeftment to be given to, "Thomas Binny, in liferent, during all the days of his lifetime, and after his death to the said Elizabeth Binny and William Maule Maule, the said intended spouses, and to the longest liver of them, also in liferent; but subject to the restrictions and limitations, provisions, and declarations thereanent, all as after expressed, and to the heirs-male of said intended marriage between the said William Maule Maule and Elizabeth Binny in fee; whom failing, to the heirs-female of the said intended marriage," and other substitutes, excluding heirs-portioners. Resignation was made of the lands, and a crown-charter was expede, containing precept of sasine in terms of the above destination. Thomas Binny and the spouses were infeft in 1844 for their respective rights of liferent. But the precept remained unexecuted as regarded the fee.

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Thomas Binny died in 1845, and W. M. Maule in 1859. There were two sons and four daughters of the marriage, but the sons predeceased their father. Miss Maule was of full age, and born before 1848. The three other daughters, who consented to the petition, were also of full age.

The petition set forth further, "that in the event of the right of the petitioner Mrs Maule not being that of the institute or of an heir of entail in possession, . . . but being only that of a liferenter, the petitioner Miss Maule is the institute or heir of entail in possession."

The prayer was "to authorise the petitioners to disentail and acquire in fee-simple the said entailed lands, and to execute an instrument of disentail," &c.

Miss Maule had made up no title.

Although the destination to the spouses did not contain the words "for liferent use allenarly" there were numerous passages and expressions in the marriage-contract, which are quoted in the Lord President's opinion, shewing that it was the entailer's express intention to restrict their right to a mere liferent.

The Lord Ordinary remitted to Mr W. R. Kermack, W.S., who reported his opinion that he did not consider himself called on to consider whether Mrs Maule's right was merely one of liferent, although it appeared to him that there were various clauses in the deed which might be held to limit her right to a liferent as distinctly as if the word "allenarly" had been used; that assuming that the fee was vested in Miss Maule, it was not clear that she was entitled to disentail as heir of entail in possession, because Mrs Maule might perhaps be still regarded as fiduciary fiar, to whom on her death the next heir entitled to succeed would, in practice, make up his title; but he reported that authority to disentail might be granted to the petitioners jointly.

His Lordship reported the case to the First Division.*

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* "NOTE.— . . . . The estate of Fearn belonged to Mr Binny, and in the contract of marriage between his daughter and Mr Maule it was settled by a strict entail. The destination is in favour of Mr Binny in liferent, and Mr and Mrs Maule and the survivor in liferent, but subject to the restrictions specified in the deed of entail, and to the heirs-male of the marriage of Mr and Mrs Maule in fee; whom failing, to the heirs-female of that marriage; whom failing, to the heirs-male of any subsequent marriage of Mrs Maule; whom failing, to the heirs-female of such subsequent marriage; whom failing, to a series of other heirs.

"The marriage was dissolved by the death of Mr Maule. He was survived by four daughters. The petition is presented by Mrs Maule and her eldest daughter. It proceeds on the footing that one or other of the petitioners is the heir of entail in possession, and prays that the petitioners may be authorised to record an instrument of disentail executed by both.

"It was not maintained that Mrs Maule was fiar. It is true that in the dispositive clause neither the word 'allenarly,' nor any equivalent, occurs. But the subsequent clauses of the deed seem conclusively to shew that her right is limited to a liferent.

"It was urged, however, that Miss Maule was the fiar, and that she was entitled to disentail. Her right of fee, if it exist, is of course subject to her mother's liferent, and her title is not made up; but in the opinion of the Lord Ordinary neither of these circumstances prevent her from proceeding with the petition, if it is otherwise well founded—See 11 and 12 Vict., c. 36, sec. 42. It is possible that she may be required to complete her title before she is allowed to record the instrument of disentail.

"The question is, whether a right of fee emerged in favour of Miss Maule on the dissolution of the marriage, or whether Mrs Maule is fiduciary fiar for such of her children as shall on her death be the heir under the destination. The Lord Ordinary is inclined to adopt the former view. He thinks that Miss

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Argued for the petitioners;—The petition was presented on the footing that as one or other of the petitioners must be the heir of entail in possession, a deed of disentail executed by both, and with the necessary consents required in either view, would be valid.

If, however, the Court were of opinion that it was necessary to determine which of the petitioners was heir of entail in possession they then contended that Miss Maule was.

Another view was suggested by the reporter, that Mrs Maule was fiduciary fiar, and that there could be no disentail till her death.

In the first place, Mrs Maule's right was a mere liferent. The words of the destination taken alone, if all the rest of the deed were disregarded, might have given her a fee. But such construction could not be applied to a marriage-contract, and there were abundant indications in the deed that the entailer intended the liferent which he conferred on the spouses not to import a fee but a liferent allenarly. Though the word "allenarly" was not used there were equivalents more than sufficient.

If, then, Mrs Maule had merely a liferent allenarly, the question remained, whether Miss Maule was now fiar and therefore heir of entail in possession, or whether Mrs Maule had and continued to have a fiduciary fee. Admitting that there was, *stante matrimonio*, a fiduciary fee in the spouses, or one or other of them, a fiduciary fee endured no longer than, *fictione juris*, the necessity for it existed. As soon as the heir emerged the fiduciary fee came to an end.[1] Where, as in the case of Ferguson v. Ferguson,[2] the real fiar was to be the heir-male of the body of the fiduciary fiar, he could not possibly be ascertained till the death of the fiduciary fiar. But here the real fiar was to be the heir-female failing heirs-male of a marriage. The heir of a marriage was necessarily ascertained at the dissolution of the marriage, and therefore from the date of the dissolution of

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Maule is, in the sense of the deed, the heir of the marriage, and that her right as such was ascertained on the death of her father.

"In the case of Ferguson v. Ferguson, 2 Rettie, 627, it was decided that under a destination to A in liferent, for his liferent use allenarly, and the heirs-male of his body in fee, no right of fee could vest during the lifetime of A. The *ratio decidendi* is, that until the death of A it could not be ascertained who was to be his heir, and that he was necessarily fiduciary fiar for the uncertain heir.

"But in Maxwell v. Logan, 15 Sh., 291, and Maclean and Robinson's Ap. Cases, 790, it was held that when an estate was disponed to a woman in liferent only, and to her second son in fee, the son became fiar as soon as born. Accordingly, he obtained, during his mother's lifetime, a decree of declarator that the fetters of the entail did not apply to him, and that he was entitled to sell and dispose of the estate at pleasure.

"Here the disposition is not in favour of a child, but of the heir of the marriage. So long as the marriage subsisted such an heir could not have existed any more than an heir-male of the body. But on the dissolution of the marriage the heir is ascertained just as much as a second or other son, and when this is so the Lord Ordinary thinks a right of fee at once vests in such an heir.

"Some difficulties have been suggested as to the mode of making up the title. It is said that it may be necessary to serve to the fiduciary fiar, and that no such service can be expede until the death of the mother. But if the Lord Ordinary is right, a service was not necessary under the former law to take up or transmit the fee. The heir, when he is ascertained, is in truth a disponee.—See the Note of Lord Corehouse in Maxwell, above cited; Douglas, 8 Macph. 374."

[1] Newlands v. Newlands' Creditors, 1794, M. 4289, H. L. 1798, 4 Pat. App. 43, Ross' Leading Cases, L. R. 3, 634; Welwood's Trustees v. Welwood, 1791, *ibid.* 3, 677; Maxwell v. Logan, Dec. 20, 1836, *ibid.* 3, 678, and 15 S. 291, 9 Scot. Jur. 157; Dundas v. Dundas, Jan. 23, 1823, *ibid.* 3, 671, and 2 S. 145; Douglas v. Thomson, Jan. 7, 1870, 8 Macph. 374, 42 Scot. Jur. 173.

[2] March 19, 1875, *ante*, vol. ii. 627.

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the marriage the succession opened to Miss Maule, who became at once heir of entail in possession, subject to Mrs Maule's liferent, and Mrs Maule ceased to be fiduciary fiar. Miss Maule was therefore in a position to disentail in terms of the Rutherfurd Act.

At advising,—

LORD PRESIDENT.—This is a petition for authority to disentail the estate of Fearn, presented by two parties, Mrs Elizabeth Binny or Maule and her eldest daughter Miss Elizabeth Patricia Maule. It is a singular example of a petition to disentail, because the only person who, under the Entail Amendment Act, can execute a deed of disentail is the heir in possession, and it is clear that there cannot be two persons in that situation. I am, therefore, indisposed to treat this matter on the footing that there is a title in one or other of these parties, and so proceed blindfold to have a disentail executed by both as if they jointly constituted an heir in possession. It is necessary to consider which of these petitioners is the heir, or whether either of them is. The heir of entail, if he fulfils the conditions of either the 1st, 2d, or 3d sections of the Entail Amendment Act, has an absolute right to execute a deed of disentail. We have no right to prevent him. Our jurisdiction only extends to seeing that he has fulfilled the conditions of the statute, and if these have been fulfilled we are bound to authorise the deed of disentail to be recorded.

Now, the question who the heir in possession is depends on the construction of the instrument of entail itself. It is in the form of a procuratory of resignation, and is contained in a marriage-contract between the Honourable William Maule Maule and Miss Elizabeth Binny, the petitioner, dated 9th April 1844. The destination is in the following terms:—Resignation is to be made in favour of "Thomas Binny, in liferent, during all the days of his lifetime, and after his death to the said Elizabeth Binny and William Maule Maule, the said intended spouses, and to the longest liver of them, also in liferent; but subject to the restrictions and limitations, provisions, and declarations thereanent, all as after expressed, and to the heirs-male of said intended marriage between the said William Maule Maule and Elizabeth Binny in fee; whom failing, to the heirs-female of the said intended marriage;" whom failing, to other substitutes. Under this procuratory, if it stood alone, and were construed without reference to the other portions of the deed, it might well be contended that the spouses after the death of the lady's father were to be joint fiars, and that after the decease of William Maule, the petitioner Mrs Maule becomes sole fiar, because the estate is given without any restrictive words, and especially the words "for liferent use allenarly." But a reference to other portions of the deed creates a strong impression that Thomas Binny intended to give his daughter and her husband a bare liferent. There are several clauses which it is necessary to advert to.

In the first place, it is to be observed that in applying the fetters a distinction is always made between "the said liferenters and heirs of entail succeeding." Then permission is given to the liferenters to make provision for younger children "in such manner and to such extent as proprietors of entailed estates are authorised to do" by statute; "and declaring also that all provisions to younger children, to be granted in virtue hereof, shall be granted by the said William Maule Maule or Elizabeth Binny, subject to all the provisions and conditions, restrictions and limitations, contained in the said Act of Parliament, in like manner and to the same effect in all respects as if the said William Maule Maule and Elizabeth Binny had been proprietors of the said entailed lands,

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barony, and estate, and not liferenters as aforesaid." Thus, their position is distinctly contrasted with that of proprietors.

Then follows another clause to enable the lady to make provision for a second husband, in which exactly the same contrast is preserved. Then, in a subsequent part of the deed, it is declared "with regard to the liferent right hereby constituted in favour of the said Elizabeth Binny and William Maule Maule" that if William Maule survives and enters into a second marriage his life interest is to be restricted to £1000. And, on the other hand, "in case the said William Maule Maule shall happen to predecease the said Elizabeth Binny, leaving issue of the marriage, and that the said Elizabeth Binny shall enter into a second marriage, then her life interest in the said estate shall in like manner be restricted, as the same is hereby restricted, to the sum of £1000 sterling yearly, ... without prejudice, however, to the right of the said Elizabeth Binny to recur to the entire liferent of the estate on the failure of the heirs of this present marriage, and that notwithstanding she may have married a second husband." Then, there is a provision for the disposal of the surplus rents. Then follows this further provision:—"And in regard it is the said Thomas Binny's special wish and desire that the said Elizabeth Binny shall in every event enjoy a liferent interest to a certain extent in the liferent of the said lands and estate of Fearn hereby provided for her and the said William Maule Maule, and the survivor of them as aforesaid, alimentarily, and unaffected and unaffectable by the debts or deeds of them, or either of them, or of herself if she be the survivor of them, therefore the said Thomas Binny hereby declares that the foresaid conveyance of the foresaid lands and estate of Fearn to the said Elizabeth Binny and William Maule Maule, and the survivor of them, in liferent, is granted under the provisions and declarations following." Then it is provided that one-third of the rents during the subsistence of the marriage shall be payable to the lady on her own receipt. "And it is further declared, as regards the rights of the said Elizabeth Binny provided to her as aforesaid, both during the subsistence and after the dissolution of the said marriage, if she be the survivor, the same shall not be saleable or assignable, either in whole or in part, by the said Elizabeth Binny and William Maule Maule, or either of them, to any extent or effect, or upon any pretence whatever, the said liferent interest in favour of the said Elizabeth Binny, as well during the subsistence as after the dissolution of the said marriage, being hereby declared strictly alimentary on the said Elizabeth Binny."

Then follows a declaration—"That it shall be in the power of the said Thomas Binny, Elizabeth Binny, and William Maule Maule, to enter into leases of the foresaid estate, or any part thereof, for the like duration, and in all respects as fully and freely as is permitted to the heirs of tailzie foresaid, and that notwithstanding that they, the said Thomas Binny, Elizabeth Binny, and William Maule Maule, are merely liferenters." The word "merely" seems to come as near "allenarly" as any other word in the English language could do..

Taking all these passages together it is impossible to doubt that it was the distinct and express intention of the testator that Mrs Maule, both during the subsistence and after the dissolution of the marriage, should have no more than a bare liferent, as it is commonly expressed in our conveyancing, "for her liferent use allenarly."

It cannot be disputed at this time of day that the word "allenarly" is not absolutely essential as a technical expression to carry into effect such an intention. There are equivalents. I know no example of a decision to the contrary, unless it

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be the interlocutor of Lord Deas in Ramsay v. Beveridge,[1] but that was reversed by the Second Division, so that the case comes to be an authority the other way. If the right of Mrs Maule is one of bare liferent she has no title and no part of a title to present a petition for disentail.

I proceed now to consider whether Miss Maule is the heir in possession. Under the destination which I have read there was nobody in existence who could take the fee as proper fiar at the time when Thomas Binny died and the liferent of the spouses came into existence. The destination is to the heir of the marriage,—first, the heir-male, and, failing such, the heirs-female, excluding heirs-portioners. At that time there was no child born; at all events no one could tell who the heir of the marriage was to be. The legal consequence was that the liferenters must sustain a fiduciary fee for the benefit of the expected real fiars when they should be ascertained. It appears to me, therefore, that during the subsistence of the marriage there was such a fiduciary fee in the spouses jointly, but on the dissolution of the marriage, and in the moment of its dissolution, there was ascertained to be an heir of the marriage, who then became the real fiar, and the estate was vested in her, and the fiduciary fee came to an end. There was no fiduciary fee left in the survivor of the marriage, for the plain reason that the fiduciary fee is created by the necessity of the law, and endures only so long as the necessity. It is necessary that the fee should be somewhere, and therefore the law invented the ingenious contrivance of a fiduciary fee to satisfy legal principle.

When the marriage was dissolved, the heir of the marriage was ascertained, just as the heir of the body is ascertained on the decease of the party of whose body he is the heir. Therefore, it appears to me that Miss Maule, being the heir of the marriage at its dissolution, became by its dissolution the party entitled to take up the fee as disponee under this deed. She is ascertained to be the party called as institute of tailzie, and she was in substance the party who took for the first time as proper disponee.

The entail was made before 1848, and Miss Maule was born before that year, and therefore she must bring herself within the 3d section of the statute, and she appears to me to have done so, having obtained the consent of the three next heirs.

It only remains to be noticed that Miss Maule's title is not made up. That is a matter which will be considered afterwards in the conduct of the case before Lord Rutherfurd Clark. It is not before us at present.

Lord Deas.—This is an application presented under the Rutherfurd Act by the Honourable Mrs Maule, and her eldest daughter Miss Maule, for authority to disentail the estate of Fearn and others, in the county of Forfar. A doubt has been suggested whether the fee is vested in Mrs Maule or Miss Maule, and the application has consequently been presented in their joint names.

The entail is contained in a contract of marriage entered into in April 1844 between Mrs Maule (then Elizabeth Binny) and her late husband William Maule Maule, with consent of her late father Thomas Binny, Esq., whereby, in consideration of the obligations thereby undertaken by Mr Maule, "and for securing the support of the said intended spouses, and the issue of the said intended marriage," Mr Binny bound himself to resign, and did resign, the said lands and estate "in favour and for new infeftment of the same, to be made, given, and granted to himself, the said Thomas Binny, in liferent, during all the days of his lifetime, and after his death to the said Elizabeth Binny and William

[1] March 3, 1854, 16 D. 764, 26 Scot. Jur. 329.

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Maule Maule, and the longest liver of them, also in liferent, but subject to the said restrictions and limitations, provisions and declaration, thereanent, and to the heirs-male of the said intended marriage between the said William Maule Maule and Elizabeth Binny in fee, whom failing, to the heirs-female of the said intended marriage," whom failing, to the other heirs therein mentioned; but always with and under the conditions, provisions, clauses irritant and resolutive, and others therein written, and, *inter alia*, with the condition "that the said Thomas Binny, and the said Elizabeth Binny, and William Maule Maule, for their respective liferent rights aforesaid, and the whole heirs of tailzie and substitutes above mentioned, shall take and possess the said lands, barony, and estate of Fearn above described upon this tailzie only, and upon no other right or title whatsoever," and shall "be obliged to cause engross and verbatim insert the whole foresaid course and order of succession, at least so far as shall be subsequent to the life-renter or heir in possession for the time, with the several conditions, provisions, clauses irritant and resolutive, and others herein contained, on the charters and infeftments to follow hereon, and in all after charters, special services, retours, and instruments of sasine of the lands, barony, and estate above specified, or any part thereof."

It is then provided that "it shall be noways lawful to nor in the power of the said Thomas Binny, Elizabeth Binny, and William Maule Maule, or any of them, or any of the heirs of tailzie and substitutes above written," to alter the order of succession, or to sell or burden the estate, or to contract debt thereon, under the pain of forfeiture. But a power is conferred on Mr Maule, and, failing his exercising it, on Mrs Maule, if she survived him, "notwithstanding that they are liferenters, to provide for their children who shall not succeed to the said lands, barony, and estate of Fearn, in such manner and to such extent as proprietors of entailed lands and estates are by law authorised to do in terms of the statute 5th George the Fourth, chapter 87." This power, it has been explained at the bar, was exercised to its full extent by the late Mr Maule in his lifetime, so that it is not open to his widow, Mrs Maule, to exercise it to any extent, and this avoids an embarrassment which otherwise might have attended this question of disentail. There were two sons of the marriage, but they both predeceased their father without issue. The marriage was dissolved by the father's death, and the petitioner, Miss Maule, as the eldest daughter, is undoubtedly the heiress of entail of the marriage, and the institute under the destination entitled to disentail the estate, unless the fee is vested in her mother in respect of the liferent conferred on the latter not being restricted to a liferent use allenarly.

I am of opinion that in a deed of strict entail, such as this, the use of the word "allenarly" is not required in order to restrict the mother's right to a bare liferent. It will be observed that by this deed the prohibitory, irritant, and resolutive clauses are all expressly made applicable to the liferenters as well as the fiars, so that there was no room for adding anything to the effect of these clauses by the use of the word "allenarly."

I think this a more satisfactory ground of judgment than gathering specialties from expressions occurring throughout this particular deed, as was done in the case of Beveridge, which has the disadvantage, as strongly deprecated by Lord Eldon in Dewar v. M'Kinnon, 1 W. and S. App. 168-9, of leaving us substantially without any rule at all.

LORD ARDMILLAN.—I am of the same opinion. There are certain dates which I think are important. The marriage took place in April 1844; Thomas Binny

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died in March 1845; William Maule died in February 1859; Miss Maule was born in May 1846,—that is to say, before 1848.

The rights of parties emerged on the dissolution of the marriage by the death of William Maule. During the subsistence of the marriage no person was, or could be ascertained to be assuredly heir of the marriage; but on the death of William Maule, Miss Maule was ascertained to be unquestionably the heir of the marriage. Mrs Maule is clearly a liferenter,—not a fiar. I do not think that the word "allenarly" is a *verbum sine quo non*. It is a word which was selected at a particular period of our law for a particular purpose; but when you find so many expressions indicating the same intention, and concurring towards the same result, as in the present case, the absence of the word "allenarly" is not fatal. Here we have an entail, a liferent declared to be "alimentary," the liferenters called "merely liferenters," and a whole series of provisions which make it very plain that no more than a liferent was intended to be given. There was undoubtedly a fiduciary fee, but that *fiducia* or trust was for the person mentioned as the heir who was to succeed,—that is to say, the heir of the marriage,—and when, on dissolution of the marriage, the heir of the marriage was ascertained, the fiduciary fee terminated. Therefore, I am of opinion that Mrs Maule was not the fiar; that from the date of the dissolution of the marriage Miss Maule was the fiar, and of course is now fiar. As to the combination of the two rights, as has been suggested, I think that although it is natural, appropriate, and prudent that Mrs Maule should be a consenting party, still the fiar, the true heir of entail, is the only person entitled to prosecute this proceeding.

Lord Mure.—I concur with your Lordship that we must make up our minds which of these petitioners, or whether either of them, is the party entitled to disentail; and that the execution of a joint instrument, on the footing that one or other of the petitioners has the right to disentail, would be of doubtful competency.

On the construction of the clauses of the deed I have no difficulty in holding, on the grounds stated by your Lordship, that Miss Maule is now the heir of entail in possession. Under the deed the right of the spouses was one of liferent. For although the word "allenarly" is not used, there are equivalent provisions which restrict their right, while they were at the same time fiduciary fiars till the dissolution of the marriage. On that event the eldest heir-female, if there was no heir-male, became the heir of the marriage, and fiar of the estate, and as Miss Maule is now in that position she should, I think, be authorised to execute an instrument of disentail.

This interlocutor was pronounced:—"Find that the petitioner, Elizabeth Patricia Maule, is the heir of the marriage between the now deceased Honourable William Maule Maule and the other petitioner Mrs Elizabeth Binny or Maule, and that on the dissolution of the said marriage by the decease of the said Honourable William Maule Maule the fee of the estate of Fearn became vested in the said Elizabeth Patricia Maule, subject to the fetters of the entail, and subject also to her mother's liferent: Find that when the title of the said Elizabeth Patricia Maule shall have been duly completed she will be entitled, as heir of entail in possession of the said entailed estate, to execute and record an instrument of disentail, on complying with the conditions of the third section of the Entail Amendment Act: Remit to the Lord Ordinary to proceed further in accordance with the above findings."

Lindsay, Howe, Tytler, & Co., W.S.—Agents.

CALEDONIAN RAILWAY COMPANY, Complainers.—*D.-F. Watson—R. Johnstone.* No. 136
WILLIAM BAIRD AND COMPANY, Respondents.—*Balfour—Mackintosh.*

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Nuisance—Pollution—Stream—Property—Landlord and Tenant.—A proprietor erected a village for the accommodation of the miners in his employment on the banks of a stream formerly suitable for primary uses. Drains were provided to carry off surface water and water from washing-houses through filtering beds into the stream, other arrangements being made by the proprietor for the removal of excreta and refuse from the miners' cottages, which, if attended to by the inhabitants, would have prevented such polluting matters from reaching the stream. In an action for interdict against the proprietor at the instance of an inferior heritor who alleged that the water from the drains polluted the stream the defender pleaded (1) that the stream was the natural channel of the drainage of his lands, and (2) that there had been no pollution. *Held*, on consideration of a proof, that pollution of the stream by the drains had been proved, and that, unless the pollution was stopped the pursuer would be entitled to have his rights protected by interdict against the defender.

Observed (*per* Lord Gifford) that if a landlord cannot erect a village without polluting a pure stream he must not erect it.

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THE Caledonian Railway Company, who were proprietors of the Forth and Clyde Canal, presented a note of suspension and interdict against William Baird and Company, iron and coal masters, owners and lessees of minerals in the neighbourhood of a part of the canal, praying that the Court should "interdict, prohibit, and discharge the said respondents from carrying or conveying the drainage or sewage of the dwelling-houses, and out-buildings connected therewith, recently erected by them at Auchinsterry, in the parish of Cumbernauld, into the burn or watercourse immediately on the west of said houses and buildings, and thence into the canal known as the Forth and Clyde Canal, the property of the complainers."

The complainers averred, and it was admitted, that "the respondents are extensive owners or lessees of minerals in the neighbourhood of Auchinsterry, and for the accommodation of their miners and workmen engaged at their pits and works in that locality they have recently erected about 100 dwelling-houses, which at present contain a population of about 600 persons."

The complainers further averred;—"The said dwelling-houses are built in rows or streets, and they, and the various out-buildings connected therewith, consisting of wash-houses, privies, and other conveniences, are all situated on an acclivity sloping towards said canal. Along each of said rows or streets the respondents have formed a gutter, by means of which the drainage or sewage from said dwelling-houses, and outbuildings connected therewith, is conveyed into a covered drain, also constructed by the respondents, and at the extremity of which, next to the canal, they have constructed a cesspool for the reception of the said sewage. The said cesspool has an outlet, from which the respondents have constructed a drain to connect the said cesspool with the burn or watercourse referred to in the prayer of the note, and which at the point of connection is the property of the complainers, and flows into the said canal."

The respondents answered this article as follows:—"Admitted that the said dwelling-houses are built in rows, and that they, as well as the wash-houses, privies, and other buildings, are situated upon ground sloping towards the canal. Admitted that the respondents have, on their own ground, formed gutters or open syvers, along which the surface-water and the water from the wash-houses is conveyed into cesspools, from which it is conducted into a covered drain on the west side of said ground. *Quoad ultra* denied; and explained that, at the extremity of the said covered drain, the water flows into a filtering pond, containing a fil-

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tering bed of coke dust or ashes, and divided into three compartments, through each of which the whole water passes successively, and that it is only after the water has been so filtered that it flows into the burn, at a point within the respondents' own ground, and the burn carries the water, at some little distance, into the canal. Explained that there are no water-closets on the ground, and no drains from the privies or dust-bins, which are roofed over. The ashes from the dust-bins are used in taking up the liquid and other matters in the privies, which by these means are kept dry. The dust-bins and privies are regularly emptied, and consequently no sewage reaches the canal from the respondents' ground. The respondents keep a man constantly employed as a scavenger in cleaning the streets and roads opposite the said houses, as well as the open water-channels and syvers; and their respective cesspools are cleaned out every alternate day. The coke dust or ashes in the filtering ponds is renewed every month,—the previous coke dust or ashes, and any matters which it may have detained from the water, being removed."

The complainers pleaded;—(1) The complainers being the proprietors of the said burn or watercourse at the place where the drainage or sewage referred to in the prayer of the note is discharged into it, and being also proprietors of the said canal, and the respondents having no authority to carry the said drainage or sewage into the said watercourse and canal, the complainers are entitled to interdict as craved. (3) The carrying of the said drainage or sewage into the said canal being calculated to cause a nuisance, and to injuriously affect the navigation on or use of the said canal, the complainers are entitled to the interdict craved, with expenses.

The respondents pleaded;—(1) In respect the burn above mentioned is the natural channel for receiving the drainage of the respondents' ground, and that their rights as owners are preserved by the Canal Act, they are entitled to continue to drain into the said burn as heretofore. (2) The complainers are not entitled to interdict as craved, in respect that the drainage of the said land has been conveyed into the said burn, and thence into the canal, for a period of more than forty years, or at least for a period exceeding seven years. (3) The prayer of the note ought to be refused, in respect that the respondents are not, and have not been, polluting the canal, to the nuisance of the complainers.

The Lord Ordinary on the Bills passed the note, but refused to grant interdict *in hoc statu*.

The Lord Ordinary closed the record on the note of suspension and answers. A proof was subsequently taken by the Lord Ordinary, in the course of which the following leading facts were brought out:—

The burn, of the pollution of which the railway company complained, was a small stream of about 250 yards in length, flowing northward from its source through a piece of ground ten yards in breadth belonging to the complainers into the canal. Prior to the operations of the respondents no sewage or drainage of any sort, excepting the ordinary agricultural drainage of the land through which it ran, had found its way into it, and the water had been perfectly pure and suitable for primary purposes. In 1873 the respondents commenced building the village of Auchinsterry, which consisted of four rows of houses, 95 feet apart, facing to the canal, the nearest row to the canal being 120 feet from it. In front of each row, and about 30 feet from the houses, were outhouses, consisting of ashpits, dry privies, and washing-houses, there being a set of outhouses for every six or eight families. At a distance of 40 feet from the houses open drains or syvers were constructed, and at the end of each row there was a cess-pool, the overflow from which was in turn conducted to a filtering apparatus about 50 feet from the burn. This filter consisted of a settling tank,

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and two other compartments filled with "danders" or engine ashes and coke dust. From this filter a pipe conveyed the overflow into the burn at a point about 30 feet from its outcome into the canal. It was the fluid coming into the canal from this filter that the railway company complained of as causing the nuisance and pollution which they were desirous to stop. The respondents adduced evidence to the effect that the only water which could come into the open syvers was rain water from the roofs of the houses, and the water from the washing-houses which were in communication with the syvers. The privies and ashpits had no connection with these drains, and there were no drains in the houses. The privies were dry privies, and the filth from them was mixed with ashes and regularly removed. The filter was also emptied every six weeks, and fresh "danders" and coke dust put into it. The respondents also employed a man, whose sole duty it was to act as scavenger and clean the privies, syvers, and streets of the village. It was, however, proved that the children and others were in the habit of using both the syvers and the ground round the outhouses instead of the privies, and that, in that manner, and from the emptying of household utensils, offensive sewage found its way into the syvers and thence to the filter and burn. Samples of the outflow from the filter were analysed by chemists for both the parties, and although there was some conflict as to the actual amount of pollution it was abundantly clear that organic matter of an offensive and noxious nature was present in the water in considerable quantity. Flocculent growths and other symptoms of pollution by domestic sewage were also apparent on the stones and sides of the burn below the point at which the outflow entered it. There was a considerable conflict of evidence as to the appearance and odour of the outflow, and of its effect upon the burn and canal, the complainers' witnesses describing it as very offensive and foul, and as polluting the canal to such an extent as to be visible for four or five yards all round the point at which it entered it, while the respondents' witnesses took a much more favourable view of its extent and effect. It was, however, clearly proved that the water of the burn was unfit for drinking or any primary use after the outflow from the filter entered it.

In the course of the proof, the respondents adduced witnesses to depone to the fact that every effort was made by them and their officials to compel the inhabitants to use the privies and ashpits as receptacles for all such filth as might constitute a nuisance, any one contravening the regulations for the use of the drains, &c., being liable to removal after one warning.

On 3d February 1876 the Lord Ordinary pronounced this interlocutor: —"Finds that the respondents, in the erection of the mining village belonging to them on the lands of Auchinsterry, have provided a system of drainage, by the use of which, in accordance with the purpose and design of the works, sewage or drainage of a grossly polluting kind has been for some time carried into the burn to the west of these lands, and thence into the Forth and Clyde Canal, to the injury of the complainers, and in violation of their legal rights: Finds that in these circumstances, and unless the evil complained of shall be forthwith remedied, the complainers are entitled to the interdict asked; but supersedes consideration of the cause for one month, to allow the respondents an opportunity of stating the means they propose to adopt to prevent further pollution of the water of the burn and canal: Grants leave to reclaim against this interlocutor; and meantime reserves all questions of expenses."*

* "NOTE.— . . . In this state of the facts it does not appear to me to admit of serious doubt that the complainers are entitled to the interdict which they ask.

No. 136. The respondents reclaimed, and argued;—(1) On the evidence there was not sufficient proof of the existence of a nuisance to entitle the Court

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It was maintained in argument, on the assumption that the respondents can be regarded as the parties causing the pollution, that they were entitled to run into the burn water polluted to some extent, if the pollution arose from what was called the natural occupation and use of their property. No authority was cited in support of this view, and I see no reason to doubt that the complainers, who have hitherto had a flow of pure wholesome water into and through their lands into the canal, are entitled to resist any material change in the character of the water as a violation of their rights. The erection of a mining village may be a fitting and proper use by the respondents of their property, but in that use they are not entitled to invade the rights of their neighbours by destroying the flow of pure water which has hitherto been enjoyed. They must make their arrangements for disposing of the sewage without invading the rights of the lower heritors, or otherwise discontinue a use of the subjects which involves an invasion of these rights, and which, on that account, is not a proper or lawful use of their property. But, again, it is said the respondents are not the parties who have caused the pollution, or who are responsible for it, and that the complainers' remedy is by interdict against the true wrongdoers—the occupants of the houses. On this point it cannot, I think, be disputed that in erecting so many houses to be occupied by hundreds of persons the respondents were bound to make some provision for carrying off the filth and sewage which is necessarily incident to the occupation of the buildings, without violating the rights of others. If no provision had been made, and the tenants of the houses had been left to discharge filth of every kind directly into the burn, which no doubt they might have been interdicted from doing, I cannot doubt that the respondents would also have been liable to interdict against a use of their property which must necessarily result in pollution of the stream. The respondents have recognised their obligation to make proper drainage or sewage arrangements, and the question is whether the works executed are of a nature sufficient to relieve them from responsibility. If it could be shewn that pollution would not occur from the natural and ordinary uses of these works, which are in all respects sufficient to provide the means of drainage without causing pollution, but has arisen entirely from the wilful acts of the occupants of the houses in declining to avail themselves of the provisions made by the respondents to prevent pollution, the complainers' complaint and remedy might not be against the respondents. But this is not the true state of the facts. The respondents have no doubt made arrangements which will secure that the houses, and outhouses, and surrounding ground, shall be kept free from any permanent accumulation of filth, and so far, as regards the sanitary arrangements for the houses, these arrangements may be entitled to the commendation bestowed on them by some of the witnesses. But the drainage works provided for the use of the village are not only of a kind which will admit of pollution being caused by their misuse, but are such that if used, as it may naturally and reasonably be expected they will be, will and do cause pollution. The respondents' case is that no excretal matter finds its way into the drains, which are used, only as intended, for the liquid refuse from the houses and the draining of the wash-houses. It is clear there is pollution in fact, and if this be as the respondents allege, then the pollution is the direct and inevitable result of their draining scheme, used quite in the way they intended and designed it should be by their tenants. I am of opinion, however, from the evidence, that the drains do carry off to some extent sewage material of a more noxious character than the respondents admit; and, in particular, convey excreta carried out from the houses and thrown into the open gutter, and washed into the gutters in wet weather from the outhouses and surrounding ground. That the drains and gutters are used and act in this way is, I think, the natural result of the situation in which they are placed, for they form the only means of carrying away filth which has accumulated in their neighbourhood in wet weather, and the most likely and convenient means to be used by the inhabitants for getting rid of much of the filth and refuse from their

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to interfere.[1] The use that was being made of the land was a natural use, and quite legal. There was no *opus manufactum*. It could not be said to be an illegal or unusual act to bring a population of human beings to any spot, and whenever there was a population in close proximity to a stream that stream lost its purity. A similar result happened from cultivation: the quantity of surface water was increased, and it was often saturated with manure; still no one was ever interdicted from draining his fields for agricultural purposes.[2] (2) If there was a nuisance it was not really caused by the respondents, and therefore the interdict to prevent the nuisance should not be directed against them.[3] The whole scheme of their system of privies and drains was to obviate anything of this sort. If the privies and syvers were used as they intended them, and endeavoured to cause them to be used, no pollution was possible. All that would flow through the syvers would be surface water, such as would have found its way into the burn and canal from the natural slope of the ground without any drains. The syvers were made for a lawful purpose, and if they were used unlawfully by other persons the landlords could not be held responsible. The illegality, if any, was not in having the drains, but on the part of those who used them improperly, and these were the persons who should be interdicted.

Argued for the complainers;—(1) The respondents had constructed premises which polluted a stream formerly suitable for primary uses. The right to send down clean water did not imply the right to send down dirty

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houses. On these grounds I am of opinion that the pollution complained of is the result of the use by the inhabitants of the drainage system provided by the respondents which might naturally and reasonably be expected. This being so, the pollution is to be traced to the respondents' works, and for the result of these works the respondents are responsible.

"It does not appear to me that any separate or difficult case arises in reference to the canal as distinguished from the burn. The complainers are entitled to resist the discharge of sewage or polluted drainage water into the canal as effectually as into the burn, but on the other hand their rights are no higher in regard to the canal than in reference to the burn. They have an obvious interest to prevent the water of the canal being made a receptacle for gross impurities, for the water being, comparatively speaking, stagnant, such impurities are calculated to make it most offensive, and so to injure the canal seriously for the purposes of navigation. It is surprising to find from the evidence that at some points considerable quantities of sewage are permitted to run into the canal. The fact that this is so does not, however, give the respondents a right to use the canal in this way for a new village, and it may yet be found that other parties so using the canal have no better right to do so than the respondents.

"As the result of my judgment, the complainers are entitled to put a stop to the present use of the drains leading to the burn and canal. But before granting interdict I think it is reasonable, in the circumstances, that the respondents should be allowed some time to make other arrangements; and while I shall find that the respondents have caused the pollution complained of in violation of the rights of the complainers, I shall in the meantime supersede consideration of the case for one month, to allow the respondents an opportunity of stating what they propose to do to put a stop to the existing evil."

[1] Campbell v. Bryson, Dec. 16, 1864, 3 Macph. 254, 37 Scot. Jur. 121; Ersk. ii. 9, 2.

[2] Montgomery and Fleming v. Findlay, July 9, 1853, 15 D. 853, 25 Scot. Jur. 499.

[3] Young v. Colt's Trustees, June 16, 1832, 10 Sh. 666; Collins v. Hamilton, April 19, 1837, 15 Sh. 895; Weston v. Incorporation of Tailors, July 10, 1839, 1 D. 1218, 11 Scot. Jur. 597.

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water.[1] (2) With regard to the argument that the landlords here were not the true polluters, and that anything that was done was done against their will, there was no such averment or plea upon record. The only plea taken was that there was no pollution. It had been proved that there was pollution, and so the complainers were entitled to their interdict. The first trace of this defence was in the proof, when the respondents examined their officials. But even if this ground could now be taken it would not avail them, as they were responsible for their tenants, who were removeable at will.

LORD JUSTICE-CLERK.—I think, in the shape in which the case has now been presented, any difficulty that I felt on one part of it has been entirely removed.

I have no difficulty on the question of nuisance. It is quite clear, I think, from the evidence, that the amount of pollution which is caused by the burn to the canal is greater than it was before, and the superior heritor was not entitled to increase the amount of impurity. But it goes a great deal beyond that; because, making all allowance for difference of opinion among scientific men, it cannot be doubted that the state of the burn between the outlet of the syvers and the canal, and the state of the canal itself where the burn flows into it, is a nuisance in the strongest sense of the word. Neither have I the slightest doubt that the defender, Mr Baird, or his tenants, had no right to do this, and that it was no part of the natural right of the riparian proprietor to discharge these drains into the burn.

The only defence that appeared to be important was that Mr Baird pleaded that he has done nothing which he was not entitled to do; that he provided this means of outlet, not for polluted water, but for clean water, or at least water that would not be productive of a nuisance, and that the bad habits of his tenants in this village have created the nuisance, such as it is. That defence might have had some importance if the facts of the case had been sufficient to sustain it. But in the present case it appears to me that this question does not arise. In the first place, it is not pleaded. Mr Baird not unnaturally assumes the responsibility, and challenges our verdict on that footing; for he raises no question as to his not being the perpetrator of the nuisance, if nuisance there was, but denies that there was a nuisance; and, secondly, he says that he had done no more than exercise the right which he had. Although I do not think there would have been any inconsistency in maintaining both pleas if he had done so, I find nothing in this record which indicates that his defence was that some one else had committed the nuisance, and that he had done nothing to aid or assist it. It turns out that the inhabitants of these houses are his colliers, who are working in his mines, and I suppose receive their habitations as part of their wages, and only as long as they remain his servants. In such a matter as this, I am disposed to look on these men as being entirely under the control of their landlord, and truly as representing him in

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[1] Dunn v. Hamilton, March 11, 1837, 15 Sh. 835—aff. H. of L. July 30, 1838, 3 Sh. and M'L. 356; Attorney-General v. Richmond, March 24, 1866, 14 Law Times, 398, L. R. 2 Eq. 306; Attorney-General v. Birmingham, July 22, 1858, 4 Kay and John. 528; Attorney-General v. Colney Hatch, Dec. 21, 1868, L. R. 4 Chanc. App. 146; Duke of Buccleuch v. Cowan, Dec. 21, 1866, 5 Macph. 214, 39 Scot. Jur. 152; Tenant v. Golding, 1 Salkeld, pp. 21 and 360; Ergemont v. Pulman, Aug. 29, 1829, 1 Moody and Malkin, 404; Cawkwell v. Russell, Nov. 19, 1856, 26 L. J. Exch. 34.

what they have done, and I think he is responsible for their acts. He can at any time turn them out of their houses; and even if he had pleaded, which he has not done, that they are the wrongdoers, and not he, I should not have been disposed in the circumstances to sustain that plea. I do not think a tenant who has an independent position, even a tenant for a year, would be in the same position with regard to his landlord. The landlord would not then be liable for all the tenant might do. But I regard these men as being truly only the servants of the landlord, occupying these houses as part of their wages; and therefore I am for adhering to the Lord Ordinary's interlocutor.

It is certainly a case involving some hardship in the ultimate result, nor do I very clearly see in what way the rights of parties are to be extricated. But it is not necessary to attend to that at this stage of the proceedings. The Lord Ordinary has in the meantime allowed Mr Baird to say what he proposes to do in order to mitigate the nuisance, and I think that was a very proper thing to do, and it would be well if attention were directed to it. One can see that great inconvenience may arise on the other side; but I have a strong conviction that in the appliances of engineering science some means of abating this nuisance may be found. It may be a matter of money; but in the meantime I think Mr Baird is responsible for the nuisance, and must take means to abate it, or otherwise the interdict here asked must pass against him.

LORD NEAVES.—I am of the same opinion. This is a question on which, in various aspects of the circumstances, nice points of law may arise; for instance, as to the liability of the landlord for what his tenant does wrong. But I do not think these questions arise on this record. I do not say that the judgment in Dunn v. Hamilton was not a right one in its circumstances; but I would not lay it down as a general proposition that a man accused civilly or criminally of a wrong thing—a nuisance or a crime—may not plead so as deny that there is a nuisance, and ultimately to say that if there is he did not commit it. This could not be held to make him liable for another man committing it, if it were held a nuisance, any more than in a case of murder a man could be prevented from pleading both that there was no murder, and that if there was, he had no hand in it. The case here is not what I have there supposed. The statements on record come to this: The Messrs Baird admit—what they could not deny—that their buildings and relative erections are the origin of the pollution that takes place. They mention, however, the expedients they have adopted for preventing the natural consequences arising from their buildings and erections, and from the population which they have thus brought there. They state that they have provided syvers and cesspools, and the question of fact is raised whether at the end of the filtration thus attempted the water is pure or unobjectionable. In one of the articles of their record they change that view into a sort of plea of *tu quoque*, by saying that the water of the burn is at least as clear and pure as the water of the canal; but the true defence to be extracted from all this is that the filtering ponds and cesspools do purify the water sufficiently for the purpose required. If they fail in that, if it is not proved that they purify the water or make it unobjectionable, I do not see that they have any other available plea. They do not say that they are prevented from doing anything that they wish to do. They take on themselves the responsibility of the arrangements, and plead upon their success. That is the issue raised here. But it is plain that they are the carriers and conveyers of the water as it now stands into the canal. The whole

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apparatus is their work. The channels made for the water reaching the burn and the canal are of their construction, and the question comes to be, as already indicated, whether the water is in such a state as to be a nuisance? If it is, I see no alternative but to hold them liable for the consequences, and as the proof shews that there is a nuisance, I think the Lord Ordinary is right in giving the Messrs Baird the opportunity which he has allowed them in the interlocutor. I am not quite satisfied with the mode in which it is expressed—"an opportunity of stating the means they propose"—(I do not see that they have proposed any means)—"to adopt to prevent farther pollution." Does that mean additional pollution? I suppose it means future or continued pollution; but that is a mere criticism on the words.

LORD ORMIDALE.—I am of the same opinion. Two questions arise in the case—1st, Has a nuisance been created,—or, in other words, has there been a breach of the laws of neighbourhood? And, 2d, If nuisance has been created, who is answerable for the consequences, or rather, are the respondents answerable for the consequences?

In regard to the first of these questions I concur with your Lordship in thinking that there can be no reasonable ground for doubt. The proof is to my mind quite conclusive to the effect that a nuisance has been created. It was indeed conceded that there was sufficient evidence of the canal having been made more offensive and more a nuisance than it had been originally. The canal, like all canals, did not, I suppose, contain the very purest water, and probably it was not fit for primary purposes; but the defenders were not entitled to make it worse. They might, on any other assumption, go from one step or degree to another till they rendered the canal so completely a puddle that it would be impossible for the ordinary traffic to be carried on. I entertain no doubt whatever therefore on the first of the disputed questions.

The other question might be a very nice one in many circumstances, but it appears to me that in the circumstances of this case there is not much difficulty, and I think the Dean of Faculty before he concluded made that very clear. The case of Dunn v. Hamilton was a very different one from the present. There the landlord, who was sought to be made answerable, as well as his tenant, had granted a lease, and he not only denied the existence of a nuisance, but he maintained that the purpose for which the lease was granted, viz., a dyework, was not calculated to create a nuisance,—he adopted, in short, the defence of the tenant on that footing, and accordingly, when it turned out that it did create a nuisance, he was held to be identified with the tenant, and equally responsible. But the present case is quite different. The Messrs Baird do not identify themselves with their tenants. They deny, no doubt, that there is any nuisance, but alternatively (and I think they are entitled so to put it) they say if a nuisance has been created they did not authorise it, and it was not the necessary consequence of anything they did. But the facts on which this branch of the case depends undoubtedly shew that they are responsible. They erected the village for the occupation of their own workers; they established the system of drainage, but they did not do so in such a manner as to render the water pure or free from pollution where it was passed into the burn and from thence into the canal. It is in this way the evil complained of has arisen. But having thus established the system of drainage, and having also assumed the control of it, they in a manner told their work people—the inhabitants of the village—"You have

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nothing to do with the drainage or sewerage, we will attend to that, and you may rely upon us to do so." They have failed, however, to do so in such a way as to preserve the burn and canal from pollution, and therefore they must take the consequences.

In these circumstances, and without going the length of holding as a universal and absolute proposition that every proprietor who erects a number of houses into a village is bound in all circumstances to prevent pollution, I entirely agree with your Lordship in thinking that the interlocutor of the Lord Ordinary is in this case well founded, and ought to be adhered to.

LORD GIFFORD.—I am entirely of the same opinion as your Lordship in the chair.

I regard this case as one of very considerable importance to the general law, because it raises the question how far a landowner, who is laying out his ground for feuing or for the erection of houses, is bound to take the necessary precautions to secure that a pure and potable stream which flows through his property shall continue to be transmitted in the same state to the heritor below him. Now, I think the upper heritor is bound to do whatever is necessary to secure that the stream which he found pure and potable shall not be destroyed by his operations. In the present case there is no material dispute as to the facts, and there can be no great variety of opinion as to the true circumstances in which the question arises. I think it is completely proved, first, that this burn was a pure and potable stream, fit for primary uses, before the respondents' village of Auchinsterry was erected. In the next place, I think it is proved that since this mining village of Auchinsterry was erected there the burn is no longer a pure and potable stream, fit for primary uses, but is a polluted and polluting stream. And, in the third place, I think it is proved that the source of the pollution which has made the change on the burn is sewage water introduced into the burn from the houses erected by the respondents. I use the word "sewage" in its large and general sense—polluted fluid coming from dwelling-houses, or from inhabited houses, or from a village, or from streets where men and women reside. Now, I do not think that there is any good distinction between pollution created by sewage and pollution which is created by any other means by which water is made dirty, and rendered unfit for the primary uses to which it had formerly been applied. Sometimes the refuse from a manufactory may create a greater nuisance than ordinary sewage, but this is a mere question of degree, and sewage from a populous district is often worse both in quantity and in intensity than the refuse of manufactories. Understanding, then, by sewage, in the general sense of the word, all the polluted fluid which comes from human dwellings, the question really is—Is it lawful to pollute and destroy a pure stream by sewage water? Of course, there will always be questions of degree. A single dwelling may produce no appreciable injury, and the case was put of a hydropathic establishment, where, although much water was used, it was said there was no apparent pollution. But in the ordinary case, where a new village is at once erected near a small stream, and where the whole polluted water created in the houses is discharged directly or indirectly into the stream, the result will be that the water of the stream is destroyed for drinking or for domestic purposes. In the present case this is the result. I think it is proved that the polluted water comes from the village of Auchinsterry, and is sent down or flows down a drain or pipe, cesspools, and filtering ponds, and ultimately into a discharge pipe, all the property of, and all constructed and maintained and upheld by the

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respondents. This discharge of sewage, even although it may be partially filtered, destroys the burn for primary and domestic purposes. Now, what is the law in a case of this kind? The respondents conceded that if the pollutions were caused by a manufactory or by artificial operations it could be stopped and interdicted by the lower heritor. But they maintained that it was otherwise if the pollution were caused as they said "naturally" by ordinary sewage from ordinary dwelling-houses. In such a case it was argued the pollution must be submitted to. I cannot assent to this doctrine. I think the law may be laid down, and I am disposed to lay it down in very broad terms, that an upper proprietor is not entitled in any circumstances or by any means whatever to pollute a pure and potable stream which passes through his property, and to send it down changed into an impure and unwholesome stream upon his neighbour's property. I cannot go along with the argument so ably maintained by Mr Balfour that in the case of ordinary dwelling-houses erected *in bona fide*, in the usual way, and *sine animo injuriandi*, the evil is practically inevitable, and therefore that the upper proprietor has a right to cause it. I think he has no right to cause it. If he cannot erect a village without polluting this stream, and, it may be, depriving his neighbours of their only supply of pure water, then he can let the village alone. He is under no obligation to build a village any more than to build a manufactory. I do not see that he has any right to interfere with the property of another man by building a village for his own behoof. No doubt he may use his own property for any lawful purpose; but the rule is he must so use it as not to injure his neighbour. I do not think it necessary to go into the nice and speculative questions about agricultural drainage, and how far agricultural drainage tainted with agricultural manure might or might not be stopped by inferior proprietors. Very difficult questions may arise in such cases, and there will always be a broad distinction between natural percolation through soils or strata and the actual discharge of polluting matter into a running stream. It is enough for the present case to find that an upper proprietor cannot in any circumstances send sewage water into a pure stream to the effect of destroying that stream for its primary uses. I think this is the result of the cases referred to. One of these cases was a very strong one. It was that of a city where there were hundreds of thousands of inhabitants, and it was said—"Where are they to send their sewage?" The answer was—wherever they liked, but not into their neighbour's property—not so as to destroy the land or the water belonging to those who happen to be on a lower level and so fitted to receive the polluting discharge. And this was the judgment of the Court. A stronger case than this could hardly be, and it is an *a fortiori* case to the present.

Nor is there any real hardship in holding that a person who produces polluted or polluting refuse must himself dispose of it otherwise than by putting it upon his neighbour's property. Its production will be lessened, or uses will be found for it in the end far better than merely throwing it down or leaving it to run over on the unfortunate residents who dwell below.

The only remaining point of the case is this: Who are the true authors of the nuisance? Is this pollution substantially caused by the defenders, and is the remedy asked for the proper one? I think it is. If the respondents had demised all their property, including this system of drainage, to somebody else who had the sole control, or if they had feued the property generally, and the vassal had erected the villas or houses, the case would have been quite different; but the

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proprietors of this village are the Messrs Baird, they draw the rents, and they let the property as it is. The system of drainage is exclusively the property of the respondents, devised and upheld by them alone, and it is by means of that system of drainage that the injurious substances which destroy the complainers' pure stream are sent into it. I cannot hold that any remedy lies at the instance of the complainers against the tenants. One tenant might be interdicted from doing a particular thing, but the sewage will still come down that stream, and it is very conclusive against the respondents to see that they intended it so to come down, that they made provision for sewage water coming down in that way, making the ordinary arrangements for stopping the solid sewage by means of cesspools, and ultimately by means of a filtering tank, but leaving the fluid sewage, which is the thing that does the mischief, to flow from the cesspools into the filtering tank, and from the filtering tank direct into the stream, which it absolutely destroys. I cannot doubt that the respondents are doing the thing complained of. It is asked, what will happen if nothing is done, and the case comes up for breach of interdict? and the question is a proper one, because I quite agree that the Court is bound to take care that they do not give such an interdict as it is impossible to enforce, or such an interdict as the parties against whom it is directed cannot really obey. But I do not see that there is any difficulty as to that. I have a little doubt with Lord Neaves as to the words of the Lord Ordinary's interlocutor, for he finds "that unless the evil complained of shall be forthwith remedied the complainers are entitled to the interdict asked." I hesitate about affirming that, because it defines what we are going to interdict. The pursuers are entitled to have a remedy, to have the pollution stopped, and when we come to frame the terms of the interdict I think there will be no difficulty in doing it. The thing to be prevented is the discharging of polluted water from the village of Auchinsterry into this pure burn by means of any apparatus belonging to the respondents for that purpose. I do not think we could prevent a miner from running out at night with refuse and throwing it into the stream. That would not be a thing for which Messrs Baird would be answerable, but they must not leave this drain and these pipes and filtering tanks to overflow into and pollute the burn. That is what I am prepared to interdict if Messrs Baird do not adopt some remedy in the meantime. I do not doubt that a remedy is possible, and if it is said that the matter may be worse than ever if the present system is put a stop to, there will be another remedy for that, viz., a proceeding under the Sanitary Acts, or a prohibition with reference to inhabiting these house. I take a pretty strong view of this case. I think this burn must at all hazards be kept pure. It might be the only water supply for these parties. I do not think anything turns on the fact that it runs into the canal, because it might be the only supply for miles along the canal for their workmen drinking. I know nothing about that. All I know is that the canal company are the proprietors of this pure and potable stream, and I think they are entitled to assert their right to it by interdict against anybody who makes it unfit for primary uses.

THE COURT pronounced this interlocutor:—"Refuse the said reclaiming note, and adhere to the interlocutor complained of, with the variation that the month thereby allowed to the respondents shall run from this date: Find the respondents liable in expenses," &c.

HOPE, MACKAY, & MANN, W.S.—WEBSTER & WILL, S.S.C.—Agents.

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June 15, 1876.
Park v. Park.

JAMES PARK, &c. (Park's Trustees), First Parties.—*Kinnear.*
WILLIAM PARK, Second Party.—*Adam.*
JAMES PARK, &c. (Park's Tutors), Third Parties.—*J. C. Lorimer.*

Special Case—Competency—Process—Minor.—Held that the Court could not entertain a special case presented by certain persons for their own interest, and also as tutors for pupil children having an adverse interest.

Observed that a special case is a contract fixing the parties to a certain statement of facts, and therefore that persons incapable of contracting cannot enter into a special case.

1st DIVISION. B.

WHEN this special case appeared in the Single Bills, counsel for the third parties, the tutors appointed by the truster to the pupil children of William Park, asked the Court to appoint a tutor *ad litem* to the pupils, in respect that the children had an adverse interest to the tutors.

At advising, the opinion of the Court was delivered by the

LORD PRESIDENT.—The Court are of opinion that they cannot entertain this special case. The first parties are the testamentary trustees of the late James Park. These gentlemen are three nephews of the late Mr Park. The second party is William Park, another nephew of the late Mr Park. The third parties are the same individuals as the first parties, but in the separate character of tutors appointed by the late Mr Park to certain pupil children. Now, there is an adverse interest between the first parties and the second party, between the first parties and the third parties, and between the second party and the third parties. The effect of this special case, which is necessarily a contract, is to bind the pupil children through these tutors to a certain statement of facts. We cannot entertain a special case between parties who are not entitled to contract. If it is necessary to have the question decided at present the parties must resort to the ordinary form of a declarator.

H. & H. TOD, W.S.—TAWSE & BONAR, W.S.—Agents.

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June 16, 1876.
Highland Railway Co. v. Jackson.

THE HIGHLAND RAILWAY COMPANY, Petitioners and Appellants.—*D.-F. Watson—Mackintosh.*
THOMAS JACKSON (Nicol and Company's Trustee), Respondent.—*Balfour—M'Kechnie.*

Railway Clauses (Scotland) Act, 1845 (8 *and* 9 *Vict. c.* 33), *sec.* 90—*Tolls—Lien.*—The 90th section of the Railway Clauses Act enacts that "if on demand any person fail to pay the tolls due in respect of any carriage or goods it shall be lawful for the company to detain and sell such carriage, or all or any part of such goods, or, if the same shall have been removed from the premises of the company, to detain and sell any other carriages or goods within such premises belonging to the party liable to pay such tolls."

The interpretation clause (sec. 3) bears that "the following words and expressions, both in this and the special Act, shall have the meanings hereby assigned to them, unless there be something in the subject or context repugnant to such construction. . . . . The word 'toll' shall include any rate or charge or other payment payable under the special Act for any passenger, animal, carriage, goods, merchandise, articles, matters, or things conveyed on the railway."

Held (1) that the word "tolls," as used in the 90th section, was to be construed as meaning tolls proper, or payments for the use of the line by persons using their own carriages, the language of the 90th section being repugnant to the wider construction of the word given in the interpretation clause; and therefore (2) that the remedies given by the 90th section were not available for the recovery of charges for goods carried by the railway company as common carriers.

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1st Division. M.

THE Highland Railway Company presented this petition to the Sheriff of Inverness-shire on 23d November 1874, for authority to sell three bags of wool and other goods in their possession belonging to Nicol and Company, manufacturers, Inverness, and to apply the proceeds in payment of an account for railway carriages from 1st July to 9th September 1874, amounting to £26, 17s. 1d. The petitioners founded on the Railway Clauses (Scotland) Act, 1845, sec. 90, and the interpretation clause, sec. 3.*

Nicol and Company's estates were sequestrated on 9th September 1874, and the trustee, Mr Jackson, opposed the petition. He pleaded;—(1) The petitioners, as common carriers, have not a general lien at common law. (2) Nor have the petitioners any such lien in virtue of the Railway Clauses Act of 1845, the right of lien thereby conferred being confined to goods undelivered; and the petitioners having ceded possession of the goods mentioned in their account, other than those stated in the petition, their right of lien over the former was relinquished, and cannot now be revived.

It was admitted that the petitioners were in the habit of keeping a monthly account with Nicol and Company; that they gave credit for the carriages mentioned in the account, other than the carriages of the goods mentioned in the petition; and that they voluntarily delivered the other goods in the ordinary way of business.

The Sheriff-substitute (Blair) pronounced this interlocutor:—(After findings in fact)—"Finds in law that the provisions of the said 90th section of the said Act apply to charges for the carriages of goods, and are not limited to the tolls for the use of the road, and that when the petitioners have within their premises goods belonging to their debtor, they may detain and sell the same for the payment of the tolls due for the carriage of other goods which have been removed without payment: Therefore repels the defences stated for the respondent, sustains the pleas in law stated for the petitioners, and grants warrant as craved in the petition," &c.

On appeal, the Sheriff (Ivory) pronounced this interlocutor:—"Recalls the interlocutor appealed against: Finds that the estates of Nicol and Company were sequestrated on 9th September 1874, and were as at the said date transferred to and vested in the respondent as trustee for behoof of their creditors: Finds that on 23d November 1874, being the date when the present petition was presented, the goods mentioned therein, and a warrant to sell which was craved by the petitioners, had ceased to be the property of Nicol and Company, and then belonged in property to the respondent, as trustee on their bankrupt estate: Finds in point of

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* 8 and 9 Vict. c. 33, sec. 90.—"If on demand any person fail to pay the tolls due in respect of any carriage or goods, it shall be lawful for the company to detain and sell such carriage, or all or any part of such goods, or, if the same shall have been removed from the premises of the company, to detain and sell any other carriages or goods within such premises belonging to the party liable to pay such tolls, and out of the monies arising from such sale to retain the tolls payable as aforesaid, and all charges and expenses of such detention and sale, rendering the overplus, if any, of the monies arising by such sale, and such of the carriages and goods as remain unsold, to the person entitled thereto, or it shall be lawful for the company to recover any such tolls by action at law."

Sec. 3.—"The following words and expressions, both in this and the special Act, shall have the meanings hereby assigned to them, unless there be something in the subject or context repugnant to such construction. . . . . The word 'toll' shall include any rate or charge or other payment payable under the special Act for any passenger, animal, carriage, goods, merchandise, articles, matters, or things conveyed on the railway."

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law that the petitioners were not entitled to have the said goods sold, and the proceeds applied in payment of the account for carriages due to them by Nicol and Company: Therefore refuses the prayer of the petition, and decerns."

The petitioners appealed to the Court of Session.

Argued for the petitioners;—1. The transference of the bankrupt's estates to the trustee could not prejudice the petitioners' lien. 2. The word "toll" in the 90th section was comprehensive enough to include ordinary charges for carriage. That was apparent from the interpretation clause. The word was also used quite generally in the special Act.[1] The point was expressly decided by Lord Shand in the Caledonian Railway Company v. Guild.[2] It was assumed in North British Railway Company v. Carter.[3] 3. The word "removal" in the section naturally covered delivery in the ordinary course of business.

Argued for the respondent;—When the clause was read with the context it clearly appeared that tolls and carriages were distinguished. That was decided in England.[4] The report in the Law Reports was imperfect, which misled Lord Shand. This limited meaning of the word "tolls" had been held to be the meaning in the 88th section.[5] The meaning was the same in the General Turnpike Act, which contained a similar provision for detention and sale of goods for non-payment of tolls.[6] Removal meant improper removal.[7]

At advising,—

LORD PRESIDENT.—When Nicol and Company, manufacturers in Inverness, became bankrupt, on 9th September 1874, they were owing to the Highland Railway Company, the appellants, an account of £26, 17s. 1d. for the carriage of goods by the railway company as public carriers between the 1st of July of that year and the date of the bankruptcy, and the railway company were at that time in possession of three bags of wool, one truss tweeds, and three bundles of empty sheets, forming part of the bankrupt estate. They presented a petition to the Sheriff for warrant to sell these goods, under the authority of the 90th section of the Railway Clauses Act, 1845, for the purpose of imputing the proceeds of the sale in extinction *pro tanto* of the account due to them. The demand was resisted by the trustee of Nicol and Company, upon the ground that the 90th section of the Railway Clauses Act did not apply to such a case. The Sheriff-substitute was of opinion that it did apply, and granted the remedy asked by the railway company. The Sheriff altered that judgment, but upon the ground, which was plainly untenable, that the lien claimed by the railway company was not available, because the goods in their hands were no longer part of the estate of Nicol and Company but were the property of the trustee,—that being the very situation of matters which makes the lien available. But the question which is raised under this petition is one of great importance and of very general application, and it depends upon a consideration of the meaning of

[1] Highland Railway Act, 28 and 29 Vict. c. 168, secs. 70, 76.

[2] Nov. 20, 1873, *ante*, vol. i. 198.

[3] July 15, 1870, 8 Macph. 998, 42 Scot. Jur. 611; Peebles v. Caledonian Railway Co., Jan. 20, 1875, *ante*, vol. ii. 346.

[4] Wallis v. London and South-Western Railway Co., Jan. 17, 1870, L. R. 5 Exch. 62, 39 L. J. Exch. 57.

[5] Scottish North-Eastern Railway Co. v. Anderson, July 8, 1863, 1 Macph. 1056, 35 Scot. Jur. 603.

[6] 1 and 2 Will. IV. c. 43, sec. 44.

[7] Opinions in Peebles v. Caledonian Railway Co., *supra*, note 3.

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the 90th section of the statute, taken along with various other sections connected with it.

The state of the case is this, that the railway company were in the habit of carrying goods for the bankrupts as common carriers, and they allowed Nicol and Company to run an account; in short, they gave them credit for the amount of the charges for the carriage of the goods, and settled the account apparently quarterly, or at some other period. The consequence was that this sum was due when Nicol and Company became bankrupt for the carriage of goods by the railway company, and they proposed to detain and sell, under the authority of the 90th section, the goods remaining in their hands, for payment not only of the carriage of those particular goods, but also for the carriage of all the other goods contained in the account. Now, the contention of the trustee is that the 90th section does not apply to charges for the carriage of goods by the railway company as common carriers, but applies only to tolls in the proper and limited sense of that word. There are other and subordinate questions raised by this record, but that is the most important. A great deal undoubtedly depends on the meaning of the word "tolls" in the statute, but I think it is quite clear that tolls is throughout it a word of varying meaning. It sometimes means one thing, and sometimes another. It sometimes means tolls in the proper sense of the word,—that is to say, tolls levied from persons using the railway with their own carriages; and it sometimes means or comprehends charges for carriage by the railway company as common carriers. The definition of the word in the interpretation clause is undoubtedly comprehensive enough to embrace both of these things. But certainly the word "tolls" itself is not always used in this statute in a comprehensive sense.

The sections of the statute which are connected with the 90th begin with the 79th, and the preface (if it may be so called) of the 79th section is expressed in these words,—"And with respect to the carrying of passengers and goods upon the railway, and tolls to be taken thereon, be it enacted as follows." This general introduction shews that the sections which follow, from the 79th down to and including the 100th, relate to these two subjects, viz.,—the carrying of passengers and goods upon the railway, and the tolls to be taken thereon,—that is, on the railway. Now, the interpretation clause provides that "tolls" is to be held to include "any rate or charge, or other payment payable under the special Act for any passenger, animal, carriage, goods, merchandise, articles, matters, or things conveyed on the railway." That, as I said before, is very comprehensive, and would, in my opinion, embrace both tolls in the proper sense of the word and also charges for carriage. But, then, the word is to have that meaning only unless there be something in the subject or context repugnant to such construction, and the true question for consideration, therefore, is whether in the subject and context of the 90th section we find anything repugnant to the comprehensive construction of the word. Reverting again to the class of sections beginning with the 79th, I may observe that in that section, referring undoubtedly to the carriage and conveyance of goods and passengers by the railway company in their carriages, the meaning of the word "tolls" is really charges for the carriage of passengers and goods. But in the 80th section, which immediately follows, it is just as clear that it is used in the other sense, and means tolls proper only,—that is, tolls for the use of the railway by the carriages of other people. The 81st and 82d sections are not important in connection with this question, because they relate to special contracts with other railway companies;

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but in the 83d section, and also in the 84th, it appears to me that the word is used in its most comprehensive sense,—that is to say, that it includes both tolls proper and charges for carriage. But then, when we come to the 85th section, we have another illustration of the varying use of this word, because this section provides that "it shall not be lawful for the company at any time to demand or take a greater amount of toll, or make any greater charge for the carriage of passengers and goods, than they are by this and the special Act authorised to demand." There the word is used in contrast or contradistinction to the term "charge for the carriage of passengers and goods," and of course accordingly in its most limited sense. Now, if one were to seek for an illustration of a repugnancy such as is contemplated in the interpretation clause we could not find it better than in this 85th section. There is an absolute repugnance there in the context and subject-matter of the clause. You could not by possibility construe "toll" there as meaning anything but toll proper. I am not desirous to say much as to the meaning of secs. 86 and 88, for this reason, that while in the case of the Scottish North-Eastern Railway Company v. Anderson this Court decided that, under the 88th section, the term is used in its most restricted sense, as meaning tolls for the use of the railway by the carriages of other persons, they did not extend that interpretation to the 86th section, which is very intimately connected with the 88th; and as a question may perhaps hereafter be raised upon the meaning of the 86th section, distinct from the 88th, I desire to offer no opinion on the matter at present. But at least one thing is clear, as settled by the case of the Scottish North-Eastern Railway Company v. Anderson, that section 88 is confined to tolls in the proper sense of the word,—that is to say, for the use of the railway by the carriages of other persons; and the 89th section, following up that meaning, provides, "that the tolls shall be paid to such persons and at such places upon or near to the railway, and in such manner, and under such regulations as the company shall by notice to be annexed to the list of tolls appoint." Now, here I do not think there can be any doubt that the word is used in the same sense as in the immediately preceding section—the 88th—because a payment for the carriage of goods is not a kind of thing that is to be "paid to such persons and at such places upon or near the railway as the company may appoint." The carriage of goods is paid upon their delivery. In the case of common carriers the delivery of the goods and the payment of the charge for carriage are simultaneous, and that is not a thing to be paid upon the railway, or to persons stationed upon the railway, at all, but is to be paid at the place of delivery. The two sections, therefore, immediately preceding section 90, undoubtedly use the word "tolls" in its more restricted and proper sense.

Now comes section 90 itself—"If on demand any person fail to pay the tolls due in respect of any carriage or goods it shall be lawful for the company to detain and sell such carriage, or all or any part of such goods, or, if the same shall have been removed from the premises of the company, to detain and sell any other carriages or goods within such premises belonging to the party liable to pay such tolls, and out of the monies arising from such sale to retain the tolls payable as aforesaid, and all charges and expenses of such detention and sale, rendering the overplus, if any, of the monies arising by such sale, and such of the carriages and goods as shall remain unsold, to the person entitled thereto, or it shall be lawful for the company to recover any such tolls by action at law." The construction which the railway company put upon this clause is, that "tolls" here means not only tolls for the use of the railway by the carriages of

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other persons, but also charges for carriage, the result of which is that the section, according to their construction, is an extension of the common law lien of common carriers to goods other than those for which the charges are due; and I rather think that in the present case they go somewhat further, looking to the way in which they run up an account for charges, and must hold that this introduces into the law of common carriers, so far as railway companies are concerned, a lien for a general balance of accounts.

Now, it appears to me that it would be very remarkable if any such change upon the law of common carriers were introduced in this form, and under cover of such words, for I do not think—reading this section even by itself and without reference to the other sections which surround it both before and after—that that is the natural meaning of the words at all. The thing which is spoken of—the subject of the clause, if it may be so called—is the refusal of persons to pay tolls due in respect of any carriage or goods. Now, it is somewhat remarkable that that phrase "carriage or goods"—"tolls due in respect of any carriage or goods"—appears in this clause for the first time. It is not used in any of these clauses previously, but it is used in some of the subsequent sections, and I think it is used throughout in the same manner. The power of the railway company is not to retain the goods. The power is to detain and sell. If the common law right of a carrier to retain goods till his charge for carriage is paid were the thing in contemplation here, and if it was the purpose to extend that lien, I think the word "detain" would not have been used, but the word "retain," which is more properly descriptive of that right which a carrier has at common law, and of the mode of enforcing that right. Then it provides, that if the carriage or goods shall have been removed from the premises of the company, they are to be entitled to detain and sell any other carriages or goods. Here again there is a phrase very well worthy of attention. The carriage or goods must have been removed from the premises, that is, from the railway, in order to entitle the company to detain and sell other carriages or goods for the unpaid tolls. If this was intended to apply to goods carried by the company, and retained in security of unpaid charges, I think the phrase would not have been "if the same shall have been removed," and I cannot think that in the present case the goods in question have been removed within the meaning of this clause; because what was done with the goods in the present instance was simply that the railway company delivered them, as they were bound to do as common carriers, but delivered them without exacting payment of their charges for the carriage. It appears to me, therefore, that the language of this section itself creates a repugnancy to the larger use of the word "tolls" permitted by the interpretation clause of the statute under certain circumstances.

But I beg attention further, particularly to sections 91, 92, and 94, where I think the language employed is very instructive in helping the construction of section 90. Section 91 provides, that "Every person, being the owner or having the care of any carriage or goods passing or being upon the railway, shall on demand give to the collector of tolls at the places where he attends for the purpose of receiving goods, or of collecting tolls for the part of the railway on which such carriage or goods may have travelled, or be about to travel, an exact account in writing signed by him of the number or quantity of goods conveyed by any such carriage, and of the point on the railway from which such carriage or goods have set out," and so forth. I suppose no one can dispute that the carriage and goods spoken of in that section refer to the carriage of a person

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using the railway with his own carriage and carrying goods in it, and it is very important to observe that the same phrase, "any carriage or goods," is repeated here just as it was used in the 90th section itself. It is applied entirely to this class—to a carriage or goods using the railway, but not being carried by the railway company as common carriers. Then, in the 92d section it is quite plain that the subject of this clause is carriages and goods belonging to the persons using the railway with their own carriages and paying tolls therefor, and that the language here is throughout quite in accordance with the language of the 90th section. The 93d section, I may mention in passing, clearly applies to tolls in the proper sense, and refers disputes concerning these tolls to the Sheriff or Justices. So, too, in the 94th section, which provides, that "If any difference arise between any toll-collector or other officer or servant of the company, and any owner of or person having the charge of any carriage passing or being upon the railway, or of any goods conveyed or to be conveyed by such carriage, respecting the weight, quantity, quality, or nature of such goods, such collector or other officer may lawfully detain such carriage or goods, and examine, weigh, gauge, or otherwise measure the same," and so forth. Now, taking all these clauses together, from the 88th to the 94th inclusive, I am of opinion that they all, without exception, refer to carriages with goods passing along the railway being the property of other persons than the railway company, and that the word "tolls" in all these clauses is used in its restricted sense as a toll taken for the passage of the carriage and goods along the railway.

The remedy given in the 90th section itself is a very intelligible and suitable remedy for an attempted evasion of the tolls. If persons passing along a road contrive to get off the road before the toll is paid, and so evade the toll-collector, the necessity for some summary remedy at once suggests itself. They ought to have paid the toll at the proper place appointed for its payment, and to the person placed there in charge to receive it, and we were reminded, not inappropriately, that there are remedies of the same kind for the evading of tolls on turnpike roads, and therefore it is quite intelligible that a clause of this kind should be introduced to give a summary and very stringent remedy for such an evasion of tolls. And it seems to me that the whole language of the 90th section is in harmony with that idea, and that none of the words used in that section can be naturally applied to a lien for the carriage of goods by the railway company acting as common carriers.

I have thus stated my view of the construction of the Act of Parliament without referring to any of the authorities which have been cited, but it would be improper to conclude my observations without mentioning these authorities. There was a case in this Division of the Court which was referred to by the Sheriff-substitute—the case of the North British Railway Company v. Carter—in which it was assumed that the 90th section does apply to charges for the carriage of goods by the railway company as common carriers, and there was no objection made on the part of the opposite party, the trustee in the sequestration, to such a construction of the section. Accordingly we assumed, in giving our judgment, that the 90th section would cover the case of charges for carriage. We did not give any effect to the lien claimed, because we thought it objectionable on other grounds, but we undoubtedly assumed in that case, without any argument or objection, that such was the construction of the 90th section. I need hardly say that we had not on that occasion thoroughly considered either the words of the 90th section itself, or the other aids to its interpretation to

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which I have now adverted, and therefore that cannot be taken to be a judgment on the question which is now before us. In the case of the Caledonian Railway Company v. Guild there is a judgment by Lord Shand on the construction of this clause, where he arrives at a result the opposite of that which I have stated, and I regret that I cannot concur with his Lordship in the very elaborate opinion which he there expresses. I see also there are some *obiter dicta* in the case of Peebles v. The Caledonian Company which give some countenance to the larger construction contended for by the railway company here, but these are *obiter dicta* only, and are certainly not binding upon us as authority.

There is thus, I think, no direct authority upon this question in Scotland; but there is a case of Wallis v. The London and North-Western Company, decided in the Court of Exchequer in England, which is a direct authority in support of the view I have just expressed. The case, as reported in the ordinary Law Reports, appears a case of much less authority than it really is, because upon that report the impression conveyed to one's mind is that the point was suggested by the Court in the course of the argument, and very summarily dealt with. But on looking at the much fuller report of the case in the Law Journal reports, it appears quite clear that the question as to the construction of the 97th section of the English Act, which corresponds to the 90th section of the Scotch Act, was raised and pleaded, and formed the subject of a distinct argument by counsel, and of a deliberate consideration by the Court; and there was there a unanimous judgment affirming that more limited construction of the word "tolls" in the 90th section, which I think is the true construction. I feel, therefore, much satisfaction in finding myself, in forming the opinion I have formed, supported by this direct and weighty authority.

I am of opinion, therefore, upon these grounds, and without going further, that this petition ought to have been refused by the Sheriff.

LORD DEAS.—I quite concur in the judgment of your Lordship, and in the grounds of it.

LORD ARDMILLAN and LORD MURE concurred.

THIS interlocutor was pronounced:—"Recall the interlocutors of the Sheriff-substitute and the Sheriff, dated respectively 12th March and 30th November 1875: Refuse the prayer of the petition, and decern: Find the respondent entitled to expenses, both in the inferior Court and in this Court," &c.

H. & A. INGLIS, W.S.—THOMAS CARMICHAEL, S.S.C.—Agents.

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GLASGOW CORPORATION GAS COMMISSIONERS, Appellants.—*M'Laren—Balfour.*
SOLICITOR OF INLAND REVENUE, Respondent.—*D.-F. Watson—Rutherfurd.*

Revenue—Statute 5 and 6 Vict. c. 35 (Property and Income-Tax Act, 1842), sec. 100, sch. D.—The Glasgow Corporation Gas Act, 1869, authorised the corporation to acquire certain gas-works, and to manufacture and sell gas to the inhabitants. The Act provided that the surplus revenue, after payment of annuities and interest of debt, should be applied to a sinking fund to reduce the debt, and to the general purposes of the corporation. *Held* that the corporation

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Observations on The Glasgow Corporation Water Commissioners v. Inland Revenue, *ante*, vol. ii. p. 708.

1st Division. B.

THE Glasgow Corporation Gas Commissioners appealed against an assessment made upon them under schedule D of the Income-Tax Acts for the year 1875-76 on the sum of £62,083, the alleged profits of the gas-works, and maintained that under the decision in the case of The Glasgow Corporation Water Commissioners v. Inland Revenue,[1] they were only assessable, under the Property and Income-Tax Act, 1842 (5 and 6 Vict. c. 35, sec. 100), for their annuities, interest on mortgages, and feu-duties, from which they were entitled to retain the tax on payment.

The following case was stated by the Glasgow Income-Tax Commissioners :—

"The facts are these: By 'The Glasgow Corporation Gas Act, 1869,' the Glasgow Gas Light Company and the City and Suburban Gas Company of Glasgow, with all their privileges, obligations, and liabilities, were transferred to and vested in the municipal corporation of the city.

"The corporation are authorised to supply gas to the city of Glasgow and suburbs. They are also required to pay the shareholders of the original companies perpetual annuities to the extent of £34,762, 10s., and in the event of there being any deficiency of funds to pay these annuities they are authorised to assess the occupiers of all lands and heritages situated within the parliamentary and municipal boundaries of the city of Glasgow at a rate not exceeding 6d. per pound on the real rent or yearly value of such lands and heritages.

"The corporation are also empowered to borrow money, not exceeding £1,000,000 sterling, on mortgage, for the purposes of their carrying the Act into execution. They are further required, by section 83 [quoted in the Lord President's opinion], to set apart as a sinking fund a sum not less than one per centum per annum on the amount borrowed, which fund is to be applied in the redemption of the mortgages or annuities, and must never be less than £2000. They are further empowered to manufacture and sell gas, gas-pipes, and lamps, and carry on such operations and business as are for the time being usually carried on by gas companies. The price charged by the corporation must not exceed 4s. 7d. per 1000 cubic feet."

Section 86 enacts—"The corporation shall apply all monies from time to time received by them under the powers of this Act (not being money borrowed, or money for the application of which provision is hereinbefore made) in manner and order following, and not otherwise—'First, In payment of the expenses of and incidental to the raising, levying, and recovering the rents, charges, and revenues, and the borrowing of monies under this Act. Secondly, In payment of the expenses of managing and maintaining the gas-works of the corporation. Thirdly, In payment of the Glasgow corporation gas annuities, and annuities to holders of funded debt, and interest of money borrowed under this Act. Fourthly, In carrying the several powers and provisions of this Act into execution, including any extension and improvement of the gas-works and mains, and may carry any balance thereof to the credit of the corporation for their general purposes.'

"In support of their preliminary objection the corporation stated— . . . . The corporation admit their liability to pay tax on the annuities, interest, and feu-duties; but they maintain that they are not liable for

[1] May 26, 1875, *ante*, vol. ii. p. 708.

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income-tax on any surplus after payment of the working expenditure, nor for the sinking fund (which in the case of the water company were found not to be assessable), as such an assessment would be practically one on means and substance.

"It was submitted that the case of the gas-works is substantially the same as that of the water-works, in which it has been found by the Court of Exchequer that there can be no profits in the sense of the Income-tax Acts. The expenses and revenue are intended to meet each other, and if there happen to be a surplus it is simply carried forward to aid in reducing the price of gas in the succeeding year.

"The charge for gas in this case is cost price as nearly as can be estimated, and is simply 'a district rate' imposed by the corporation upon themselves, and payable in proportion as they use the article. The object of the corporation in taking over the undertakings of the old gas companies was to save profits, and give the inhabitants gas at cost price. There are no profits belonging to any one for his patrimonial interest, and no individual is enriched by the exercise of the statutory powers of the corporation, who are merely gratuitous trustees for the general community; and though the corporation have power to apply the surplus to their general purposes they have never done so, and have refused to do it, any surplus being always carried to next year's account.

"It was argued on behalf of the Crown that in the case of the water-works the whole point was whether the monies collected by means of a compulsory general district rate, under the authority of an Act of Parliament, could be regarded as profit; and the Court held that they could not be so regarded, because the rate must be, and was, adjusted so as to cover the expense incident to the supply of water, and leave no surplus.

"In the case of the gas-works there is no obligation upon any householder in Glasgow to have pipes laid down to his house or to burn gas, and the amounts paid by those to whom gas is supplied are in no respect general or compulsory rates, but are payments made according to the quantity consumed, and in conformity with contracts between the consumer and corporation.

"It was further submitted that it is a commercial undertaking.

"By section 54 of the said Act of 1869 the Glasgow Corporation is 'empowered to manufacture, purchase, supply, sell, let, lay down, place, and maintain gas fittings, meters, pillars, pipes, lamp-posts, lamps, burners, and other articles and things connected with gas-works, or with the supply of gas for public or private consumption, in such manner as the corporation think proper, and generally may carry on such operations and business as are for the time being usually carried on by gas companies.'

"Again, they compete beyond the municipal boundaries with other gas companies, which are purely commercial undertakings, and sell their gas at the same price as the corporation do.

"Further, by the last part of section 86 of the said Act (quoted *supra*), the corporation are empowered to carry any balance or surplus to the credit of the corporation for their general purposes, clearly shewing that it is anticipated that profits will be realised; and these profits, when so realised, may be applied as part of the common good.

"No such powers and privileges as those conferred on the corporation by sections 54 and 86 of the Gas-Works Acts are contained in the Water-Works Acts, so that the two cases are not the same in principle, nor are they analogous.

"It was therefore maintained that the assessment was correct, and should be affirmed.

"The Commissioners, having considered the case, were of opinion that

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there was no difference in principle between the two cases; and, as the trust existed for the benefit of the community, they sustained the appeal, and restricted the assessment to the amount of the annuities, interest, and feu-duties—say £59,712.

"A case was then craved on behalf of the Crown for the opinion of the Court of Exchequer."

Lord Shand appointed the case to be heard before the First Division.

At advising,—

LORD PRESIDENT.—In this case the Income-Tax Commissioners say that they have not found any difference in principle between the present case and the case which we decided in regard to the water assessments in Glasgow. If I could agree in that opinion I should be very glad to confirm the decision of the commissioners; but the distinction between the two cases is, I think, very palpable, and essential for the purposes of this question. The Glasgow Corporation Act of 1869 empowered the magistrates and town-council—the corporation of Glasgow—to purchase the undertakings of the two companies which had been previously authorised by Act of Parliament to supply Glasgow with gas, and the 4th section of the statute transferred the whole property of these two companies to the municipal corporation.

The way in which the corporation were authorised to pay the price for this subject which they so acquired is provided by the 11th section of the statute, and it was by way of annuity to the shareholders in the former gas companies, corresponding to the value of the interest which they held in those companies. The corporation were then empowered to manufacture and sell gas to the inhabitants of Glasgow and suburbs, and the 83d section provided that there should be a sinking fund to pay off the debt which, of course, the corporation were obliged to incur, in the first instance, for the purpose of erecting works and setting the concern agoing. The provision is—"The corporation shall, after the expiration of two years from the passing of this Act, set apart as a sinking fund a sum not less than one per centum per annum on the amount borrowed under this Act, which sinking fund shall from time to time be invested in Government securities, and shall, with the accumulations thereof, be, together with the interest on the several amounts paid off, applied by the corporation to the redemption of mortgages or annuities, and not otherwise; provided that the said sinking fund shall not be less than £2000 in any one year."

Now, as regards the other clauses of the Act with respect to the conduct of this undertaking by the corporation, it is only necessary to add that they have no power to compel anybody to take their gas. On the contrary, it is quite optional for any of the inhabitants to buy their gas from the corporation or not as they think fit, and the corporation are put under a restriction as to the price which they are to charge for the gas by the maximum price of 4s. 7d. being allowed. Then, finally, the 86th section of the statute provides for the application of all monies that are to go into the gas corporation in the way of revenue—"The corporation shall apply all monies from time to time received by them under the powers of this Act (not being money borrowed or money for the application of which provision is hereinbefore made) in manner and order following, and not otherwise (namely), first, in payment of the expenses of and incidental to the raising, levying, and recovering the rents, charges, and revenues, and the borrowing of monies under the Act; secondly, in payment of the expenses of managing and maintaining the gas-works of the corporation; thirdly, in pay-

ment of the Glasgow corporation gas annuities and annuities to holders of funded debt, and interest of money borrowed under this Act; fourthly, in carrying the several powers and provisions of this Act into execution, including any extension and improvement of the gas-works and mains, and may carry any balance thereof to the credit of the corporation for their general purposes." The revenue of the corporation is applied in terms of this section in the first place in payment of the interest of mortgage debt, and in payment of the annuities; and there can be no doubt that income-tax is charged on that part of the revenue—not on this corporation, but on their creditors—the creditors on the mortgage debts and the holders of annuities—because the income-tax which is levied on the corporation, in the first instance, forms a deduction from the payment of these interests and annuities. But then the question has arisen, and it comes to this very narrow point, whether, if there be anything beyond that—if there be any revenue beyond what is applied in this way, or in maintaining the work, and which goes into the sinking fund in terms of the 83d section, or goes into the coffers of the corporation for their general purposes under the 86th section—that is or is not liable for income-tax. Now, I answer that question in the affirmative. It seems to me that the corporation of the city of Glasgow is by virtue of this statute empowered to enter into a speculation as traders in gas. No doubt, it may have been for the benefit of the community—that is perfectly true—but they have all the character and attributes of a trading company. They acquired the works for the purpose of manufacturing gas; they manufactured gas, and sold it to those who were willing to become buyers; but they cannot compel anybody to take it who is not willing to do so, and willing to do so at their price. They are empowered and authorised—nay, bound—to make provision for the paying off of the mortgage debt which they had incurred at the commencement of the concern; and after they have done that, whatever surplus there is belongs to the corporation for its general purposes—that is to say, goes simply into the common good of the corporation, which is, in other words, saying that the surplus belongs to this company—to this trading company—for its own uses and purposes. The distinction between this and the case which is relied on by the Income-Tax Commissioners is very clear. There never could be any surplus or balance of profit under the Water Trust Act, for this simple reason, that the statute made it imperative so to use every shilling of revenue that was levied under that statute, so far as it was not otherwise employed, as to reduce the rates paid by the ratepayers; and in that way there never could be any balance at all. There was no trading in the sense that, after paying the expenses and interest, the balance which was not otherwise appropriated was to be devoted to the special purpose in question. The further distinction which exists between the two cases is this—that by the Water Trust Act the commissioners thereby appointed were authorised to levy the assessment within a certain district, at a certain rate, according to the rental of the property within that district, and that they were to apply it for a public purpose; and all the monies raised by means of that assessment were devoted exclusively to that public purpose—to the public purpose defined by the statute itself. In this case there is no authority to levy a rate at all, and therefore the case belongs to a different category, because that rate which is authorised to be levied by the 42d section* of the statute is

* "It shall be lawful for the corporation, and they are hereby authorised and

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really nothing more than the creation of a security or guarantee for the annuitants, the shareholders of the companies—an arrangement for the benefit of the concern, in turning it to as profitable account as possible, in order to enable the corporation to continue to pay the annuity. That, however, is not to come into operation under ordinary circumstances, and forms no proper part of the scheme under which the corporation are to conduct the business of manufacturing and selling gas. I think the distinction in this way between the cases is so clear that it is needless to waste more words upon it. The portion of the revenue which goes into the sinking fund is just a part of the income of this trading corporation, which is used by them for paying off their debt, and the portion of it beyond that, which goes into the funds of the corporation for their general purposes, is also just something which they have gained in the way of profit or surplus revenue for corporate benefit; and it does not require that profits shall be for the benefit of individuals only in order to make them profits within the meaning of schedule D of the Income-tax Act. If they are for corporate benefit they are just as much profit within the meaning of the statute; and I have no hesitation in setting aside the decision of the commissioners, and sustaining the assessment.

Lord Deas.—I need not repeat what was said when the former case was before the Court, because the opinions have been referred to at length in the course of the argument. Your Lordship in the chair has explained the circumstances of the present case clearly, and I am of opinion that no grounds have been stated for distinguishing between the position in which the corporation now stands with reference to the sale of gas from the position formerly occupied by the two original gas companies. I entirely agree with your Lordship.

Lord Ardmillan.—I also am of the same opinion, and have little to add to what has already been said. I think there are two grounds on which the distinction of this case from the case of the water company rests. In the first place, in the mode of operation by which the funds come in. How do the funds come in? In the case of the water company the funds came in by an assessment over all the parties liable in a public assessment, and every person had to pay that assessment whether he consumed the water or not. But in the case of the supply of gas every person is not bound to take it in. The relation between the corporation and the ratepayers in regard to gas is the relation between a company or corporation selling and individuals purchasing. In regard to the mere use of the article, the water supplied by the water company was not in the same position as the gas. If a person chose not to use the water so supplied, having a supply in his back-green or elsewhere, he was not bound to use it; but he was

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required from time to time, in the event of there being any deficiency of funds for payment of the Glasgow corporation gas annuities, to assess and levy on and from the occupiers of all lands and heritages situate within the parliamentary and municipal boundaries of the city and royal burgh of Glasgow, an annual assessment, to be called the gas guarantee rate, not exceeding sixpence in the pound on the real rent or yearly value of such lands and heritages; . . . . . provided also that the said assessment shall be levied and applied only for the purpose of paying the Glasgow corporation gas annuities, and any interest which may be due thereon, and the expenses connected with the levying and applying of such assessment."

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bound to pay the assessment. But if he uses oil lamps in preference to the gas supplied by the corporation he may do so, and then he will be relieved from paying for the gas which the corporation manufacture. Therefore the distinction in the mode of operation as to the manner in which the funds are gathered is very obvious; but the other distinction is just as obvious. What is the ultimate result in administering the funds? In the case of the water-rate, the ultimate result led, by force of the statute, to a diminution in the water-rate. There is no such result in the case of the gas. The statute, after setting forth what may be done with the funds, ends by saying that the balance shall be carried to the credit of the corporation for their general purposes. I have no doubt these purposes are wise and beneficent purposes, but they are purposes within their own control, so far as this statute goes. I cannot see any ground for dealing with this company as other than a company choosing to sell to those who buy, and the profits they make, after complying with certain statutory regulations about the payment of debt, is property at their own disposal. The case of the water corporation is quite different, for a statute law came in and gave them statutory powers, and imperative statutory directions for the ultimate application of the fund for the benent of all assessed.

LORD MURE concurred.

THE COURT pronounced this interlocutor:—"Reverse the determination of the commissioners, and sustain the assessment to the full amount: Find the Commissioners of Inland Revenue entitled to costs, and remit," &c.

DAVID CROLE, Solicitor of Inland Revenue—CAMPBELL & SMITH, S.S.C.—Agents.

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June 21, 1876.
Naismith v. Cairnduff.

JAMES NAISMITH, Pursuer.—*D.-F. Watson—J. A. Crichton.*
JAMES WILSON CAIRNDUFF, Defender.—*Asher—J. P. B. Robertson.*

Superior and Vassal—Feu-Contract—Conditions—Minerals.—A feu-contract, in which the superior reserved the minerals, and bound himself to pay any damage caused to buildings by working them, contained a stipulation that the vassal should not erect any other building than cottages, to be used as dwelling-houses, with suitable office-houses. The vassal having built a house of two stories, *held* that the superior had a sufficient interest to enforce implement of the condition, and the vassal ordained to take down the house, in so far as it exceeded one square story and attics.

Superior and Vassal—Conditions—Plan.—A feu-contract provided that the buildings to be erected should consist of cottages, with suitable offices, "which cottages shall not exceed four in number, and shall be built on the sites shewn on the plan, and shall front the north, and shall each of them be in point of size and accommodation, as well as architectural character, at least equal to either of the two cottages which have been already erected." *Held* (*dub.* Lord Deas), in a question between the superior and vassal, that the feu-contract was not to be construed as restricting the vassal to the precise limits of the building sites shewn on the plan.

1ST DIVISION. Lord Rutherfurd Clark. B.

IN 1868 James Naismith granted a feu of 1 acre 1 rood and 30 poles of ground, lying in the parish of Bothwell, in Lanarkshire, to James W. Cairnduff. The feu-duty was £14, 7s. 6d. The feu-contract contained a clause reserving the minerals to the superior, with power to work the same, without entering upon or breaking the surface of the ground feued, and subject to the condition that Naismith and his successors should be bound to pay to the vassal all damage that might be done to the ground

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or the buildings to be erected thereon. The feu-contract also contained the following clauses:—"Declaring that the buildings to be erected on the foresaid plot or area of ground shall consist of cottages, with suitable offices, which cottages shall not exceed four in number, and shall be built on the sites shewn on the said plan or sketch, and shall front the north, and shall each of them be in point of size and accommodation, as well as architectural character, at least equal to either of the two cottages which have been already erected on the ground to the southward thereof, lately feued to the said William Henderson, and the outer walls of the said cottages, and also of any out-houses, coach-houses, stables, and offices to be erected on the ground hereby disponed, shall be built of stone and lime, and the said cottages and other buildings shall be covered with slates, and shall be erected at the distance of not less than 15 feet at all points from the west side of the said parish road; and the front and gable walls of the said cottages shall be of polished ashlar, or neatly dressed square rubble work: And the said James Wilson Cairnduff and his foresaids shall not be at liberty at any time to erect any buildings upon the said plot or area of ground other than the said four cottages, to be occupied as dwelling-houses, with suitable out-buildings or office-houses to be used and occupied in connection therewith."

The feu-contract had a plan or sketch of the ground endorsed, shewing, with four spaces marked red, the sites of cottages referred to in the charter.

Naismith had feued an adjoining piece of ground to a Mr Henderson in 1867, who had erected two cottages of one story and attics upon it.

Naismith brought the present action against Cairnduff, alleging that he was erecting, instead of a cottage, a double villa of two square stories in height, and upon a different site from that shewn on the plan. That a villa of this size was more likely to be injuriously affected by mining operations, and that the value of the pursuer's mineral property was in consequence depreciated.

The conclusions of the summons were, *inter alia*, for declarator "that the erecting by the defender of a double villa or dwelling-house of two square stories in height on any part of the said area of ground, or otherwise the erecting of such villa or dwelling-house on the site marked A B C D on the plan or sketch above-mentioned, is contrary to the conditions, declarations, and restrictions contained in the titles of the defender, and that the defender is not entitled to make such erection; and the defender ought and should, by decree foresaid, be interdicted from proceeding farther with such erection," and should be ordained "immediately to take down and remove the building already erected on the site above-mentioned; or otherwise to take down, alter, and remove the same, in so far as may be necessary to bring it into conformity with the declarations, conditions, and restrictions contained in the defender's titles, and, in particular, in so far as the said building is a double villa or dwelling-house, and also in so far as it exceeds in height one square story and attics; all at the sight of our said Lords, or of a man of skill to be appointed by them."

The defender admitted that the building he had erected was two stories in height, and contained two separate dwellings. He referred to the feu-contract, and the plan attached, as to the site of the buildings.

The pursuer pleaded;—(2) The dwelling-house which the defender is in course of erecting not being a cottage, and being in various other respects a violation of the contract of parties as embodied in the feu-contract and relative sketch or plan, the pursuer is entitled to interdict, and to have the same removed and taken down as and to the extent concluded for.

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The defender pleaded;—(1) The pursuer's statements are irrelevant. (3) The defender not having violated any of the conditions of his feu-right, is entitled to absolvitor; and, *separatim*, if there has been any departure from the conditions of the feu, the pursuer having sanctioned or acquiesced therein cannot now challenge the same.

After a proof the Lord Ordinary pronounced this interlocutor:—"Finds that the defender has violated the conditions of the feu-contract libelled by erecting a house which is not a cottage: To that extent finds, declares, and decerns in terms of the conclusions for declarator and interdict: Decerns and ordains the defender to take down the house erected, or in the course of being erected by him, in so far as it exceeds in height one square story and attics, and that at the sight of Mr John Baird, architect in Glasgow: Finds the pursuer entitled to expenses, of which allows an account," &c.*

The defender reclaimed, and argued;—What was meant by the feu-charter was that the defender should erect houses of at least the size of cottages—a cottage was the minimum which was to be erected. There was no restriction against there being more than a cottage. The object was to secure the feu-duty. The superior did not intend, by using the word "cottage," to restrict the vassal to a particular size of house. He had no interest to do so.[1]

The pursuer argued that the Lord Ordinary was right in the views expressed in his interlocutor and note.

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* "NOTE.—The buildings of the defender are objected to—1st, because they are not cottages; and 2d, because they are not erected on the sites specified in the plan referred to in the feu-contract.

"The defender did not maintain that the house which he was erecting was a 'cottage,' but he contended that there was no restriction on the character of the buildings, provided that they were used as dwelling-houses, and that even if there were, the pursuer had no interest to enforce it.

"The Lord Ordinary does not think that this answer is well founded. The feu-contract declares that the buildings to be erected on the feu 'shall be cottages;' and again, that the defender shall not be entitled to erect any buildings 'other than the said four cottages.' These provisions are so express that, in the opinion of the Lord Ordinary, they cannot be extended by construction in the manner which the defender proposes.

"The Lord Ordinary is also of opinion that the pursuer has sufficient interest to insist on the fulfilment of this condition, as the contravention of it might diminish the value of the minerals which are reserved to him.

"With respect to the sites, the case is more difficult; for though the defender is not entitled to erect any houses other than cottages, he is not prohibited from building larger cottages than those referred to in the feu-contract. His obligation is to build cottages as good as those already erected on Henderson's feu, and this implies that he may erect cottages which are larger and better. But this could not be done without occupying a larger area than that shewn on the plan as the site for building. Further, it is not easy to reconcile the restriction for which the pursuer contends with the provision that the cottages and other buildings shall be erected at a distance of not less than 15 feet from the west side of the parish road.

"Considering that the restrictions on the use of property must, in order to be effectual, be expressed in the clearest manner, and besides, that the pursuer has no apparent interest to object to the position on which the defender's house has been erected, the Lord Ordinary has not given effect to the objection stated by the pursuer with respect to the site."

[1] Campbell v. Clydesdale Bank, June 19, 1868, 6 Macph. 943, 40 Scot. Jur. 539; Alexander v. Stobo, March 3, 1871, 9 Macph. 599, 43 Scot. Jur. 311.

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LORD PRESIDENT.—There are two questions distinctly raised here, and both of them must be considered. One is, whether the defender, in building his houses on the ground feued under the feu-contract of 1868, is entitled to deviate from the areas marked red on the plan, as applicable to each of the cottages. Now, the provision in the feu-contract is that "the buildings to be erected on the foresaid plot or area of ground shall consist of cottages, with suitable offices, which cottages shall not exceed four in number, and shall be built on the sites shewn on the said plan or sketch, and shall front the north, and shall each of them be in point of size and accommodation, as well as architectural character, at least equal to either of the two cottages which have been already erected on the ground to the southward thereof, lately feued to the said William Henderson." Taking the clause as a whole, I am satisfied, with the Lord Ordinary, that it was not intended to restrict the feuar to the precise limits of the areas marked red. That would be too strict a reading of the contract. I do not think every deviation from the areas marked red would be a violation of the contract. If it was intended that there should not be any deviation it would have been reasonable to specify in the feu-contract the exact dimensions of the areas, which might have been ascertained by applying a pair of compasses to the plan. If the feuar was to be restricted to an area of 40 by 30 feet it should have been specially stipulated. On this point I agree with the Lord Ordinary in refusing to sustain this ground of action.

But I also agree with the Lord Ordinary that this house is a violation in style and size so far as regards height. I think that what was intended to be erected was four buildings of the nature of cottages, in the ordinary sense of the word, that is, single story houses. It does not exclude apartments in the roof. As many cottages have rooms with windows in the roof as not, whether they be cottages for labourers or of a more ornate character. I should not be disposed to exclude apartments in the roof. There is a very good example of the kind in the ground feued in 1867 to Mr Henderson, which shews windows in the roof. But the building which the defender has erected is a house of two stories. If you look at the back there is no possibility of denying that there are two stories. When you look at the front there are two windows which run up into the roof, but this is only for the purpose of ornamentation. The two windows which are not ornamental do not run up into the roof. I do not think that this building is a cottage.

The question comes to be, whether the superior is entitled to have the building pulled down so far as it exceeds the limits of a cottage. I have no doubt there were several objects which the superior had in view in making the stipulation he did. One was, to have so much building as would secure his feu-duty. Another was, to ensure that the buildings on this ground should be of the same character as the buildings in the neighbourhood, and that was for the benefit of the adjoining feus. But surely it is not out of the question to say that there is an additional reason to be found, and that is suggested by the fact that there are minerals in the district of a valuable kind. They are reserved to the superior, and he contemplates working or letting them. He undertakes to be responsible for any damage which may arise, and has therefore a most material interest to stipulate what buildings shall or shall not be erected on the ground. Surely the superior would have an obvious interest on the face of the feu-contract to prevent the erection of buildings or manufactories of a ponderous character. But is it not equally natural that a superior, in such a position, should desire to

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secure himself against the erection of buildings even of the nature of dwelling-houses. If a street of dwelling-houses three or four stories high were erected, the risk of damage would be greatly increased. Therefore he limits his feuar as to the buildings to be put on the ground. But first of all he stipulates for one cottage to be put down at once, which will secure his feu-duty, and then there are to be three more. These are to be at least as good as the cottages erected by Henderson. But he has a separate clause of prohibition, which is in these terms :—"And the said James Wilson Cairnduff and his foresaids shall not be at liberty at any time to erect any buildings upon the said plot or area of ground other than the said four cottages, to be occupied as dwelling-houses, with suitable out-buildings or office-houses to be used and occupied in connection therewith." It is said that there is no restriction as to the size of the out-buildings or offices. I think these must be suitable. If he were to build a coach-house of two stories he would be liable to an action similar to the present.

I think the defender was entitled to build a house of one story only, and therefore I have no hesitation in agreeing with the Lord Ordinary.

LORD DEAS.—The first question is, what kind of building is prohibited by this feu-contract? It bears to prohibit every kind of building except cottages. I can have no doubt that by a cottage was here meant a building of one story. As your Lordship has pointed out, there were two things to be provided for with reference to the buildings—one, that there might be a sufficient building to secure the feu-duty; the other, that the amenity of the feuing stances might be preserved. Plainly these two things were in the view of the superior. But it does not follow that there was not a third thing in view,—namely, that the superior should be able to work the minerals without being liable to pay ruinous damages. Any mining engineer who knew the district might be able to say whether coal existed in it. The superior reserves the minerals, and agrees to pay the surface damages which may be caused by working them. It is impossible to imagine a better reason for his wishing that the houses should neither be heavier nor more valuable than one-story houses. I am disposed to concede that the superior must have an interest in order to entitle him to enforce such a restriction. But I think he has here a clear interest, and I have therefore no hesitation in coming to the same conclusion with the Lord Ordinary.

I give no opinion on the other point, whether the vassal was bound to build exactly on the sites marked on the plan.

LORD ARDMILLAN.—I agree with the Lord Ordinary. This house is not the sort of house contemplated by the contract of feu, and it is not a cottage in the ordinary sense. I am glad to be assured on this point by referring to Richardson's Dictionary. The word "cottage" does not indeed occur in its proper place in the alphabetical order; but under the word "cote" or "cot" the word "cottage" is given, and these words are explained as "anything which covers, shelters, or protects the human or any other body, whether applied to a place for men to dwell or rest in, or for the shelter and protection of sheep, pigeons, or other animals,"—a very general description, but including a cottage.

Chaucer and Surrey are quoted as giving illustration of the word "cote." Spenser says—

> "But if to my cottage thou wilt resort,
> So as I can, I will thee comfort."

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Dryden says—

"But what plain fare her cottage did afford—
A hearty welcome at a humble board—
Was freely hers; and to supply the rest
An honest meaning and an open breast."

I cannot doubt that what is meant generally by the word "cottage" is a dwelling with a character of simplicity and humility. What was in this case meant was a house of one story; and the superior had an interest to make that a condition, as larger buildings might increase his responsibility for mineral workings.

LORD MURE concurred.

THE COURT adhered.

DEWAR & DEAS, W.S.—ALEXANDER MORISON, S.S.C.—Agents.

No. 141.
June 23, 1876.
Sneddon v. Mossend Iron Co.

ROBERT SNEDDON, Pursuer and Respondent.—*Fraser—Lorimer.*
MOSSEND IRON COMPANY, Defenders and Appellants.—*D.-F. Watson—Pearson.*

Master and Servant—Reparation—Culpa—Collaborateur.—*Held* that where a coalmaster had devolved the entire charge of a coal-pit upon a competent manager and competent subordinates he could not be made liable in damages for the death of a miner employed in the pit, alleged to have been caused by their fault.

Sheriff—Process—Closing Record—16 *and* 17 *Vict. c.* 80 (*Sheriff Court Act*, 1853), *sec.* 3.—*Observed* that a Sheriff, before closing a record on a summons and minute of defence, ought to hear parties, and ascertain that the grounds of action and defence are properly stated.

1ST DIVISION. Sheriff of Lanarkshire. M.

THIS action was raised in the Sheriff Court of Lanarkshire by Robert Sneddon, miner, against the Mossend Iron Company, and William Neilson, ironmaster, "the only known partner of that company."

The conclusions of the summons were for £500 of damages "as solatium for the loss, injury, and damage sustained by the pursuer through the gross carelessness and culpable neglect of duty of the defenders, or others for whom they are responsible, in having failed or neglected to make, or caused to be made secure the roof and sides of a travelling road and working place in a coal-pit situated at or near Bellshill aforesaid, commonly called No. 1 Orbiston Pit, belonging to the defenders, or of which they are lessees, and which was being wrought by them at the date aftermentioned, whereby, on or about the 11th day of August 1873, while the deceased John Sneddon, miner, residing in Bellshill, son of the pursuer, was engaged in the employment of the defenders as a miner in said coal-pit, at or near the place known as the Causeway Top, and at or near to a horizontal pivot-wheel at the top of an incline in said pit, on which pivot-wheel a chain works, by which loaded hutches of coal are let down and empty hutches drawn up the incline; and while the said John Sneddon was in the act of disconnecting an empty hutch from the said chain, or engaged in the execution of some other duty at or near thereto, the roof and sides of the said travelling road or working place, or part thereof, in which he was then engaged, or along which he was then proceeding, gave way and fell upon his person, whereby he was crushed to the ground and instantaneously killed."

The record was closed upon the summons and the following minute of defence:—"A denial that the falling of the roof or sides, whereby the pursuer's son, John Sneddon, was killed, was occasioned by *culpa* on the part of the defenders, or others for whom they are responsible, said fall

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having arisen either from some latent defect in the roof or sides or materials supporting the same, in respect of which the defenders were not responsible, or from the fault of the deceased himself, or of some one or more of his fellow-workmen."

A proof was allowed before answer. From the proof the following facts appeared:—There were two partners of the Mossend Iron Company, William and James Neilson. Neither of them took any personal supervision of the mining operations in the Orbiston Pit, but devolved these entirely on James Munro, as colliery manager, and his subordinates. On 11th August 1873, while the pursuer's son was engaged in the defenders' pit, a large stone fell from the roof of the place where he was working, and killed him. The accident arose from the supports of the roof being insufficient. It was further proved that the duty of providing for the support of the roof lay on the said manager, and John Gillies as oversman, and William Downie as roadsman, and that these persons were experienced and skilful persons, quite competent to the discharge of the duties committed to them, and were furnished by the defenders with all the requisite materials to enable them to discharge their duties.

The Sheriff-substitute (Clark) pronounced this interlocutor:—"Finds that, on or about the date libelled, the 11th August 1873, while the pursuer's son, the deceased John Sneddon, miner, was engaged in the employment of the defenders as a miner in their coal-pit known as No. 1 Orbiston Pit, and at or near the place known as the Causeway Top, and at or near a horizontal pivot-wheel at the top of an incline, the roof and sides of the place at which he was working gave way and fell upon his person, so that he was crushed to the ground, and killed, by and through the fault of the defenders, or of those for whom they are responsible: Therefore, and for the reasons assigned in the subjoined note, finds the defenders liable to the pursuer in damages, and assesses the same at the sum of £200 sterling, and decerns against the defenders for said sum accordingly: Finds the defenders liable to the pursuer in expenses; allows an account thereof," &c.*

* "NOTE.—From the evidence it would appear that on the occasion in question the pursuer's son was engaged at work at the defender's pit, when the roof and sides of the place where he stood suddenly gave way and fell upon him, crushing him so that his death resulted almost immediately after. At and prior to the occurrence the roof was not supported in a sufficient manner. The mere fact of the occurrence taking place is of itself *prima facie* evidence of this; because it is plain that when proper precautions are taken, the roof of a coal-working will not fall in, unless for the occurrence of some *damnum fatale*, which no one could foresee, or for some piece of gross impropriety on the part of the men at work. But, apart from this presumption, there are facts in the present case which sufficiently explain the falling in, and affix liability against the defenders.

"In the first place, the roof was not properly supported by being furnished with the proper appliances and gearing. . . .

"Secondly, the whole arrangements as to the construction and working of the wheel were unsatisfactory in the highest degree. . . . Now, it is important to notice that all these precautions against danger, which were so obvious and necessary in themselves, were afterwards supplemented and adopted by the defenders, but only after the pursuer's son had lost his life from their absence. After, and not before, this deplorable occurrence, the roof was supported by proper gearing, the wheel was removed to a more secure part of the workings, a brake was supplied, and a brakesman appointed.

"The defence amounts to a denial that the falling of the roof was occasioned by *culpa* on the part of the defenders; and a suggestion that it arose from some latent defect in the roof or sides, or materials supporting the same, for which

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Both parties having appealed, the Sheriff (Dickson) pronounced this interlocutor:—"For the reasons stated by the Sheriff-substitute, adheres to the judgment appealed against, except as to the sum at which the Sheriff-substitute has assessed the damages, and decree therefor, to which extent recalls the said judgment....: Assesses the said damages at £100 sterling, for which sum, with interest as libelled, decerns against the defenders."

The defenders appealed to the Court of Session, and argued;—Where a master had devolved the whole management upon a person thoroughly competent, and furnished him with proper subordinates and sufficient materials, he could not be liable to the workmen for injuries sustained through the fault of these persons. The only ground for a claim such as the present was personal fault on the part of the master, and there was no proof of that.[1]

Argued for the pursuer;—The master was bound to see that the pit was so constructed as to be safe. The *onus* lay on the defenders to shew that they instituted a proper system of working. There was a difference between the institution of a system and the carrying out of the system. The master was responsible for the former but not for the latter. Here there was a defective system, and for that the master was answerable.[2]

At advising,—

Lord President.—The summons in this case is founded on the allegation that the deceased was killed "through the gross carelessness and culpable neglect of duty of the defenders, or others for whom they are responsible, in having failed or neglected to make, or caused to be made secure, the roof and sides of a travelling road and working place in a coal-pit situated at or near Bellshill aforesaid, commonly called No. 1 Orbiston Pit, belonging to the defenders, or of which they are lessees, and which was being wrought by them at the date aftermentioned." That ground of action has been sustained by the interlocutor of the Sheriff-substitute, who finds, "that on or about the date libelled, the 11th August 1873, while the pursuer's son, the deceased John Sneddon, miner, was engaged in the employment of the defenders as a miner in their coal-pit known as No. 1 Orbiston Pit, and at or near the place known as the Causeway Top, and at or near a horizontal pivot-wheel at the top of an incline, the roof and sides of the place at which he was working gave way and fell upon his person, so that

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the defenders are not responsible, or from fault on the part of the deceased or of his fellow-workmen.

"The first observation that occurs on this defence is the very obvious one, that it is silent as to what the alleged latent defect was, and does not specify of what fault the deceased or his fellow-workmen were guilty. Upon all this the defence is a perfect blank. In the course of the proof, however, the defenders attempted to make out that the whole roof had been properly and efficiently geared at and prior to the accident." . . .

[1] Wilson v. Merry and Cunningham, May 31, 1867, 5 Macph. 807, 39 Scot. Jur. 426—in the House of Lords, May 29, 1868, 6 Macph. (H. L.), 84, 40 Scot. Jur. 486; O'Byrne v. Burn, July 8, 1854, 16 D. 1025, 26 Scot. Jur. 559; Bartonshill Coal Company v. Reid, June 17, 1868, 3 Macqueen, 266; Hall v. Johnston, Feb. 8, 1865, L. J., 34 Exch. 222; Wright v. Roxburgh and Morris, Feb. 26, 1864, 2 Macph. 748, 36 Scot. Jur. 371; Howells v. Landore Siemen's Steel Company, Nov. 4, 1874, L. R., 10 Q. B., 44; Lennan v. Addie and Miller, July 20, 1859 (decided June 19, 1857), 21 D. 1382.

[2] Weems v. Mathieson, Feb. 17, 1860, 4 Macqueen, 215; Dixon v. Rankin, Jan. 31, 1852, 14 D. 420, 24 Scot. Jur. 164; Leddy v. Gibson and Company, Jan. 18, 1873, 11 Macph. 304, 45 Scot. Jur. 212; Wyllie v. Caledonian Railway Company, Jan. 27, 1871, 9 Macph. 463, 43 Scot. Jur. 220.

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he was crushed to the ground, and killed, by and through the fault of the defenders, or of those for whom they are responsible." The direct personal fault of the defenders is not alleged by the pursuer, and there is no attempt made to prove it. Both the summons and the interlocutor of the Sheriff-substitute leave it uncertain by whose fault the accident took place. No doubt the interlocutor of the Sheriff-substitute says that the fault was committed by some one for whom the defenders are responsible. But I cannot find from the Sheriff-substitute's note who the person was he thinks was in fault. Yet he has arrived at the conclusion that the defenders are responsible for the fault of some one whom he does not specify. It is impossible to sustain such a judgment. The indirect responsibility of the defenders for some one else is not to be assumed in a case like the present, where the person injured is the servant of a company not personally superintending the business.

The Sheriff-substitute, and the Sheriff, who affirmed his judgment, have been misled by the manner in which the case was stated. The defenders ought to have distinctly stated that they were not responsible for the fault of any one in their employment, whether manager, oversman, or roadsman. If that had been stated the Sheriff-substitute and the Sheriff would have considered the case in a very different way.

When the appeal was stated to us it was quite obvious that the main question was one of law. Assuming that there was fault, and that the fault was committed by some one in charge of the pit, were the defenders responsible? If the case had been instituted in this Court we could not have proceeded until a new plea was added. But the 72d section of the Court of Session Act of 1868 gives us the following authority:—"The Court may, if necessary, order proof or additional proof to be taken in any appeal under this Act, such proof to be taken in the same manner as proof may be competently taken in any cause depending before the Inner-House, and shall thereafter, or without any such order (if no such proof or additional proof is necessary), give judgment on the merits of the cause according to the law truly applicable in the circumstances, although such law is not pleaded on the record; and the record may, with leave of the Court, be amended at any time, on such conditions as to the Court shall seem proper."

Following out this direction, we must look into the evidence to see on whom the fault lay, and whether the defenders are answerable for that fault. There is a little delicacy in affirming on the evidence before us that there was any fault at all. If there was any fault it lies between three persons—Munro, the manager; Gillies, the oversman; and Downie, the roadsman. The fault consisted in not properly supporting the roof. All these three had a duty of supporting the roof. The support of a roof requires to be attended to as the mine progresses. In the present case there was a dangerous roof which required a good deal of skill and energy to keep up. The delicacy in deciding the question of fault is that when this action has been dismissed, as I think it must be, it is quite possible that the pursuer may bring an action against these three men on account of personal fault. It would be embarrassing to have to decide such a case after having formed an opinion either that these men were or were not in fault. Of course a decision in the present case would not be *res judicata*. But it would be embarrassing that we should have already pronounced a judgment on the matter of fact. I therefore refrain from giving an opinion whether or not there was fault. One thing is clear, that if there was any fault it was fault in not supporting the

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roof, and the only persons responsible were these three—Munro, Gillies, or Downie, or one or more of them. The question of law is, assuming that there was fault, were the defenders responsible for that fault? It is not alleged that any one of them was unfit for his duties. On the contrary, there is evidence that Munro was a man of experience and skill, and that the two others were well acquainted with their duties. That being the case, I find it quite impossible to distinguish the present from the case of Wilson v. Merry and Cunningham. I am not referring to the *dicta* of the noble and learned Judges who decided that case. I am referring merely to our own decision, which was, that when persons in the position of the Mossend Iron Company here are not engaged personally in the supervision of a pit but employ other persons who are properly skilled in the supervision of the working of the pit, they are not responsible although an accident happen to one of the workmen which may result in his death. On that ground I arrive at the conclusion that the defenders are not responsible.

LORD DEAS.—I agree with your Lordship in thinking it not necessary for the decision of the present case to give any opinion whether fault has or has not been established on the part of the three persons your Lordship has named; although, if there was fault, it must, no doubt, have been that of one or more of these persons. One part of the evidence is unsatisfactory, viz., that which regards the matter of fact whether any part of the roof fell except the stone which killed the man whose death gave rise to the action. It has not been proved that anything else fell. And if that was the state of the fact, I should have wished to know whether a stone of this description was likely to be found in such a roof. The proper precautions for securing the roof would depend a good deal on this.

But in order to get to the question whether the masters were responsible, we must take the case on the assumption that there was fault on the part of those under them. The Mossend Iron Company carried on a variety of works under the supervision of skilled managers. It is not easy to see what more they could have done than to select these managers carefully. The partners could not have done the work themselves, nor could they be expected to have been upon the spot so as to have given instructions personally as to how it should be done. The probability is that they could not have done this so well as the skilled men who did so. It is not said that the manager would have had any difficulty in getting whatever materials he required, if he chose to ask for them. It is not indeed said what materials were necessary and were not used. The masters' duty was to furnish money to get the necessary materials, and it is not said that they failed to do so. In that state of facts, I have difficulty in distinguishing this case from the case of Merry and Cunningham. I think it would be a distinction without a difference. The record is very vague, and the question was not raised in the Sheriff Court. That may be important in a question of expenses, but cannot affect the judgment we are to pronounce on the merits, or the principles by which we are to be guided.

I am therefore constrained to agree with your Lordship.

LORD ARDMILLAN.—In this action of damages at the instance of Robert Sneddon, miner, near Bellshill, against the Mossend Iron Company, both Sheriffs have decided in favour of the pursuer. Differing only in regard to the amount of damages, the Sheriffs concur entirely in their view of the evidence and in their application of the law.

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The pursuer is the father of the late John Sneddon, miner, a young man of about twenty-three, who was unfortunately killed by the fall of a portion of the roof of the place where he was working in the defenders' coal-pit, and while in their employment. The father claims damages in respect that the death of his son was caused, as he alleges, by fault on the part of the defenders, or those for whom they are responsible. The accident happened on the 11th of August 1873, and this action was raised on the 4th of September 1874.

It does not appear necessary, in the view which we are taking of this case, to pronounce decidedly on the question of fact whether there was fault or not causing the accident in which the pursuer's son met his death. We must assume the fact of fault, because fault is alleged, and we are dealing with the relevancy.

Now, it appears on these averments that the defenders, partners of the Mossend Iron Company, though the employers of the man killed, were not present on the occasion; that they are not alleged to take personal charge of the pit-workings, or even of the furnishing of apparatus, or the direction of the system of working; and it is not alleged that the persons whom they appointed as manager, oversman, and roadsman were persons unfit or incompetent to discharge the duties committed to them. Such incompetency or unfitness has not been alleged. Under these circumstances, the question which arises in point of law is, whether, on the alleged facts, the defenders are liable in damages to the pursuer in respect that the death of his son was caused by the fault of one or more of the defenders' servants, including the manager, the oversman, and the roadsman employed by them?

It is of great importance, especially to the operative classes, that the true state of the law on this subject should be known. If the absence of redress in the form of damages tends to make them more cautious it may be of some service. The protection which the law affords to workmen in a coal-pit in such a case as this ought not to be matter of doubt, and ought to be seen clearly to be according to justice.

The law on the subject has in recent years been frequently considered, and the change in the law has been favourable to the employers. The redress afforded to workmen has been restricted and limited. The protection against responsibility on the part of the employers has been extended and strengthened.

In the case of an injury inflicted on a stranger, the master or employer has frequently been held responsible for the fault of his servant. The maxim *qui facit per alium facit per se* applies, and the master cannot in that case escape from responsibility because the act was not done by his own hand but by the hand of his servant. This has been repeatedly recognised as law. It is so stated by our institutional writers; it has been repeatedly so decided; and it is so laid down authoritatively by Lord Cranworth in the Bartonshill Coal Company v. Reid, and by the Lord Chancellor (Lord Cairns) in the case of Wilson v. Merry and Cunningham; and Lord Colonsay, in the same case, says,—"I hold it to be quite clear that the liability of a master for injury done by the fault or negligence of his servant falls to be dealt with on different principles where the sufferer is a stranger, and where the sufferer is a fellow-servant engaged in the same common employment."

This distinction must now be considered as quite settled. There is a series of decisions, some of which have been already alluded to, which leave no doubt on the subject. In the case of injury to a workman by the fault of a fellow-work-

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is meant by "others"? I know of no "others" for whom they are responsible. The defence is not very intelligible either. What is meant by their "denial that the falling of the roof or sides, whereby the pursuer's son John Sneddon was killed, was occasioned by *culpa* on the part of the defenders, or others for whom they are responsible"? Do they mean that there were others for whom they may be responsible? If the Sheriff had heard parties in explanation, it would have turned out, without the expense of a proof, that the fault lay with the manager, and then the question might have been decided on relevancy; and it is much to be regretted that this course was not taken. The expense would then have been trifling.

The other Judges concurred.

THE COURT pronounced this interlocutor:—"Recall the interlocutors of the Sheriff-substitute and the Sheriff, dated respectively the 4th August and 31st December 1875: Find in point of fact (1) that on or about the 11th August 1873, while the pursuer's (respondent's) son, the deceased John Sneddon, miner, was engaged in the employment of the defenders (appellants) as a miner in their coal-pit known as No. 1 Orbiston Pit, and at or near the place known as the Causeway Top, and at or near a horizontal pivot-wheel at the top of an incline, the roof and sides of the place at which he was working gave way and fell upon his person, so that he was crushed to the ground, and killed; (2) that the death of the said John Sneddon was caused by the support of the roof having proved insufficient; (3) that the defenders took no personal superintendence of the mining operations in the said pit, but devolved these entirely on James Munro as colliery manager, and his subordinates; (4) that the duty of providing for the support of the roof lay on the said manager, and John Gillies as oversman, and William Downie as roadsman; and (5) that these parties were experienced and skilful persons, quite competent to the discharge of the duties committed to them, and were furnished by the defenders with all the requisite materials to enable them to discharge their duties: Find in law that if the roof fell through the fault of the said James Munro, John Gillies, and William Downie, or any one or more of them, the defenders are not answerable for such fault: Therefore assoilzie the defenders from the conclusions of the summons, and decern: Find no expenses due to or by either party in the inferior Court, but find the appellants entitled to expenses in this Court: Allow an account thereof to be given in, and remit the same, when lodged, to the Auditor to tax and report."

P. H. CAMERON, S.S.C.—JOHN GILL, Solicitor.—Agents.

No. 142.
June 24, 1876.
Wardrope v. Duke of Hamilton.

JAMES WARDROPE, Pursuer and Respondent.—*Rhind.*
THE DUKE OF HAMILTON AND BRANDON, Defender.—*D.-F. Watson—Gloag.*
JAMES WOOD AND ANOTHER, Defenders and Appellants.—*J. P. B. Robertson.*

Process—Relevancy—Master and Servant.—A pursuer averred that the defenders W. and T., being in the service of the other defender H., and acting with his authority, or at least for his behoof, did on a turnpike road shoot at and kill the pursuer's dog, and wound the pursuer.

The pursuer proposed an issue—"Whether" W. and T., or one or other of

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them, acting in the employment of H., "wrongfully shot at the pursuer's dog, ... whereby the said dog was killed, and the pursuer wounded."

Held that there was no relevant averment inferring liability against H., and action against him *dismissed.*

Process—Record—Amendment—Improper statement.—A party allowed to amend his record by deleting impertinent and scandalous statements.

1st Division.
Sheriff of Lanarkshire.
M.

THIS was an action of damages in the Sheriff Court at Hamilton by James Wardrope, tailor, against the Duke of Hamilton and two of his gamekeepers. He averred—"The defenders—the one or other aiding, abetting, instructing, and acting on behalf of the other or others—at least the defenders James Wood and John Tait, being in the service of the other defender, His Grace the Duke of Hamilton, and acting with his authority, or at least for his behoof, along with another (whose name is at present unknown), the one aiding, abetting, and assisting the other, and both acting in concert and collusively, on or about 5th November 1875, and in, at, or near the turnpike road leading from Glasgow to Carlisle, about a mile distant from Stonehouse, county aforesaid, did fire at or in the direction of the pursuer and his greyhound bitch, known by the name of 'Dolly Varden,' all wrongously, illegally, wantonly, and maliciously, and did shoot and kill the said animal (which was of the value of £70 or thereby), and did shoot and wound the pursuer."

Separate defences were lodged for the Duke of Hamilton and for the gamekeepers.

The Duke pleaded;—Preliminary—(1) There being no sufficient averment that the present defender either did the acts complained of, or gave any instructions or authority to the other defenders to do them, the action, so far as directed against the present defender, is irrelevant. Merits—(2) The act complained of being, and being alleged to be, of a criminal character, the present defender cannot be made liable therefor, merely on the ground that the other defenders were in his employment as gamekeepers, or without proof of special instructions.

The Sheriff-substitute (Spens) pronounced this interlocutor:—"Sustains the preliminary plea stated for the Duke of Hamilton, in respect there are no averments stated relevant to infer liability as against him, and assoilzies him from the conclusions of the action: Finds him entitled to expenses," &c.: "*Quoad ultra*, repels the preliminary pleas stated for the defenders Wood and Tait, in respect it is averred that in their alleged actings, which resulted in the alleged injury to pursuer and death of the dog in question, they were acting in concert."

On appeal, the Sheriff (Dickson) pronounced this interlocutor:—"Adheres to the interlocutor appealed against, in so far as it repels the preliminary pleas for the defenders Wood and Tait; but with this addition, that the said pleas are reserved in so far as they may affect the merits: *Quoad ultra* recalls the said interlocutor, repels the pleas for the Duke of Hamilton in so far as preliminary, reserving them as above, and, before answer, allows to the pursuer a proof of his averments, and to the defenders a conjunct probation."

Wood and Tait appealed for jury trial to the Court of Session.

The pursuer proposed issues, the first relating to the gamekeepers. The second and third were—"(2) Whether, on or about the 5th day of November 1875, and on, at, or near the turnpike road leading from Glasgow to Carlisle, about a mile distant from Stonehouse, in the county of Lanark, the defenders, James Wood and John Tait, or one or other of them, acting in the employment of the defender, His Grace the Duke of Hamilton and Brandon, wrongfully shot at the pursuer's dog 'Dolly Varden,' whereby the said dog was killed, and the pursuer wounded, to the pursuer's loss,

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injury, and damage. (3) Whether, on or about the 5th day of November 1875, and on, at, or near the turnpike road leading from Glasgow to Carlisle, about a mile distant from Stonehouse, in the county of Lanark, the pursuer's dog 'Dolly Varden,' was killed, and the pursuer wounded, through the fault of the defenders His Grace the Duke of Hamilton and James Wood and John Tait, or one or more, and which of them, to the pursuer's loss, injury, and damage?"

The Duke objected to the second and third issues, on the ground that there was no averment on record that the keepers were acting under his instructions.

LORD PRESIDENT.—I desire to call attention to certain impertinent and scandalous statements appearing on the record, and we must consider whether it is not necessary to impose some penalty on the author.

The statements were—In the summons:—"And he having delayed prosecuting or enforcing his claims in order that the public prosecutor might do his duty and bring the criminals to justice, but in vain."

In the condescendence:—"It is true that the pursuer lodged information with the public prosecutor of the occurrence libelled, and that the form of apprehension and admitting to bail was gone through, and never afterwards followed out. The pursuer is a humble man, but to himself and his family his life was of some little consideration. The Duke of Hamilton's servants, it is presumed, were of more consideration."

The pursuer's counsel explained that the author of these statements was dead, and he was allowed to amend the record by deleting the passages.

LORD PRESIDENT.—Before adjusting these issues we must dispose of the first plea for the Duke of Hamilton, which the Sheriff has repelled. The question is whether there is an averment that in shooting the dog and injuring the pursuer these men were acting under the instructions and authority of the Duke. I cannot find such an averment. The only statement is that they were "in the service" of the Duke, and "acting with his authority or at least for his behoof," and that is construed by the second issue to bear that these persons "were acting in the employment" of the Duke. I am clearly of opinion that such a statement is not sufficient to infer liability against the Duke. Employment as a gamekeeper does not imply authority to shoot dogs, or do any other illegal act. Therefore I think the second and third issues must be disallowed.

LORD DEAS.—This is a criminal charge, and it would require very specific averments indeed against the master to make him liable for his servant.

LORD ARDMILLAN and LORD MURE concurred.

THIS interlocutor was pronounced:—"Disallow the second and third issues: Find that the pursuer has made no relevant averments to support the conclusions of the summons as against the defender, the Duke of Hamilton: Dismiss the action so far as directed against the said defender, and decern: Find the said defender entitled to expenses," &c.

GEORGE BEGG, S.S.C.—TODS, MURRAY, & JAMIESON, W.S.—BRUCE & KERR, W.S.—Agents.

JAMES JOHNSTON, Petitioner and Appellant.—*Begg.*
JOHN RAE AND OTHERS, Respondents.—*Burnet.*

No. 143.
June 24, 1876.
Johnston v. Rae.
Dean of Guild of Glasgow.
M.

Process—Appeal—Expenses.—An appeal against a judgment in the Dean of Guild Court of Glasgow was lodged in March, and the case was sent to the Short Roll, but had not been put out in the week's roll of cases for hearing. It would probably have been put out the following week, but the appellant lodged a note asking the Court to refuse the appeal. The respondent asked for a larger sum of expenses than £1, 1s., which was the usual sum allowed when an appellant departed from his appeal before the case was put out for hearing. The respondent stated that the papers had been sent to counsel in order to be ready for the hearing, as there had been another case between the parties, and it was necessary to decide whether papers which were produced in that process should be printed in the present appeal.

LORD PRESIDENT.—I think this is a special case hardly falling within the general rule. If instructions have been sent to counsel in the expectation of the case appearing in the roll, and this was done in good faith, I cannot help thinking that this appeal cannot be withdrawn without payment of expenses. There was nothing premature in the instructions. I am therefore for finding the respondents entitled to expenses.

The appellant then consented to expenses being modified.

THE COURT pronounced the following interlocutor:—"Dismiss the appeal, and decern: Find the appellant liable in expenses, which modify to £5, 5s."

MORTON, NEILSON, & SMART, W.S.—MACGREGOR & ROSS, S.S.C.—Agents.

GEORGE WILLIAM HUTTON RIDDELL, Pursuer.—*Adam—Kinnear.*
LORD POLWARTH AND OTHERS, Defenders.—*D.-F. Watson—Balfour—Rankine.*

No. 144.
June 24, 1876.
Riddell v. Lord Polwarth.

Entail—Statute 11 *and* 12 *Vict. cap* 36 (*Entail Amendment* (*Scotland*) *Act*, 1848), *sec.* 3—*Date of Entail—Mortis causa deed.*—In a question between the seller and purchaser of lands which had been disentailed, *held* (in conformity with the *ex parte* judgment of the First Division in petition Riddell, February 6, 1874), that an entail created by a *mortis causa* deed dated prior to 1st August 1848, which did not come into operation until the death of the granter after that date, was to be regarded as an entail dated prior to 1st August 1848.

(*Vide* Riddell, *ante*, vol. i. p. 462.)

2D DIVISION.
Lord Shand.
I.

In April 1873 Captain Riddell, heir of entail in possession of the estate of Muselie, executed an instrument of disentail of that estate, with the consent of his brothers, the three next heirs of entail living and of full age, under the 3d section of the 11th and 12th Vict. c. 36 (Rutherfurd Act). Thereafter he presented a petition to the Court of Session for warrant to record this instrument of disentail.

Captain Riddell's title to the estate was under two *mortis causa* deeds dated respectively February 5, 1836, and July 1, 1848, executed by the entailer, Charles Riddell of Muselie, who died on 11th December 1849.

The cause was reported by the Lord Ordinary (Shand) to the First Division, and on 6th February 1874 the Court held (Lord Deas *dis.*) that although the deeds creating the entail were *mortis causa* deeds, and the

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granter survived the 1st of August 1848, the date in the statute, the entail was one dated prior to 1st August 1848, and granted the prayer of the petition.

The deed of disentail having been recorded, Captain Riddell proceeded to divide the estate of Muselie into four lots, with a view to a sale. Lord Polwarth having purchased two portions of the entailed estate, a question was raised as to the validity of the disentail. Captain Riddell, accordingly, on 21st June 1875, raised an action of declarator and implement against Lord Polwarth, and also called as defenders for their interest his brothers and the nearest heirs called in the deeds.

Lord Polwarth lodged defences, and pleaded;—(3) The deeds under which the pursuer held the subjects at the date of the disentail proceedings, being *mortis causa* deeds, constituted a valid entail from the date only when they came into operation by the death of the granter; and this having occurred subsequent to 1st August 1848, the pursuer could not competently disentail the said subjects, and the instrument of disentail executed and recorded by him is null and void, and he still holds the subjects under the fetters of the said deeds. (4) The validity of the title offered by the pursuer being open to serious doubt, the defender is not bound to accept it.

On 20th July decree in absence was pronounced against the other defenders. At the suggestion of the Lord Ordinary, who proceeded on the authority of the case of Dunlop v. Crawford, Jan. 25, 1850, 11 D. 1062, and Jan. 25, 1850, 12 D. 518,[1] a supplementary summons calling all the heirs of entail in existence as defenders was executed, and on 4th January 1876 conjoined with the original action. On 27th January decree in absence was pronounced against all the defenders called in the supplementary summons, and on 1st February 1876 the Lord Ordinary found, decerned, and declared against Lord Polwarth in terms of the conclusions of the original summons.*

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[1] 21 Scot. Jur. 403, and 22 Scot. Jur. 154.

* "NOTE.—The answer to the defence stated in the first three pleas in law for the defender is, that the point raised has been decided—Petition Riddell, 6th February 1874 (1 Rettie, 462). That decision is not *res judicata* in a question with the defender, but it is a direct authority against the contention that the pursuer was not in a position to disentail the estates, and that the estates have not been validly disentailed. Even if the soundness of the decision were in my opinion doubtful, I should give effect to it, although pronounced in a proceeding *ex parte*. But the case was very carefully considered, and although one of the learned Judges differed, I see no reason to change the view I entertained in the application to disentail the estates, and which was adopted by the majority of the Court.

"It was further urged that the validity of the title is at least open to such doubt and risk of future objection that the defender is not bound to accept it, even if the Court should be of opinion that the doubt is not well founded, and reference was made to the case of the Duke of Devonshire v. Fletcher, June 19, 1874 (1 Rettie, 1056), and the other cases there mentioned in the opinion of Lord Ardmillan. That case was so special in its circumstances that it would be difficult, I think, to use it as an authority of general application. But however that may be, the present case differs from it and the other authorities referred to, in so far as the question said to raise a doubt in reference to the title has been expressly decided against the defender's view. This is a state of matters entirely different from any case which has hitherto occurred, in which a point of difficulty as to the title which the Court must consider and decide for the first time arises in the very litigation in which the question of the pursuer's liability to complete the contract of sale is raised. It appears to me that it cannot be properly represented that the question of validity of the title is

Lord Polwarth reclaimed. At advising,— No. 144.

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LORD JUSTICE-CLERK.—In this case I am of opinion that the Lord Ordinary's interlocutor should be adhered to. I do not think it necessary to go at any length into the reasons for this opinion, as they are entirely coincident with the detailed opinion given by the Lord President in his judgment in the petition, reported in 1 Rettie, p. 462.

I am of opinion that the word "dated" in the Act of 1848 means "bearing date," and, therefore, the date this deed bears is the date of the entail in the sense of the statute.

LORD NEAVES, LORD ORMIDALE, and LORD GIFFORD concurred.

THE COURT adhered.

JOHN ROMANES, S.S.C.—GEORGE BRUCE, W.S.—Agents.

WILLIAM HUME, Petitioner.—*Pearson.* No. 145.

THE DIRECTORS OF THE HIGHLAND PEAT FUEL COMPANY AND OTHERS, Respondents.—*Strachan.*

June 27, 1876. Hume v. Directors of Highland Peat Fuel Co.

Process—Expenses—Joint Stock Company.—In a petition for the winding up of a company and the appointment of a liquidator, an objection to the person proposed in the petition as liquidator should be stated by counsel verbally without lodging answers.

WILLIAM HUME, a creditor of the Highland Peat Fuel Company, presented a petition to the Court under the Companies Act, 1862, for the winding up of the company, and suggested the name of a liquidator. 1ST DIVISION. M.

The directors and certain creditors lodged answers, in which they did not oppose the prayer of the petition, but they objected to the liquidator proposed, and suggested another name.

The Court appointed a third person as liquidator.

Both parties craved payment of their taxed expenses out of the company estate.

The petitioner objected to the respondents' account, amounting to £24.

The Court pronounced an interlocutor appointing £55, 19s. 11d., the amount of the petitioner's expenses, to be paid out of the estate of the company, and, "as regards the account of expenses incurred by the respondents, the directors of the said company, and John Baxter and others, No. 109 of process, remit of new to the Auditor to tax the said account on the footing that the said respondents were not entitled to lodge answers for the purpose of stating their objection to the person proposed as liquidator in the petition, but were only entitled to appear by counsel on the calling of the petition and object verbally to the appointment of the person so proposed, and to report."

DOVE & LOCKHART, S.S.C.—G. C. BANKS, S.S.C.—Agents.

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doubtful, where, as here, there is a standing decision in a previous proceeding that the title is good; and on this point it cannot, I think, make any difference that the decision was in accordance with the view of a majority of the Judges only.

"Apart from this ground, which is, I think, sufficient to dispose of the defence, the case of Dunlop v. Crawford, 11 D. 1062 and 12 D. 518, seems to be a precedent directly in the pursuer's favour. In that case the Court gave an opportunity to all the persons called as heirs of entail to appear and oppose the sale of the property, and none of them having appeared, decree was given as concluded for. The pursuer having called all the heirs of entail, and taken decree against them, is in the same position as the pursuer in that case, and is entitled to decree unless the defender, who has appeared, can succeed in shewing that the title is bad."

No. 146.

June 27, 1876. Earl of Dalhousie's Trustees v. Earl of Dalhousie.

2D DIVISION. Lord Rutherfurd Clark. R.

THOMAS YOUNG AND OTHERS (Trustees of Fox, Earl of Dalhousie), Pursuers.—*Rutherfurd.*
GEORGE, EARL OF DALHOUSIE, Defender.—*Kinnear.*

Entail—Constitution of Improvement Debt.

THIS was an action of declarator raised in January 1874 by the late Earl of Dalhousie against Admiral Ramsay, now Earl of Dalhousie, for the purpose of constituting as a debt against the succeeding heirs of entail in the estates of Panmure and others three-fourths of certain sums which he had expended in the improvement of these estates. He died in July 1874 before decree was obtained, leaving a settlement dated December 1872, in which he conveyed to his trustees and executors his whole estate, heritable and moveable, and "in particular, all claims which shall be competent to me or my representatives at my death for entailed improvements on the estates of Panmure and Brechin."

His trustees and executors were sisted as pursuers in his room.

By the deed of entail of these estates it was provided that the late Earl, as institute, or any succeeding heir of entail, should be a creditor of the succeeding heirs for three-fourths of any sums expended in improvements of a certain kind, but it was declared that the executors of the person making such should have no right to repayment unless "he shall, by some probative writing under his hand, have expressly declared or signified his intention that a share of the improvement expenditure should form a charge against the succeeding heirs of entail."

Upon the narrative that questions might arise concerning the amount of the sums expended at a great distance of time, when the material witnesses might be dead, the deed of entail further provided that it should be lawful for the institute and each of the heirs of entail, after expending money on improvements, to bring, if so advised, an action of declarator before the Court of Session, or a process before the Sheriff, in which the next heir of entail should be called, in order to have the amount to be charged upon the entailed estate ascertained.

The defender contended that no probative writing, such as was required by the entail, had been executed by the late Earl; that a mere assignation of all claims competent did not shew the testator's intention that this particular debt should form a charge against the succeeding heirs of entail, and that in consequence the pursuers had no title to sue.

The Court held that the late Earl had by his settlement effectually signified his intention that his trustees should be creditors for the improvement debt which he was in the course of constituting, and repelled the defender's plea of no title.

GIBSON-CRAIG, DALZIEL & BRODIES, W.S.—MACKENZIE & KERMACK, W.S.—Agents.

No. 147.

June 28, 1876. Lockyer v. Ferryman, &c.

EDMUND BEATTY LOCKYER, Pursuer.—*Fraser—Campbell Smith.*
AUGUSTUS HAMILTON FERRYMAN AND OTHERS (Sinclair's Trustees), Defenders.—*D.-F. Watson—Kinnear.*

Process—Res Judicata—Canon Law—Consistorial Cause.—The rule of the canon law that decrees against marriage do not pass *in rem judicatam* was not adopted by, and forms no part of, the law of Scotland.

Process—Res Judicata—Summons.—A raised an action of declarator of marriage, and in the summons, as originally framed, laid his case on *de præsenti* acknowledgment. Afterwards, in revising the condescendence, he added an averment of promise *subsequente copula.* In the course of the action an interlocutor

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was pronounced expressly allowing him an opportunity of proving the alleged *copula*, but he adduced no evidence. Decree of absolvitor was pronounced. A, after an interval of thirty years, raised another action of declarator of marriage against the representatives of the former defender, who had died, and specially averred *copula* in his condescendence. *Held* that this action was barred *exceptione rei judicatæ*, the grounds of action having been disposed of in the former case.

Process—Consistorial Cause.—Opinions, that the Instruction to Commissaries of 1563 as to the finality of decrees in the Commissary Courts after the expiry of a year and day did not obtain with respect to decrees of the Court of Session in causes the jurisdiction in which had been transferred from the Commissaries to that Court.

2D DIVISION. Ld. Craighill. I.

(*Vide* A B v. C D, June 14, 1844, 6 D. 1148, 16 Scot. Jur. 500; and Lockyer v. Sinclair, March 3, 1846, 8 D. 582, 18 Scot. Jur. 290.)

In 1842 Mr Lockyer raised an action of declarator of marriage in the Court of Session against Miss Sinclair of Freswick, and after sundry procedure the Lord Ordinary (Cuninghame), on 17th July 1845, pronounced an interlocutor assoilzieing the defender. This interlocutor was reclaimed against by the pursuer, and on 3d March 1846 the Second Division adhered to the Lord Ordinary's interlocutor.

The pursuer appealed against these interlocutors to the House of Lords, but owing, as he alleged, to the failure of his agent to lodge the appeal case in due time, the appeal was dismissed.

Miss Sinclair died in June 1870, leaving a trust-disposition and deed of settlement in favour of certain trustees, who accepted of the trust, and proceeded to administer her estate.

Mr Lockyer, on 9th August 1875, raised this action against Mr Ferryman, the beneficiary under Miss Sinclair's trust-deed, and her trustees, and concluded (1) for declarator that he and Miss Sinclair were married persons; (2) for decree of reduction of the various interlocutors pronounced in the course of the former action, and of the extract decree following thereon; (3) for decree of reduction of Miss Sinclair's trust-deed, and certain other deeds following on and relative thereto; and (4) for a decerniture on the defenders to convey and make over the whole of the late Miss Sinclair's means and estate, heritable and moveable, to him.

The pursuer's averments in support of the conclusion for declarator of marriage were substantially the same as those contained in the former action, viz. that the marriage was constituted by the parties signing a marriage-contract, and exchanging holograph acknowledgments of each other as husband and wife, which it was contended were intended to be evidence of *de præsenti* matrimonial consent, and constituted *ipsum matrimonium*. Alternatively, it was averred that the marriage had been constituted by *copula* following upon promises contained in the marriage-contract, and given at other times. The pursuer averred that in the former "declarator of marriage the pursuer's case was, so far as regarded the conclusions of the summons, based upon the foresaid marriage-contract and the acknowledgments or declarations of marriage, dated the 29th August 1839, and upon these documents exclusively. There was no averment of consummation of the marriage by *copula* made in the summons. An averment of consummation was subsequently introduced into the revised condescendence; but promises of marriage followed by consummation did not form one of the grounds of action, and the pursuer's case was not originally, and never at any time, rested upon it."

The pursuer also averred that, although a proof before answer of his averments on record was allowed him in that action, owing to short-

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In support of the conclusions for reduction the following averments were made:—(Cond. 21) "As before mentioned, the sole evidence adduced by the defender, the said Janet Sinclair or Lockyer, against the pursuer in the said declarator of marriage, was that of Maria Sinclair and Jane Sinclair, and the Court, in construing the said contract of marriage and the said acknowledgments, and the whole attendant circumstances, proceeded upon the evidence of these said witnesses; but the pursuer has ascertained, and now avers and offers to prove, that both of the said witnesses committed wilful and corrupt perjury throughout the course of their evidence, and in particular portions thereof bearing directly upon the construing of the said contract and acknowledgments, destroying the same by explaining them away; that is to say, in the whole substance of their evidence, in so far as it was material and relevant, and in so far as it formed a ground for the judgment of the Court, both in the Outer and Inner Houses, they were suborned to commit perjury by the said Janet Sinclair or Lockyer, and in all the matters hereinafter detailed wherein they committed perjury they acted in concert with her."

Then followed detailed passages from the evidence of these two witnesses—the aunt and sister of Miss Sinclair, both of whom had since died—which the pursuer alleged contained untruths, knowingly sworn to by these witnesses.

The averments as to conspiracy, &c. were,—(Cond. 35) "The decree of the Court in the previous action, in regard to the pursuer's marriage, in so far as it proceeded upon oral testimony, was procured by conspiracy, fraud, perjury, and subornation of perjury. The defender, Janet Sinclair, conspired with her sister, Jane Sinclair, and her aunt, Maria Sinclair, who were examined as witnesses, to swear to facts and circumstances tending to shew that no marriage had been contracted between the pursuer and the said Janet Sinclair or Lockyer. In carrying out this conspiracy they swore falsely, in the knowledge that it was false, to many particulars, some of the chief of which are above set forth, and it was well known to the said Janet Sinclair or Lockyer, who lived with them, brought them to give evidence, and consulted with them day by day about the evidence which they were to give, and which they had given, that what they deponed to was false. The said Janet Sinclair or Lockyer repeatedly, previous to her death, confessed to various persons that she had led her sister and aunt Maria to swear falsely, and she greatly blamed herself particularly for having led her sister to do so, but her aunt, she said, ought to have known better than have so allowed her; and she, the said Janet Sinclair or Lockyer, expressed great contrition therefor. The proof lasted for months, and in the course of it she had ample opportunity to suborn the said witnesses, and she availed herself of her opportunities, by holding repeated, and indeed daily communings with them, for the purpose of fabricating evidence, and inducing them to testify contrary to the truth. Every parole statement which implied that there had been no marriage was a false statement; the whole material depositions of the said witnesses were false, and were procured through subornation of perjury, which was practised by the said Janet Sinclair or Lockyer."

It was further averred that at the date of the proof in the previous action it had been impossible for the pursuer to procure witnesses to prove the consummation of the marriage, as the servants of the family had been bribed and put out of the way, and that it was only after the death of Miss Sinclair and one of her uncles that such evidence had been obtainable. The following averment was made as to one of these wit-

nesses :—"The principal witness of the pursuer's marriage was the said James Olson, now deceased, and previous to his death, when in declining health, he revealed the knowledge which he possessed to many persons, and expressed great indignation and horror at the conduct of the Sinclairs, and fear and shame of his own concern with it, and thereby incited others to follow his example in revealing the facts of the pursuer's marriage. To his intimate friends he stated that he had received from Janet Sinclair or Lockyer and her relatives several hundreds of pounds to go out of the way and keep quiet so long as the proof lasted, in order that the pursuer might not have the benefit of his evidence."

There was also an allegation that fresh witnesses had been discovered who would depone in favour of the pursuer's case.

Mr Ferryman and Miss Sinclair's trustees defended the action. In their defences they narrated the conclusion in the previous action, and the averments of sexual intercourse contained in the revised condescendence (Cond. 16) annexed to the summons in that action, and the plea in law founded thereon. They also quoted an interlocutor of the Lord Ordinary, on 18th July 1843, in the following terms :—"Before answer, allows the pursuer a proof of his averments, and to the defender a conjunct probation, with this explanation, that the pursuer, before leading any evidence to establish the allegation of *copula* in London under the 16th article, shall be bound to furnish the defender's agent with a specific note setting forth the time and place of the act said to have been done in London." This passage from the final interlocutor of the Lord Ordinary, of 17th July 1845, was also quoted :—"Finds that the pursuer has totally failed to prove that any consummation of the said intended marriage ever took place, as alleged in the libel and record, and on the whole matter sustains the defences, and assoilzies the defender from this action." As also this finding in the interlocutor of the Second Division of 3d March 1846 :—"Finds that the pursuer, by his counsel at the bar, did not insist in the prayer of his reclaiming note, in so far as it prays for an alteration of any of the other findings in the interlocutor of the Lord Ordinary than those on the merits of the declarator, and therefore to that extent refuse the prayer of the reclaiming note : Find that in stating his case on the merits of the declarator the pursuer, by his counsel at the bar, expressly admitted that he did not now insist, as any part of his case, in the averment that consummation of the alleged marriage between him and the defender, by conjugal intercourse, had ever taken place, and that he did not mean to represent any part of the proof as intended to prove the same even indirectly."*

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* The pursuer's answer to this passage was as follows :—"With regard to the alleged admissions of counsel founded upon in it, the pursuer has no knowledge whatever, except that he never gave any counsel authority to admit that consummation had not taken place. He believes that his counsel admitted no more than that consummation was no part of the case which they were then pleading, it never having been made so by competent averment in the original summons, and no proof being led, or being capable of being competently led, in support of it. The admissions of counsel were never intended to do, and did not do, more than explain the limits of their argument, otherwise they would have been reduced to writing, and made part of the records of the Court. The pursuer was not present at the debate in the Inner-House. The pursuer believes and avers that his counsel rested his case entirely on the written documents as being evidence of *ipsum matrimonium*. All his counsel, from first to last, objected to make consummation any part of the case, because it was unnecessary, and because it appeared to them to be uselessly prejudicial to the defender's character, and therefore to the pursuer himself, she being his wife. What are, or may

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Pleaded for the pursuer, in addition to the pleas in support of the conclusion for declarator of marriage;—3. The decrees ought to be reduced, in respect that they were obtained by and through the fraud of the late Janet Sinclair or Lockyer and others. 4. The said decrees ought to be reduced, in respect that they were obtained and pronounced upon the evidence of witnesses who gave false evidence wilfully, and who were suborned to commit perjury by the said Janet Sinclair or Lockyer and others. 5. New evidence being now available to the pursuer not at the date of the previous action known to exist, or not procurable, and sufficient to prove the existence of his marriage, he is entitled to sue and obtain decree in the present action of declarator. 6. The trust-disposition and deed of settlement executed by the said Janet Sinclair or Lockyer ought to be reduced and set aside, as (1) she was a married woman at the time, and executed the said deed without her husband's consent, and (2) had by her previous contract of marriage effectually conveyed to her husband, in the event of his survivance without issue, all right and title to the subjects and others conveyed by the said trust-disposition. 8. The decree in the former action having been obtained by the defender therein by fraud and subornation of perjury, the pursuer is entitled to reduce the same, notwithstanding the expiry of year and day from date thereof. 9. The plea of *res judicata* stated against the present action is untenable, because the decree was obtained by the defender in the former action (1) by subornation of perjury; and (2) because the matters of fact alleged in the present action have been emergent since the said decree, and have come to the pursuer's knowledge thereafter; and (3) because the present action is founded upon different *media concludendi* from those proponed in the former action.

Pleaded for the defenders;—1. The defenders are not bound to satisfy the production, and the action ought to be dismissed, in respect that this action was not raised, and that no action of reduction of the said decree of absolvitor was raised, within year and day of the date of the decree. 4. The pursuer's statements are not relevant or sufficient in law to support the conclusions of the summons. 5. The action is excluded *exceptione rei judicatæ*. 6. The action is also excluded by *mora*, taciturnity, and acquiescence.

On 15th February 1876 the Lord Ordinary pronounced this interlocutor:—"In the first place, Finds that the alleged marriage betwixt the pursuer and the now deceased Miss Janet Sinclair Traill Sinclair, sought to be declared in the present action, was the subject of a former action of declarator against her at the instance of the pursuer; that both the grounds on which the declaratory conclusion of the present action is rested—that is to say, the interchange of matrimonial consent *de præsenti* and promise *subsequente copula*—were grounds set forth on record, and upon which parties joined issue in the former action; and that from this last mentioned action the said Janet Sinclair Traill Sinclair was assoilzied by the sentence or decree set forth on the record in the present action: Therefore sustains the fifth plea in law for the defenders in the present action. In the second place, Finds that more than year and day has elapsed since the said sentence or decree of absolvitor was given or pro-

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seem to be, set forth as admissions on the part of the pursuer were not made in point of fact, and the statement that they were so made in the interlocutor was entirely unwarranted by anything which the pursuer's counsel said. The pursuer was not asked, nor was his counsel, to give in any minute of admissions, and the case was left for the decision of the Court solely upon the evidence in process."

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nounced, and consequently that, by virtue of the Instructions to Commissaries, A.D. 1563 (art. 20), and the relative Act of Ratification, 1592, c. 64, reduction of said sentence or decree is now excluded: Therefore sustains the first plea in law for the defenders in the present action. In the third place, and *separatim*, Finds that the pursuer's statements on record are not relevant or sufficient in law to support the reductive conclusion of the summons in the present action, by which the pursuer seeks to have the said sentence or decree of absolvitor reduced: Therefore sustains the fourth plea in law for the present defenders. And in the fourth place, Finds that the pursuer's title to challenge the trust-disposition and settlement of the said deceased Miss Janet Sinclair Traill Sinclair, and relative writs specified in the summons, is based on the contingency of his success in the conclusion for declarator of marriage, and that it cannot be sustained, seeing the defenders are now to be assoilzied: Therefore sustains the third plea in law for the defenders in the present action. For these reasons, assoilzies the defenders *simpliciter* from the haill conclusions of the summons, and decerns: Finds the pursuer entitled to the expenses of discussing the preliminary defences, and modifies these expenses to the sum of ten guineas: *Quoad ultra*, finds the defenders entitled to the other expenses of process: Allows an account of these expenses, in which credit shall be given to the pursuer for the said ten guineas, to be lodged by the defenders, and remits," &c.*

* "NOTE.—This action has been raised by Mr Lockyer, the pursuer, against the defenders, the testamentary trustees of the late Miss Sinclair of Freswick, to have declared a marriage betwixt him and Miss Sinclair, and to vindicate rights which, on the assumption of the alleged marriage, are said to belong to the pursuer, as the survivor of the spouses. The fact is, however, that this same marriage, upon the reality of which the pursuer still insists, was the subject of an action of declarator raised more than thirty years ago by the pursuer against Miss Sinclair herself, and from which, after issue had been joined and proof led, she was assoilzied. For more than twenty years this judgment was considered to be decisive, but the time came when Miss Sinclair died. The idea of a new attempt to make out what formerly could not be established then occurred to the pursuer, and the result was the institution last autumn of the present action. These particulars explain why it is that this summons contains not only a declaratory, but reductive conclusions. Before the pursuer can render available both grounds upon which the conclusion of declarator is laid, assuming that he can succeed in either, he must set aside the decree of absolvitor in favour of Miss Sinclair formerly pronounced. Hence that decree is now challenged. The testamentary disposition executed by Miss Sinclair, in the belief that she was a single woman, and left at her death for the regulation of her succession, is also challenged, and the ground on which it is impugned is, that it is, as is said, inconsistent with rights to which the pursuer may lay claim, should the alleged marriage be declared. But as to this last conclusion nothing requires to be said in addition to this explanation. It is based on an assumption which, as the Lord Ordinary thinks, cannot be realised, and so it falls, because there is not in the pursuer a title on which it can be maintained.

"I. The first of the pleas of parties which it is necessary to consider is the defenders' fifth plea, which is, that 'the action is excluded *exceptione rei judicatæ*.' The defenders under this plea contend not merely that the conclusion for declarator now insisted in is the same as that from which in the former action Miss Sinclair was assoilzied, but that both the grounds on which that condescendence is now rested were grounds also to be found in the former action. These grounds are (1) the interchange of matrimonial consent *de præsenti*, and (2) promise, followed by *copula*. The pursuer admits that the first of these grounds was in the first action; the second, he contends, was not in that cause a ground of action. The consequence is, that, before the comprehension or sweep of the defenders' pleas can be ascertained, it is necessary to determine whether

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The pursuer reclaimed.

Argued for him;—

I. This action was not excluded by the exception *rei judicatæ*, for two

promise *cum copula* was or was not within the former action. Two things which must be considered in disposing of this action are uncontested. The pursuer, on the one hand, admits that promise *cum copula* was on the record. The defenders, on the other hand, admit that it was not disclosed in the summons. If, therefore, its appearance in the summons was essential, it cannot be held that both the grounds on which the present declaratory conclusion is based were in the other action, in the technical acceptation of that expression, while the opposite view leads as certainly to the opposite conclusion. The Lord Ordinary thinks that the appearance of the averment and the relative plea on the record was, in the circumstances, all that was required. That the introduction of the new ground, as leave to amend the summons had neither been asked nor given, might have been opposed, and probably with success, by the defender, may be allowed. But what the pursuer did was not opposed. On the contrary, it was acquiesced in. Parties consequently joined issue upon all that was in the record, and of all, so far as averments were concerned, a proof was allowed. This, in the opinion of the Lord Ordinary, is sufficient to bar the pursuer from pleading the alleged incompetency of the procedure by which the grounds of action were enlarged. He might have benefited, and undoubtedly he hoped to benefit, by the change, and he exposed his adversary to a new hazard. The consequence is, that, as he took the advantage at the time, he must be content to bear now the concomitant disadvantage of the course which he pursued.

"The pursuer seeks to avoid this result by urging (1) that the proof which was allowed was not led, and (2) that the new ground of action was not in the end made a ground of judgment. On the first of these considerations all that the Lord Ordinary will say is, that the opportunity for adducing evidence was afforded, and his failure to improve it cannot circumscribe the area which his proof, had it been led, might have covered. As to the second, if the promise *cum copula* was on the record upon which issue was joined, the accident that the case was so presented in the end by the pursuer as to leave only the alleged interchange of matrimonial consent *de præsenti* for judicial determination, does not limit the comprehension or the effect of the decree of absolvitor which was pronounced.

"Dallas v. Mann, 14th June 1853, 15 D. 746, was referred to by the pursuer as an authority by which he was supported in the contention now under consideration. The Lord Ordinary, however, thinks it inapplicable to the circumstances of the present case. There, all questions in the original cause were still open, and the position of parties with reference to the point now raised was the antithesis of that which the pursuer and defenders now occupy. In Dallas v. Mann the objection to competency was not raised by the pursuer. On the contrary, after being suggested by the Court, it was adopted by the defender, and thereby became his objection. The personal bar here existing was therefore not raised, and consequently the Court was left free to dispose of the point in the way in which it was decided.

"II. But, assuming that the plea of *res judicata* is valid, with reference not to one merely, but to both grounds on which the alleged marriage is now sought to be declared, the sentence or decree relied on may nevertheless be impugned. Even decrees *in foro* may be reduced, and the next question is, whether that by which Miss Sinclair was assoilzied can in the present action be impeached? The defenders plead that it cannot, because, as set forth in their first plea, more than year and day has elapsed since the decree was given, and in their fourth plea that 'the statements of the pursuer are not relevant or sufficient in law to support the conclusions of the summons.' These questions will now be considered.

"In the first place, is the first of these pleas of the defenders well founded? The pursuer says it is not, and he so contends, because, as he says, there is no finality in a judgment finding against a marriage. The favour to marriage in his view is so great that any number of opportunities of proving it, whatever

reasons: 1st, by the rule of the canon law—which had been adopted into the law of Scotland—*sententia lata contra matrimonium nunquam transit* in rem judicatam—the interval between them, may be allowed. This is rather a startling doctrine. It seems strange, and though many strange things are true, this, the Lord Ordinary thinks, is not one of the number. The most anomalous results might flow from its recognition. What would have happened had Miss Sinclair married after being assoilzied, and been the mother of children? Would this marriage have been a nullity, and her children declared bastards? This result would be a serious commentary on a doctrine whose only claim to recognition is that it favours marriage. The canonists are said to sanction it, and there seems to be authority for this, and perhaps for something more, in the opinion of Lord Medwyn, to be found in the report Norris v. Gilchrist, 14th January 1847, 9 D. 466. The passage referred to is at p. 483. Lord Medwyn undoubtedly is in such a question to be regarded with great respect, but his authority is not conclusive. Be it that the rule of the canon law was what he represents, by what is it proved that this rule is now the law of Scotland? *Res judicata* is, as the Lord Ordinary understands, a plea for which foundation may be afforded by decrees as well in consistorial as in other actions. Nor is there any distinction betwixt decrees declaring a marriage and those by which an alleged marriage is negatived. One rule applies to all classes of actions, and to all judgments, whatever their effects on the pretensions either of pursuer or of defender. Menzies v. Menzies, 14 S. p. 47, is warrant for this proposition, and the judgment in Longworth v. Yelverton, 10th March 1865, 3 Macph. p. 601, and H. of L. 30th July 1867, 5 Macph. p. 144, particularly when read in the light of the opinions delivered, cannot be reconciled with the idea that a sentence assoilzieing a defender from a conclusion by which an alleged marriage is sought to be declared is one in aid of which, when impugned, the plea of *res judicata* may not by the law of Scotland be invoked and sustained.

"Putting aside, then, the doctrine that there is no finality for a judgment of absolvitor from an action of declarator of marriage, what has next to be considered is, whether year and day is the period within which a challenge of such sentence as that by which Miss Sinclair was assoilzied must be instituted. This also was the subject of a very learned argument. The practice prior to the Reformation, and that by which the Reformation was followed in the Consistorial Courts, were referred to for the purpose of suggesting that the Instructions to Commissaries given in 1563 did not apply to such a judgment as that challenged. These Instructions (par. 20) will be found in Balfour's Practicks, p. 659, and the Act of 1592, c. 64, by which these were confirmed, at p. 676 of the same work. The Lord Ordinary thinks it unnecessary to say more upon this point than that it has been settled by the decision in Menzies v. Menzies, 21st Nov. 1835, 14 S. p. 47, and by the cases cited on p. 49 of the report. Guided by these authorities, he has sustained the first plea for the defenders, which is a plea rested on these instructions.

"III. If the challenge of the former decree be excluded by lapse of time, it is immaterial whether the statements of the pursuer would or would not be relevant or sufficient as grounds of reduction. But a plea against the relevancy has been stated, and upon this plea the Lord Ordinary has thought it right to give his decision. The only reasons which appear to the Lord Ordinary worthy of consideration are the alleged perjury of witnesses who were examined in the former action, and the alleged subornation of these witnesses by the late Miss Sinclair, the defender in that action. The libelling of these charges was sharply criticised by the defenders' counsel, for the purpose of shewing that it was less full in some things than in the circumstances should be required. This objection the Lord Ordinary would hesitate to entertain, and the truth is, that the entertaining of it would seemingly be of small advantage to the defenders, because the particulars desiderated would probably be supplied. That upon which he has proceeded in holding the statements of the pursuer irrelevant or insufficient is the single consideration that the alternative presented in the 12th art. of the condescendence, and in the first plea in law for the pursuer, is incon-

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in rem judicatam; and, 2d, the ground of action in this case was different from that in the former one. (1) There was no doubt that it was the rule of the canon law that decrees against marriage could not become final, but were liable to be opened up at any time.[1] This rule was adopted in Scotland at the time of the Reformation. The whole canon law, so far as not inconsistent with the new state of affairs, became part of our consistorial law, and was acted upon in various cases.[2] That this was so was evident from the *dicta* of eminent Judges in some well-known cases.[3] Sir Thomas Craig, who was a great consistorial lawyer, was of opinion that the canon law was the law of Scotland.[4] This being so, it fell upon the defenders to shew that the law had been altered with regard to *res judicata.* (2) Again, *res judicata* never applied to an action based upon different grounds. The ground of action in the former case had been expressly narrowed to *de præsenti* acknowledgments having constituted a marriage, while this action was based on promises *subsequente copula.* Moreover, it would have been incompetent to have led evidence as to the alleged *copula,* as the averment as to it was not in the original summons, but was only added on revisal, and it had been held that a new ground of action imported into a record which had not been in the original summons could not be remitted to probation.[5] Even if it had been competent, the pursuer was

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sistent with that unconditional and absolute allegation of perjury which is indispensable to the relevant libelling of such a case. The idea that a pursuer may charge perjury in so far as witnesses have deponed to facts adverse to the constitution of a marriage contracted by the interchange of *de præsenti* consent, and in the same summons bring forward another ground of action, involving the implication that there was no *de præsenti* contract, and therefore that the things as to which the witnesses are charged with perjury are things upon which they may have spoken the truth, is one that, in the opinion of the Lord Ordinary, must be discountenanced and repudiated. And the plea of irrelevancy or insufficiency has, as a consequence, been sustained.

"IV. The only other plea upon which it is necessary to say a word is that urged against the title of the pursuer to insist in the conclusions of the summons. The meaning of this plea, as understood by the Lord Ordinary, is, that the testamentary deeds of the late Miss Sinclair cannot be challenged, because the pursuer never was her husband, and consequently has not the patrimonial rights, the vindication of which is the ultimate, or perhaps, in a sense, the primary, purpose of the present action. Reading it in this way, this plea has also been sustained. The result naturally, or indeed necessarily, flows from the preceding findings in the interlocutor, by which the pursuer's failure to make good the grounds of his declaratory conclusion is established."

[1] Decretals of Gregory IX., b. ii. tit. 27, cap. 7, and *ibid.* tit. 28, caps. 5 and 20; Sanchez, De Sancto Matrimonio, b. vii. disp. 100, sec. 14; Brückner, Decis. Jur. Matri. p. 461, sec. 66; Burge, Com. on Internat. Law, vol. i. 183; Shelford on Mar. and Div. 474; Poynter on Mar. and Div. 157; Lancelotus, Inst. Juris. Canon. b. iii. tit. 15, sec. 16; Bowzer v. Ricketts, March 3, 1795, 1 Hagg. Consist. Rep. 213; The Queen v. Millis, March 29, 1844, 10 Clark and Finelly, 534, see p. 722.

[2] Collection of Decisions in vol. iii. of Miscellanies of the Maitland Club; Statuta Eccles. Scotic. i. 176; Riddell's Peerage and Consist. Law, 447, *et seq.* and 473, note; Liber Officialis Sanctæ Andreæ, pub. by Bannatyne Club; Fraser, on Par. and Child, 2d ed. p. 22; Balfour's Practicks, 670.

[3] Dalrymple v. Dalrymple, July 16, 1811, 2 Hagg. Consist. Reps. 54, Lord Stowell, p. 81; M'Adam v. Walker, March 4, 1807, Mor. App. *voce* Proof, No. 4, H. of L., May 24, 1813, 1 Dow, App. 148, Lord Eldon, p. 181; Morris v. Marshall, Jan. 14, 1847, 9 D. 466, 19 Scot. Jur. 154; Brymer v. Riddell, 1811, contained in Bell's rep. of a putative marriage; Officers of State v. Alexander, May 25, 1866, 4 Macph. 741, 38 Scot. Jur. 389.

[4] Jus Feudale, i. 3, 24, ii. 18, 17, and 21; Stair, i. 1, 14-16.

[5] Dallas v. Mann, June 14, 1853, 15 D. 746, 25 Scot. Jur. 448.

prevented from leading evidence as to *copula* in the former action, as decree of circumduction passed against him before he had obtained his witnesses.

II. The Instruction with regard to a year and a day contained in Balfour's Instructions to the Commissaries[1] was merely the introduction by Balfour into the Commissary Court of the practice which obtained in his own Court as Official. Subsequent Instructions were also issued which superseded those earlier ones by Balfour.[2] Moreover, it appeared from Hope's Major Practicks that Balfour's Instructions were repealed.[3] This rule, therefore, no longer obtained, and the cases founded upon were wrongly decided.[4]

III. In any view, the decree in the previous action having been obtained by conspiracy and fraud, which were here relevantly averred, and of which proof was offered, the pursuer was entitled to have it opened up.[5]

Argued for the defenders;—

I. (1) The rule of the canon law that sentences against marriage never passed *in rem judicatam* was based on the fact that the officials who administered the consistorial law had a spiritual jurisdiction, and actually decided more *pro salute animæ* than to settle litigated points.[6] The canon law was undoubtedly the basis of our consistorial law, but many of its rules were naturally and necessarily discarded when the jurisdiction was transferred from a spiritual to a civil Court, and, among others, this as to the want of finality in decisions, which had arisen solely from the spiritual nature of the jurisdiction. The weight of the authority of the institutional writers was to the effect that the canon law was only incorporated into our law so far as not repugnant to it,[7] and its rules would need to have been expressly adopted before they became binding. The law of England recognised the finality of judgments on questions of status.[8] (2) The terms of the previous summons covered the case of marriage constituted by promise *subsequente copula*, and that had been made the subject of a special allowance of proof in that action.[9] Moreover, it had been expressly abandoned as a ground of action, as appeared from the interlocutor of the Second Division, and the pursuer must accordingly be held as confessed.

II. The rule of finality after the expiry of a year and day with regard to matrimonial causes was purposely introduced, and a similar policy had been followed in the case of the English Act transferring jurisdiction from the ecclesiastical to the civil Courts in such causes.[10] The object was that in questions of status there should be a definite time when there would

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[1] Balfour's Practicks, p. 659, arts. 19 and 20, and p. 676.

[2] Stat. 1662, cap. 1; Stat. 1666; A. S. 1553–1790, p. 97; White v. Sibbald, Jan. 28, 1725, M. 7551; Murray v. Edinburgh, July 1, 1697, M. 7549.

[3] Hope's Major Practicks, MS. of 17th century, Adv. Lib. (see Fraser on Parent and Child, 2d edn., List of Authors, p. xxv., note).

[4] Donald v. Thom, May 16, 1823, F. C; Menzies v. Menzies, Nov. 21, 1835, 14 S. 47, 8 Scot. Jur. 24.

[5] Oughton, Ordo Judic. Eccles.-Civ. Brit. et Hibern., tit. 306; Gore v. Stacpoole, Feb. 17, 1813, 1 Dow, 18; Earl of Bandon v. Becher, Aug. 1, 1835, 3 Clark and Finelly, 479; M'Pherson v. Tytler, May 14, 1839, 1 D. 718, 11 Scot. Jur. 435; Forster v. Grigor, Jan. 21, 1871, 9 Macph. 445, 43 Scot. Jur. 214.

[6] Shelford on Mar. and Div. p. 474, note.

[7] Stair, i. 1, 16; Ersk. i. 1, 42.

[8] Smith's Leading Cases (7th ed.), ii. 760, and 803, note, and cases there, *et seq.*; Meddowcroft v. Huguenin, May 10, 1844, 4 Moore's Privy Council Rep. 386; Perry v. Meddowcroft, Nov. 17, 1846, 10 Beav. 122 and 138; Sopwith v. Sopwith, April 24, 1861, Prob. and Mat. 30 L. J. 131.

[9] Honyman v. Campbell, March 3, 1831, 5 W. and S. 92, Lord Chanc. p. 142; Yelverton v. Longworth, July 28, 1864, 2 Macph., H. of L. 49, Lord Chanc. p. 66.

[10] 20 and 21 Vict. cap. 85, secs. 55-57.

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be an end of strife. The rule had been recognised again and again as in existence.[1]

III. The averments of fraud, conspiracy, and subornation here made were far too general and vague. All the facts required to be set forth in such cases.[2]

At advising,—

LORD JUSTICE-CLERK.—Thirty years ago, that is, in the year 1846, a judgment of absolvitor was pronounced by this Court in an action of declarator of marriage brought at the instance of the present pursuer against the late Miss Janet Sinclair. The alleged marriage was said in the summons to have been constituted by a written contract of marriage, and certain other written documents passing between the parties, by which it was maintained that a marriage had been constituted by declaration *de præsenti;* and it was also alleged in the summons that this marriage was completed and that the parties thereafter conducted themselves towards each other as husband and wife. In the record in that action the latter statement was expanded into a distinct averment that *copula* had intervened. But the pursuer made no attempt to prove this assertion, and his counsel at the hearing of the cause formally and deliberately abandoned it.

Since that judgment was pronounced, the defender, Miss Sinclair, herself, and most of the persons concerned in or cognisant of the circumstances, have died. The present pursuer during this long interval has taken no farther step to assert his alleged marital rights; but now that his alleged wife, all her relatives who gave testimony in the former action, and most if not all of the other witnesses, have gone to their graves, he proposes to re-open the whole controversy, and wishes to be allowed to establish all which the judgment of the Court decisively negatived, for the purpose of obtaining right to Miss Sinclair's property against her executors. It is needless to say that the contention is maintained under most unfavourable circumstances, and with all reasonable presumptions against it.

The defenders plead—1st, that the former judgment is *res judicata* as regards the whole grounds of the present action; 2dly, that the action is wholly excluded by a clause in the instructions applicable to consistorial causes, under which all decrees become final after a year and day from their date; and 3dly, they plead that the allegations of fraud, perjury, and conspiracy are wholly irrelevant.

The pursuer, in reply, maintains that the former decree, being one of absolvitor in a declarator of marriage, did not pass into *res judicata*, according to the brocard of the canon law that *sententia lata contra matrimonium nunquam transit in rem judicatam*, and that therefore, even if this action had been brought on the same grounds as those on which the former case proceeded, he is entitled to try the question again. But he farther pleads—1st, that the former judgment was obtained by fraud, perjury, and conspiracy; and 2dly, that the allegation of a marriage constituted by promise *subsequente copula* was not competently made, and was not embraced in the former action.

These pleas have given rise to an important and interesting discussion, and it is more from regard to the topics discussed in the argument than from any doubt as to the result that I propose to examine them a little in detail.

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[1] Donald v. Thom, and Menzies v. Menzies, *supra*, p. 891, note 4; Gardner v. M'Arthur, in note to Donald v. Thom.

[2] Irvine v. Kirkpatrick, August 2, 1850, 7 Bell's App. 186, Lord Brougham, p. 210; Shedden v. Patrick, February, April, and May 1854, 1 Macq. 590, Lord Chancellor (Cranworth), 616.

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The first question, and one of considerable interest, although, I think, of little difficulty, relates to the plea of *res judicata*, and its application to matrimonial causes. The rule of the later canon law in regard to *res judicata*, as contained in the Decretals of Gregory IX., is sufficiently distinct. It will be found in the Decretals, L. ii. tit. 27, chap. 7, and is in substance this, as summarised by Corvinus in his Aphorisms, book iii. tit. 34—"Sententia recte lata, post decem dies, si ab ea non fuerit appellatum transit in rem judicatam." That is the general rule. Then comes the exception—"In rem judicatam non transit sententia quæ impugnari potest; ut est ea quæ contra matrimonium, aut pro matrimonio, in gradu prohibito contracto, lata."

In the more expanded exposition of Sanchez, the distinction between the *sententia contra matrimonium* and the *sententia pro matrimonio* is not so sharply drawn; but it comes out quite distinctly in section 14 of Disputatio 100, book 7. The *ratio* is simply this, and it is mainly applicable to suits for the annulling of a subsisting marriage, in which a sentence *pro matrimonio* passes into *res judicata* by the tacit consent of both parties, who may lawfully remain together if there be no annulling impediment, and that consent may be inferred from the absence of an appeal. But a sentence *contra matrimonium*, either annulling the marriage or separating the parties, never passes into *res judicata*, because if the marriage is lawful, it is sinful for the spouses to live separate. His words are—"Quia sententia illa transiens in rem judicatam foveret peccatum, separando veros conjuges, vel uniendo qui tales esse nequeunt."—L. vii. t. 100, sec. 1. It is on this ground alone, viz. the duty of the Church to provide against the possible sin of separating husband and wife, that this exception in favour of sentences *contra matrimonium* from the general law of *res judicata* is decided in the Decretals and defended by the commentators.

Before considering the grounds on which it has been contended that a law such as this should be enforced in this Court in regard to a purely civil process, I may remark, that if we had occupied the place of the Superior Spiritual Courts of which Sanchez writes, I do not think the pursuer would fare in the present action much better than under our ordinary rules. For, assuming it to be true, which may be doubted, that the former decree was a sentence *contra matrimonium* in the sense of the Decretals, and that therefore it did not pass into *res judicata*, it by no means follows, and there is no authority to that effect in the canon law, that the pursuer, as a matter of right, would have been entitled to have his case tried again. The very reverse is quite clearly indicated in the very passage in the Decretals to which I have referred. The power of the Superior Spiritual Court to permit or direct rehearing of the case was entirely discretionary, and was more of the nature of a dispensing power than an ordinary exercise of jurisdiction, as very clearly appears from the instances given in the Decretals on which this plea is founded. And so the appropriate proceeding under it was not by raising a new action in the same tribunal, but by a *querela* or complaint to the Superior Spiritual Court. As to this, Sanchez says, "In the second place, understand that although the sentence does not wholly pass *in rem judicatam*, it does pass to this effect, that he who wishes to impugn it shall not be heard to do so indiscriminately, but must allege some probable cause of injustice, which the Judge may be led to believe *jure ultimo*, so that the contending parties may not be heard indefinitely."

Now, what have we here? In the first place, one of the alleged spouses is dead, and thus no sin can possibly arise from the former decree subsisting. I suspect

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this of itself would have been conclusive, for we learn from Sanchez, sec. 12, that where the suit is with third parties, and not between the spouses, the exception does not apply. But, secondly, the pursuer has delayed to impugn the decree until all the witnesses are dead, and that by itself would be quite sufficient against the exercise of any such discretionary power, unless the pursuer can allege, which I shall consider afterwards, that he could not have brought his action sooner. But on the face of this record the pursuer is so far from shewing why the decree should be opened up, that he has shewn the best possible reason for refusing to disturb it. He has delayed his challenge until, by his own admission, the case cannot be fairly tried. If, therefore, he were to be judged by the canon law, it would rather appear that he must fail. But, putting this apart, I am quite clear that the rule in question forms no part of our law. It is not said ever to have been acted on in any single case, not even in the Bishop's Courts, during the very questionable period in which, after the Reformation, the consistorial law was administered by them. We are asked to sanction that which in every view is an entire novelty. I need not detain the Court by going into the exhausted controversy of the authority of the pontifical law in Scotland. I had thought it had been well settled, 1st, that it never was adopted in its integrity, even in Catholic times; 2dly, that since the Reformation, while our consistorial law has been necessarily built on the broad lines of the canon law, we have adopted its principles and maxims only as we adopted those of the civil law—we have done so in so far as these appeared to be just and equitable, and consonant to the general spirit of our jurisprudence, and no farther; and 3dly, that matrimonial suits are purely civil causes, and are entertained in this Court as a purely civil tribunal, having no right and no duty to administer any spiritual jurisdiction whatever, and whatever may have been the practice of the Episcopal Courts, during those troubled years after the Reformation in which Episcopacy was established in Scotland, since the Revolution there has been no such thing as a spiritual sentence pronounced by the civil Court, nor is any cause cognisable by us on spiritual grounds. Instead, therefore, of following the argument for the pursuer into the obsolete records of the old Commissary Court I prefer to rely on the safer authority of Stair and Erskine as to the effect to be given to the pontifical law. Stair says—"And there is reason for the abrogation of the canon law at the establishing of the Protestant religion, because in the Popish Church it was held as an authoritative law; but since it is only esteemed a law as to those cases that were acted by it when it was in vigour, and in the rest only as our customs assume some particulars thereof, according to the weight of the matter." And so Erskine, speaking of the canon law, says—"It is compounded, on the one hand, of beautiful principles of equity, chiefly borrowed from the Roman law, and, on the other, of a collection of absurd canons and rescripts, extolling Church authority above all secular powers." I am not at all moved by the *dicta* ascribed to Lord Stowell and Lord Eldon in the cases of Dalrymple and M'Adam. They are true in the general sense in which alone they were delivered, that our marriage law and that of England rested on the general principles of the canon law, excepting so far as altered. It was, beyond doubt, not only a system of rules for Churchmen, *pro salute animæ*, but a great, and in its better days a wise, and in some respects a salutary, code of civil and social jurisprudence. But it must not be forgotten, that while the original principles of the canon law applicable to marriage exhibit a large and philosophical spirit, there is no part of the whole system of the canon law, as it ultimately

prevailed, so suggestive of social tyranny, or so much opposed to human freedom and happiness, as that by which the marriage law came to be encrusted. The whole doctrine of the impediments to marriage, which comprised a long catalogue, embracing many matters besides the prohibited degrees, and some of the most arbitrary and frivolous description, and the corresponding doctrine of the power of dispensation, of themselves would have been perfectly sufficient to insure its rejection in this country; and the very brocard with which we are dealing, the result and object of which was to keep in the hands of the ecclesiastical authority for an indefinite time the honour and happiness of many families, is simply one of the worst of those weeds which grew up so luxuriantly round the pontifical fabric.

Without trespassing on the historical ground, my opinion on this plea of *res judicata* is, that as this is a purely civil action, and as the Court is a purely civil Court, it must be regulated by the general principles applicable to our civil jurisprudence, and cannot be affected by the manner in which any spiritual Court decided or dealt with spiritual causes on spiritual grounds.

I am, therefore, of opinion that the judgment in the former case stands in the way of the consideration of the present by the exception *rei judicatæ*. I am farther of opinion that the decree in the former action is applicable to the whole ground embraced in the present. It was contended on the part of the pursuer that his former action did not embrace the ground of a marriage constituted by promise *subsequente copula*. If it had not embraced it, it would not have been surprising, seeing that such a ground of declarator on the part of the man is, if competent, to say the least of it, very unusual. But I have no doubt whatever that the summons quite sufficiently embraced, and indeed necessarily embraced, the ground in question, so far as it was competent. He alleged, indeed, in the former summons, *sponsalia de præsenti;* but that necessarily includes a promise *de futuro* also; and then he alleges that the marriage was completed, and that the parties conducted themselves to each other as husband and wife. Had the pleadings rested there, they would have been sufficient; but in the condescendence the allegation is specifically made. It was the subject of a special allowance of proof, obtained on the part of the pursuer without objection on the part of the defender, and therefore I have no doubt that this ground was sufficiently pleaded, and was negatived by a final and effectual judgment. I may observe that the same objection was taken and disregarded in the well-known case of Honyman v. Campbell, 5 Wilson and Shaw, 123. Lord Justice-Clerk Boyle says in that case—"The objection taken is of this nature, that in the summons, while the pursuer concludes for decree of declarator of marriage, she confines herself to one particular species of marriage, viz. a marriage said to have taken place in 1813 by declaration *de præsenti* between the parties as husband and wife, and that that is the only ground in the summons on which she lays her case. But, my Lords, after attending as closely as I can, and being free to admit that, according to the rules of strict procedure which we now observe in this Court, I was at first sight struck with the importance of the objection, yet, upon consideration of the whole of that summons and the objections taken to it, I am of opinion that they are not good." The Lord Chancellor deals in a similar way with the objection taken to the summons, and says (p. 142)—"In this case the whole matter is brought in, and all the ways in which a party may be married are set forth, without very distinctly specifying in which of those several ways it is; but reliance is mainly placed on the latter part of the summons. Still,

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within the four corners of the summons I find enough to let in evidence of the kind of marriage now relied on." And the case was decided on this ground.

But even if I had been of a different opinion, I should have been prepared to hold that the course which the pursuer has followed on this matter is one which cannot be permitted to succeed. The pursuer in the former case deliberately raised and deliberately abandoned this ground of action as a substantive fact. We learn this from the opinions of the Judges, who expressed themselves very strongly on this subject. I apprehend that by thus abandoning this allegation, the pursuer admitted its falsehood, or at least barred himself from again asserting its truth. He would not have been permitted to have raised this question on appeal to the House of Lords in the former case, not because the judgment was final, but because the pursuer was confessed on this specific allegation. Now, what is proposed here? The pursuer made a grievous imputation on the character of Miss Sinclair—an imputation which, if false, was base in the extreme. The lady denied the charge, and defied her antagonist to the trial of it. After taking a judgment allowing him to prove it, he made no attempt to support it by evidence, but deliberately abandoned it in Court, and during the five-and-twenty years which elapsed before the lady's death he never reasserted it. Now he proposes to blast her memory when she is in her grave. It is sufficiently doubtful whether such an action is competent at all after the death of one of the parties; but I am quite clear that in this case the pursuer is conclusively barred from maintaining it.

On this preliminary plea, therefore, I am very clearly of opinion that the former judgment is *res judicata*, being a judgment in an action between the same parties, relative to the same subject-matter, and brought on the same grounds. But I have still to consider the allegations of fraud, conspiracy, and perjury by which the former decree is said to have been obtained.

I entertain no doubt that an allegation relevantly made, that a decree was obtained by the successful party having induced or bribed the witnesses to depone falsely, is, like any other fraud, sufficient to rescind or subvert a decree so obtained. If a man obtains a decree by bribing the Judge, or by personating the creditor in a debt, the judgment so obtained must yield to a proof of the facts. This is not controverted for the first time. In the first volume of Sir George Mackenzie's works, page 42, there is a pleading by that accomplished lawyer in the case of Milton v. Milton, which raised the question in what case a sentence may be reduced by a reprobator of the depositions of the witnesses whereupon the sentence was founded. In this pleading he deals with the whole question of how far an allegation of conspiracy and perjury is relevant, and refutes with great detail all the suggestions which were urged from the bar in this case. He quotes a passage from the Pandects, book 42, title 1, and law 33, *De re Judicata*, which is precisely in point:—"Hadrianus aditus per libellum a Julio Tarentino et indicante eo falsis testimoniis, conspiratione adversariorum, testibus pecunia corruptis, religionem judicis circumventam esse, in integrum causam restituendam; in hæc verba rescripsit, 'Exemplum libelli dati mihi a Julio Tarentino mitti tibi jussi; tu, si tibi probaverit, conspiratione adversariorum, et testibus pecunia corruptis, oppressum se, et rem severe vindica; et si quæ a judice, tam malo exemplo circumscripto judicata sunt, in integrum restitue.'"

The authorities dwelt upon from the law of England as to collusion seem to have no application to this matter. The question which arose in these cases was not what effect the ecclesiastical Court would give to its own sentences,

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or on what grounds they would set them aside, but what effect another Court, which could neither pronounce them nor set them aside, ought to give to them. It would rather seem on principle that the sentence, while it stood, should receive effect. But in these cases, when the sentence appeared to have passed by collusion, the difficulty was avoided by holding it not to be a sentence at all. But whatever the logic of these cases, this is a totally different matter. I entertain no doubt that a Court which has the power of pronouncing or reducing its own sentences is entitled to set aside any decree which is relevantly challenged, on the ground that the party has obtained it by the procuring of false testimony; and there is abundant authority to that effect.

A qualification, however, must be observed here. If the ground of challenge, or the assignment of perjury, be merely the repetition in another form of the contention or plea which was proponed and repelled in the former suit, or the assertion of facts which were within the knowlege of the party at the time the decree was pronounced, this can form no ground for impugning the decree. It is so laid down by Voet, in words which are clear and precise. He says—"Quod si sententia ex falsis instrumentis aut testimoniis aliisque documentis lata sit, rescindi potest, ubi falsitas probata fuerit, quæ lite pendente neque adversario neque judici innotuerat, sic ut religio judicis per hujusmodi falsitatem circumventa fuerit; petita ad id per modum querelæ vel accusationis (non per actionem ordinariam) restitutione in integrum, ut sententia, per restitutionem enervata, perdat deinceps omnem rei judicatæ auctoritatem, ac causa ex integro examinatur, perinde ac si judicatum non esset."

Voet rightly restricts this remedy to grounds of which neither the party nor Judge were aware, and he goes on to say that it will not be sufficient to entitle the party to this remedy to allege that he has since found documents which will enable him better to prove his case. Now, applying this rule to the allegations in the present summons (which the pursuer proposed to amend), I find nothing whatever stated which amounts to a relevant allegation of fraud. The truth or falsehood of the statements of the witnesses was the question which was tried in the former case, so was their honesty or credibility, and the alleged falsehood must have been quite well known to the pursuer at the time. To say now that they swore falsely is to say no more than he said then. To say that the lady and the witnesses knew these statements to be false is merely to repeat what the pursuer says that he knew, and what he maintained before. Nor is any new aspect given to the allegation by saying that Miss Sinclair and her aunt and her sister acted in concert in giving and promoting this evidence. The pursuer knew that they acted in concert, and probably had they been alive they would have avowed that they did so. It would have been a totally different matter had the alleged false testimony related to something not within the pursuer's knowledge at the time, and in regard to which he could point to specific sources of information by which the truth was at last revealed to him. But no such allegation is to be found from beginning to end of this record. He says he has been informed of this conspiracy since Miss Sinclair's death. But he was bound to have said when, and how, and by whom he was so informed. He says that one of the witnesses had repeatedly said that he was bribed; but he nowhere makes the specific allegation that the witness was bribed, neither does he say, what was essential, how and from whom he had this information.

Divested, therefore, of its generalities, I find nothing in this assignment of conspiracy and perjury but that which was perfectly well known before, namely,

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that these witnesses gave evidence which the pursuer says they knew not to be true, and that they all acted in concert in doing so. As to their knowledge of their evidence not being true, it is certain that the pursuer knew as much about that when the evidence was given as he does now.

One advantage, no doubt, the pursuer would have in a re-trial of the case: The evidence he impugns could not be repeated; nor could the parties assailed defend themselves. But this is hardly an advantage to which the pursuer is entitled.

It only remains that I should say one word on the plea which the Lord Ordinary has sustained, founded on the instructions given to the commissioners at different periods during the existence of that Court, and the cases of Donald v. Thom, and of Menzies, which were referred to. I have the greatest respect for the Judges who decided the case of Donald v. Thom and the subsequent case of Menzies, but I am not satisfied that these instructions have the effect attributed to them. The instructions relate not to matrimonial causes only, but to questions as to teinds, as to testaments, and a variety of other important branches of jurisdiction. We are asked to say that no judgment pronounced by this Court in any such causes can become final until a year and day has elapsed. Whatever may have been the operation of these instructions in the old Court of the Commissaries I am inclined to think that they do not apply to judgments of this Court, and I am not aware of a single example in which any such application of them has been made. But it is quite unnecessary to decide that matter. With this exception, I am for adhering to the judgment of the Lord Ordinary.

Lord Neaves.—I concur in the judgment which your Lordship proposes to pronounce, and generally on the same grounds.

This case would be one of great importance to the public, as well as to the parties, if it were one of difficulty; but it appears to me to be attended with no difficulty. To my mind it is too clear to leave any room for doubt or hesitation. There are so many grounds for throwing out this action that one does not know which to put in the van.

The argument has raised several questions as to the law of Scotland itself, and as to the influence or effect of the canon law upon our own law.

There can be no doubt that the canon law had considerable authority in all the Christian countries which came under the jurisdiction of the Latin Church. At the same time I think, with deference, that there is some exaggeration in the judgments of Lord Stowell and Lord Eldon, where they trace some of the principles of our law directly to the canon law. I cannot say that I think that the principle of *de præsenti* consent constituting marriage can be said to come from any source other than the law of nature and the elements of the Roman law. The canon law did not call it into existence; it belonged to the category of contract, and was dictated by the necessities of humanity and social life; and so arose directly from the law of nature embodied in the common law.

After the Reformation the authority of the canon law in this country was greatly weakened. When we threw off the spiritual authority of the Popes we naturally also threw off their judicial authority, and so when we got rid of the Popes we got rid of their canons to a great extent. We began to administer consistorial law in civil Courts, and when the causes were in civil Courts they fell naturally under the rules of civil procedure, and among others, as I think, under the rule of *res judicata*,—the House of Lords then coming in place of the Pope as regards review. Any portion of the canon law which we adopted or

preserved at the Reformation was only *secundum bonum et æquum*, and we are not likely to have adopted a rule by which a case such as this could be tried over and over again after the lapse of any intervals of time—long or short. Were it so such a case might be tried annually, to the infinite distress of the party so oppressed.

The next point is—supposing there can be *res judicata* in matrimonial causes—does the rule apply here? If we look at the former action we find it was a declarator of marriage, just as this is. The record in the former action is framed on the same grounds as that we are now dealing with. There is an alleged contract of marriage, and *copula* is stated to have followed on it. Of these statements proof was allowed to the pursuer. That proof was taken, but it contained no proof of the *copula* averred, and that part of the case was expressly given up by the pursuer in the presence of the Court. But now the pursuer says here, I ought not to have been allowed to add the statement of *copula* to my original summons, and the Court who allowed me to do so was wrong, and I am now entitled to get rid of the statement, and all that followed on it. Your Lordship has pointed out that there are in the original summons itself sufficient allegations that, after the execution of the contract of marriage, the parties conducted themselves as married persons. That, it is true, is set forth very generally in the summons, but then it was stated specially, and with particularity, in the condescendence, without objection being taken by any one. The summons, without that statement, would not have been relevant, for it is as fixed a rule as can be, that a mere marriage-contract, as we frame it, is not a present consent but one *de futuro*. Mr Erskine has stated that very clearly in his Institutes, book 1, tit. iv., sec. 3,—"The written antenuptial contracts, therefore, in use with us, do not constitute marriage; for though their style seems to import a consent *de præsenti* in the following words, 'We take one another for our lawful spouses,' yet the obligation, which is immediately subjoined, to solemnise the marriage in the face of the Church, shews that the parties do not hold thecontract for perfected till that ceremony be performed. Hence instances have occurred of persons being charged upon letters of horning to solemnise the marriage in the terms of that written obligation; whereas, if the marriage had been perfected by subscribing the contract, the proper action would have been a declarator of it before the Commissaries." That statement by Erskine is not mere conjecture, but it is the law of the document, and a law which ought not to be altered or called in question. The summons, therefore, in the previous case, would not have been relevant without something importing cohabitation. The action was thus one truly laid on promise *subsequente copula*, as more fully developed in the condescendence, and could not else have been relevant.

A man cannot take away the effect of *res judicata* by merely abandoning one of his grounds of action. *Res judicata* is not to be got rid of by mere variations in the circumstances. Any additional fact belonging to the same general category will not serve to avoid the plea. On these grounds I have no doubt that there is *res judicata* here.

I know of no example in which an action for the constitution of marriage *subsequente copula* was brought after the death of one of the parties, and it looks as if it were not a proper proceeding; because such summonses, according to our styles, usually contain a conclusion for a decerniture upon the defender to solemnise the marriage. And, as Mr Walter Ross, in the preface to his Lectures (p. 13), says,—"Styles, as the unerring records of our jurisprudence, were of the greatest authority with our forefathers. 'Arguments brought from style (says

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Sir George Mackenzie) are a great part of our fundamental law—they, to lawyers, are what the chart is to geographers, or the compass to seamen.'"

Besides, after the death of one of the parties, it is impossible to get at the true state of matters. The very connection between the promise and the *copula* is of the utmost importance, and often gives rise to very delicate considerations. It does not follow that marriage is the result of every *copula* following after a promise. The promise and the *copula* may bear no relation to each other at all. The special circumstances are of vital importance in such cases. If, on the whole matter, there has been no *verus consensus*, then there can be no marriage. A promise in itself is no *verus consensus*, and if it is not clear that the intercourse following amounted to a consent to marry there is no marriage. Then, is it possible in this case to overlook the *mora*? Thirty years have passed since the case was tried, and the woman is in her grave with all her immediate kin. Then comes this pursuer with his old summons, and wishes to re-try the case, when she is dead, in order to gain a large pecuniary advantage. The effect of this *mora* is matter of the highest importance.

As to collusion, there was no collusion between the pursuer and defender of the nature stated in the cases cited to us; there is no ground for alleging that they entered into any collusive agreement to deceive the Judge, and all the allegations tending otherwise to impeach the proof are irrelevant and inadmissible, particularly when reference is made to the pursuer's own course of action in the former case.

I concur with your Lordship that it is not necessary to decide the question as to finality after a year and day. The other circumstances are amply sufficient.

Lord Ormidale.—Although this case raises some questions of importance and interest I cannot say that I think it is attended with difficulty.

The present is a second action at the instance of the pursuer, having for its object to establish that a marriage had been entered into between him and the late Miss Janet Sinclair. His first action was directed against Miss Sinclair herself, and was instituted in this Court in 1839. It was defended by Miss Sinclair, who denied that there had been any marriage between her and the pursuer. A litigation ensued, in the course of which the parties joined issue on the question whether there had been a marriage or not; and the litigation did not terminate until 1846, when a judgment of the Lord Ordinary assoilzieing Miss Sinclair from the pursuer's action was unanimously adhered to in the Inner-House. And it was only in August last (1875) that the present action was brought by the pursuer, directed against Miss Sinclair's testamentary trustees, the leading conclusion of which is, like that in the former action, a declarator of his marriage with Miss Sinclair. Not only has the present action been brought after such a lapse of time, but also about six years after the death of Miss Sinclair herself, and after the death of her sister, her aunt, and her uncle Sir John Sinclair of Barrock, as well as others, being all the parties who, on the pursuer's own shewing, could be expected to throw any material light upon the disputed question.

It is in these circumstances, generally stated, that the Lord Ordinary has pronounced the interlocutor reclaimed against, assoilzieing the defenders from this second action of the pursuer, on the ground that the judgment in the former action is conclusive against him on the principle of *res judicata*, and for the other reasons stated in his interlocutor and relative note.

It was contended on the part of the pursuer, in support of his reclaiming

note—1st, that according to the canon law, which he represented as being also the law of Scotland, there is no prescription or finality of a judgment pronounced adversely to the marriage status; or, in other words, that the pursuer neither was nor could be precluded, on the principle of *res judicata*, or on any other ground of finality, from insisting in the present or in as many more actions as he might choose to bring, that he was married to the late Miss Sinclair; 2d, that his present action is not exposed to the defence given effect to by the Lord Ordinary, founded either upon the finality of judgments in consistorial cases referred to in the Instructions to Commissaries, of 1653, or upon the plea of *res judicata*, or upon any other ground; and 3d, that whatever effect the plea of *res judicata* might, in other circumstances, be entitled to, none can be given to it in the present case, where the judgment in the former action was, as he maintained, obtained through conspiracy and fraud.

(1) In regard to the pursuer's contention, founded on the canon law, I have no hesitation whatever in rejecting it. The canon law may, no doubt, be said, fairly enough, to be the basis of the consistorial law of Scotland, but that all its rules and principles are to be held as imported into, and to form part of, the consistorial law of Scotland, I entirely dispute. No authority, no decided case, not even the *dictum* of any of the institutional writers, was referred to by the pursuer in support of his contention. On the contrary, all the authorities, at least all of them entitled to any weight or consideration at the present day, appear to me to be very clearly and unmistakeably opposed to the pursuer. Thus, Lord Stair, in the passage of his great work (b. i., t. 1, sec. 16), commented on in the argument, says that none of the rules in the civil, canon, or feudal laws "have with us the authority of law, and are therefore only received according to their equity and expediency, *secundum bonum et æquum*;" and Mr Erskine again, who followed Lord Stair at a later period, says (b. i., t. 1, sec. 42), in reference to the canon law,—"That since the Reformation it has declined fast in its authority, so that it is now little respected except in questions of tithes, patronages, and a few articles more of ecclesiastical right, where the canons are consistent with the Protestant principle." And although I am not aware of any judicial decision or other express authority refusing to give effect to the rule of the canon law, that there is no finality of a judgment adverse to the marriage status—if there be such a rule, of which I am not satisfied, at least in the absolute and unqualified sense in which it was urged for the pursuer—I can entertain no doubt that this arises from the circumstance that so startling and unjust a rule—one so entirely opposed to what in modern times must be held to be, in the words of Lord Stair, *secundum bonum et æquum*—has not been attempted to be founded on or enforced. The present action, indeed, suggests very forcibly the inexpediency of adopting the rule of the canon law referred to, if there be such a rule, for supposing that Miss Sinclair had married another person by whom she had children during the thirty years which intervened betwixt the termination of the pursuer's former suit and the commencement of his present action, what complicated relations and interests might have arisen—relations and interests which, supposing the pursuer were right in his contention, would probably, if not inevitably, have led to results of the most painful and distressing description.

But although, for the reasons which have been now alluded to, there may be no express or direct decision on the point, nothing, I think, can be more conclusive on the subject than the case of Shedden v. Patrick, in which both this Court and the House of Lords proceeded on the assumption that such a rule formed no

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part of the law of Scotland. And in the later case of Longworth v. Yelverton (March 10, 1865, 3 Macph. 648), the Lord President observed in reference to an argument such as that maintained by the pursuer in the present case,—"I think Mr Smith" (the pursuer's counsel) "carried it a little further, and seemed to suggest that in consistorial suits of this kind there was very little element of *res judicata* at all, and that the judgment might be opened up at any time. I do not think that that is a sound position according to our law, and I do not see any good reason why, in consistorial questions of this kind in regard to status, there ought to be less conclusiveness or *res judicata* than in other cases." The case of Norris v. Gilchrist, cited by the pursuer, is also, I think, when fairly considered, an authority against rather than favourable to him; for, as I read the report of that case, the validity of the plea of *res judicata*, where the circumstances admitted of its application, as in the present case, was distinctly recognised by all the learned Judges, although in that case it was, quite consistently, held that failure in a service could not found a defence of *res judicata* to an action of declarator of legitimacy—the object of the two proceedings being essentially different; the one being a step of procedure merely towards the vindication of patrimonial rights and interests, and the other having for its direct and sole object the establishment of personal status. I cannot say, therefore, that I have been the least moved in the present case by that of Norris v. Gilchrist, the decision in which I must regard as inapplicable.

(2) I have been unable, however, to satisfy myself that the defence of finality given effect to by the Lord Ordinary, founded upon the Instructions of 1563 to Commissaries, can be safely relied upon; and, fortunately for the defenders, it is not necessary for their defence that it should be. I doubt very much whether the Instructions referred to were intended to do more than regulate the mode and extent of review of the judgments of Commissaries in the processes themselves in which these judgments were pronounced. And in this view of the case of Donald v. Thom, cited at the debate, and Menzies v. Menzies, referred to in the Lord Ordinary's note, in both of which a review in this Court by way of reduction of the judgments of inferior Commissaries was sought, cannot be available as precedents in the present case, where a reduction is sought of a former judgment—not of any inferior Court or Commissary but of a judgment of this Court, and on grounds different, as the pursuer represents it, from the grounds on which the Court proceeded in pronouncing the former judgment. Besides, since the date of the two commissary judgments sought to be reduced in Donald v. Thom, and Menzies v. Menzies, all actions of declarator of marriage, as well as some other consistorial actions, have been made competent to the supreme Court alone by the statutes 4 Geo. IV. cap. 97, and 1 Will. IV. cap. 69. Accordingly, the judgment now sought to be reduced was pronounced, not by the Commissaries to whom the Instructions in question were addressed, but by the Lords of Council and Session. Having regard, then, to the enactments of the statutes just referred to, and in particular to section 9 of the former and section 33 of the latter, I am disposed to think that since the passing of these Acts, if not before, the finality referred to in the Instructions to Commissaries, on which the Lord Ordinary founds, is no longer applicable.

(3) But if that be so, the defence of *res judicata*, also sustained by the Lord Ordinary, becomes all the more important. In regard to this defence (which I cannot doubt is equally available in such a case as the present as in any other) the only answer made to it by the pursuer, as I understood his argument, was,

that although the object of his present action is in its leading conclusion the same as that of his former one, they are laid upon different grounds—that is to say, that while the former action was libelled exclusively upon the alleged marriage having been completed by the interchange of matrimonial consent *de præsenti*, the present action, in addition to that ground, is also laid upon the separate ground of the marriage having been constituted by promise *subsequente copula*.

Now, whether, in the very peculiar circumstances in which the present action has been brought, and especially keeping in view the lapse of time which occurred between the termination of the former suit, the death of Miss Sinclair and other parties during that time, and consequent loss of evidence and change of circumstances, there might not have been a good and sufficient defence to the present action, even although laid, as averred by the pursuer, upon grounds different from that libelled on in the former, I think it unnecessary to consider, because I am quite clear that the pursuer is not in a position to maintain that his present is laid upon any grounds different from those of his former action. The way in which the pursuer endeavours to maintain the contrary is not a little singular, for while he admits that in the record, as ultimately made up and closed in the former action, and on which the parties joined issue and went to proof, both grounds of action—promise with *copula* as well as interchange of consent *de præsenti*—were expressly and unequivocally founded on by him—he says he committed an irregularity in doing so, in respect that the latter ground of action was alone in the summons. This is the very singular way in which the pursuer endeavours to avoid the plea of *res judicata*. But I am very clear, in the first place, that there is no room for the distinction on which he founds between his summons and record in the former suit; and, in the second place, that even if there were, he is barred from now availing himself of it.

I have examined the summons and record in the former suit, and I am quite satisfied that promise *cum copula* as a ground of action was not only condescended on in the record, but also libelled on in the summons. The written contract of marriage was expressly libelled on, and particularly that part of it whereby the parties agreed to marry, and "promised to solemnise the bond of marriage with all convenient speed." And then, after setting out the interchange of lines to the effect that the parties held themselves as married, the pursuer goes on to libel that "they afterwards considered themselves as married, and conducted themselves towards each other as husband and wife." I think there was here a sufficient libelling of marriage on both the grounds referred to; and at any rate, that any room for doubt on the subject must be held to be cleared up and removed by the statements and pleas in the record as subsequently made up and closed. And that it was so understood by both parties in the former suit is beyond all question, for not only did the pursuer obtain an order or allowance to prove all his averments in his closed record, but he did so without objection on the part of the defender. Nor do I think it of any consequence that the pursuer did not lead any parole evidence, but contented himself with what he had in writing, and obtained in the cross-examination of the defender's witnesses. That the Lord Ordinary in the cause held that the pursuer had libelled as one of his grounds of action promise *subsequente copula* is clear from the terms of his judgment on considering the proof and whole cause; for it appears from the report of the case (8 D. 589) that he expressly found "that the pursuer has totally failed to prove that any consummation of the said intended marriage ever

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took place, as alleged in the libel and record." And the interlocutor containing this finding (p. 627 of report) was adhered to by the Court. But the matter does not rest there; for I find from the same report (p. 508) that the Lord Justice-Clerk, in giving judgment in the Inner-House on the pursuer's reclaiming note against the Lord Ordinary's interlocutor, stated that he had abandoned his allegation of consummation, and that "the case was most distinctly stated to us as one in which it was not possible, or intended, to allege that any conjugal intercourse had followed on the declarations which are said to constitute, and to have been granted for the purpse of constituting, actual marriage, as of the date, between the parties." Lord Cockburn also (642) refers to this abandonment by the pursuer. Accordingly, the formal judgment of the Court contains an express finding to the effect that "the pursuer by his counsel at the bar expressly admitted that he did not now insist, as any part of the case, in the averment that consummation of the alleged marriage between him and the defender by conjugal intercourse had ever taken place, and that he did not mean to represent any part of the proof as intended to prove the same, even indirectly." And it was further expressly found "that the pursuer by his counsel at the bar stated that he did not insist as any part of his case in the averment that the alleged marriage had been made known to any of the relations or domestics of the defender; and therefore refuse the reclaiming note, and adhere to the interlocutor of the Lord Ordinary reclaimed against; and of new assoilzie the defender from the whole conclusions of the libel, and decern."

In this state of the matter it is impossible, I think, for the Court now, on any statements which are made in the present record, to hold that the judgment in the former suit is not *res judicata* against him, or that he is not barred and precluded from insisting in the present action.

(4) But the pursuer argued that the plea of *res judicata* stated against the present action is untenable, because the judgment in the former suit was obtained by fraud, conspiracy, and subornation of perjury; and I do not say, having regard to the opinions of the learned Judges in this Court, and of the noble and learned Lords in the Court of last resort, in Shedden v. Patrick, that a case might not be laid upon fraud and conspiracy and subornation of perjury so as to require investigation; but I am very clearly of opinion that the present is not a case of that description. In order to demonstrate this, I consider it unnecessary to go over the pursuer's averments in any detail, especially after the observations which have been already made on the subject by both your Lordships who have preceded me in delivering your opinions. I may observe, however, that he nowhere avers that there was conspiracy or collusion of any kind between him and the defender, Miss Sinclair, in the former action, having for its object to impose on the Court, and to obtain a judgment as in a fictitious or mock suit. That is not the nature of his case at all. At the very most his averments amount merely to some very vague statements and general charges of conspiracy and collusion between the defender, her sister, and her aunt, all of whom are now dead. And these statements or charges are manifestly so vague and wanting in precision as to be clearly untenable and unavailing in any view that can be taken of them. On this point it is sufficient to refer to the opinions delivered in the House of Lords in the case of Shedden v. Patrick, and also in the case of Irvine or Douglas v. Kilpatrick (7 Bell's Appeals, p. 186). These opinions are, I think, conclusive to the effect that the pursuer's averments, as well in the record as closed as in his proposed amendments, are quite insufficient,

as not shewing with the requisite relevancy and precision of what the alleged fraudulent conspiracy consists—how, when, and where it was entered into or carried out, if it ever existed, which I see no reason for believing it did.

In the circumstances, and for the reasons now stated, I am of opinion that the pursuer's reclaiming note ought to be refused, and the Lord Ordinary's interlocutor adhered to, except as regards its second finding, which I think should be recalled as unnecessary.

LORD GIFFORD.—On 5th April 1842, being now upwards of thirty-four years ago, the present pursuer, Mr Edmund Beatty Lockyer, raised an action of declarator of marriage against Miss Janet S. T. Sinclair, of Freswick, in Caithness. The summons concluded to have it found and declared that the pursuer and Miss Janet Sinclair were lawfully married persons—husband and wife of each other—and there were the usual ancillary conclusions for adherence, and otherwise.

The action was defended by Miss Sinclair, who denied that any marriage had ever taken place, or that anything had ever followed on the antenuptial marriage-contract which had been executed by the parties, or on certain writings which had thereafter passed between them. In the summons the pursuer had not averred specifically that the alleged marriage was ever consummated, or that any sexual intercourse had ever taken place. He contented himself with averring generally in the summons that the parties, after *de præsenti* consent to marry had taken place, "considered themselves as married, and conducted themselves towards each other as husband and wife."

In the revised condescendence, however, the pursuer made this general statement specific, and averred a number of times and places when and at which connection was said to have taken place. These averments Miss Sinclair denied, as the record bears, "in the most solemn and positive manner," and the record was then closed between the parties; the pursuer founding his case that marriage had taken place (1) On the averment that solemn and serious *de præsenti* consent had been interchanged between him and Miss Sinclair, and (2) That even if this were not so, actual marriage was completed by written promise to marry *subsequente copula*.

A very long and very keenly contested litigation followed, and continued for four years. The whole of the pursuer's averments in his revised condescendence were remitted to proof. A very long proof was led, consisting not only of documents and correspondence passing between the parties, but also of parole testimony, and although the number of witnesses was not great, consisting (including the pursuer's conjunct proof) of only five witnesses in all, yet the examination of these witnesses was very minute and protracted, extending to upwards of 300 pages of print.

After a long struggle in the proof, in the course of which numerous questions as to competency were raised, and after very full argument, the case was decided against the pursuer—first by the Lord Ordinary, and afterwards by the unanimous judgment of the four Judges of the Second Division. The whole Judges were of opinion that no marriage had taken place between the pursuer and Miss Sinclair, and it is important to note, in reference to the contention now maintained by the pursuer, that the judgment of the Second Division contains the following very express and specific finding:—"Find that in stating his case on the merits of the declarator, the pursuer by his counsel at the bar expressly ad-

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mitted that he did not now insist as any part of his case in the averment that consummation of the alleged marriage between him and the defender by conjugal intercourse had ever taken place, and that he did not mean to represent any part of the proof as intended to prove the same even indirectly; and further find that the pursuer by his counsel at the bar stated that he did not insist as any part of his case in the averment that the alleged marriage had been made known to any of the relations or domestics of the defender." It was besides perfectly clear upon the proof which had been led in the case (and this is noticed by all the Judges) that the pursuer had utterly and absolutely failed to prove any of his averments regarding the consummation of the alleged marriage, and had even failed to raise the slightest suspicion that any connection had or might have taken place. On this point, and as an example, I may notice what was said by Lord Justice-Clerk Hope. Speaking of the pursuer's averments of consummation, his Lordship says—"It is right to add (but I beg to state that I only do so lest any inference should be drawn from the omission to make the statement, not in the least degree because I think it in any respect necessary for the vindication of this lady from any imputation, or because I think she can suffer from anything this pursuer has said) that, looking to the whole proof, I not only utterly disbelieve the statements on this point which the pursuer chose to place on the records of the Court—I disbelieve them not merely as a Judge examining evidence, but as a man scrutinising narrowly the conduct of a female—I not only disbelieve them, but I am satisfied that they were truly placed by the pursuer on record for the purpose, by intimidation, of driving the defender into marriage, or of attempting to dishonour the lady by whom he had been rejected." Others of the Judges expressed themselves to the same effect.

The pursuer's action, then, of 1842, after the fullest investigation, and after a keen and protracted litigation, failed on both the grounds on which he relied, and final decree of absolvitor was pronounced by this Court on the 3d March 1846. The pursuer took an appeal to the House of Lords, but after considerable delay he failed to follow it forth, and the appeal was finally dismissed by the House of Lords in February 1850. The result of these judgments was to find that the pursuer and Miss Janet Sinclair were not and never had been married persons; that both of them were single and unmarried and free to marry any person with whom they might choose to contract.

The final judgment of the Court pronounced in 1846 stood unimpugned and unchallenged for thirty years until the present action was raised on 9th August 1875. Miss Janet Sinclair died on 18th June 1870, understood and reputed to be an unmarried person, and as such she executed as her will a trust-disposition and settlement in favour of Mr Ferryman and others, the present defenders, who are her representatives administering her estate in terms of the settlement. The aunt and sister of the said Miss Janet Sinclair, who were the principal witnesses in the action of 1842, are also now dead, and it cannot but be that after the lapse of thirty-seven years from the date of the occurrences in dispute death must have removed many of the persons who might possibly have thrown light upon, or given evidence regarding, the occurrences which then took place.

It is in these circumstances that the pursuer now, in 1876, seeks to open up the decree of absolvitor pronounced in 1846. He asks this Court to re-try the whole question which formed the subject of keen and protracted litigation thirty

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years ago. He demands that the question whether there was any marriage between him and the late Janet Sinclair in 1839 shall be investigated into and determined of new, just as if no proceedings had taken place during the four years 1842 to 1846, and just as if he was now raising the question for the first time. He now proposes to lead new evidence to prove (apparently principally by hearsay of witnesses who are now dead) facts and circumstances which he failed to prove in 1842. He says he will establish that Miss Sinclair's aunt and sister, who were examined and cross-examined at such length in 1843 and 1844, gave false evidence—that the late Miss Sinclair herself induced them to do so, or conspired with them that they should swear falsely, and he now asks the Court to declare, after Miss Janet Sinclair's death, that she was the wife of the pursuer in 1839, and that the pursuer now, as her surviving husband, has right under the contract of marriage to Miss Sinclair's whole means and estate, heritable and moveable. In short, having failed to substantiate the marriage during Miss Sinclair's life he proposes to do it now that she is dead, to the effect of carrying off her whole property. The demand is a very startling one—I think I may say that it is unprecedented—and it would require to be supported by very strong and special grounds.

I am of opinion that the pursuer has failed to state any relevant or sufficient grounds for setting aside the final decree of 1846, that the pursuer is not entitled now to raise or try the questions embraced in this action, and that the defenders are entitled to decree of absolvitor. I am therefore for adhering to the judgment of the Lord Ordinary.

The first plea relied on by the defenders is that the judgment of 1846 constitutes *res judicata* between the parties and their representatives; that that judgment is binding upon the present pursuer, and that he is barred and estopped thereby from trying over again the question which was then, after full trial, finally decided against him. I think this plea is well founded.

It is not and cannot be disputed that the litigation which went on from 1842 to 1846 was a litigation before a competent tribunal—a litigation in which all the proper parties took part, and in which the questions raised were fairly and fully contested. It was in no sense a collusive lawsuit and litigation in which there was only a pretended contest, and in which, as happened in some of the cases cited at the bar, the pretended antagonists really concurred in obtaining the decision, and the Court was deceived and entrapped into pronouncing a judgment which both parties knew the facts would not justify. Collusion, in the proper sense of the word, is out of the question. There was certainly no collusion in the litigation between the pursuer and the late Miss Janet Sinclair. Instead of collusion there was the keenest, the most strenuous, the most bitter, opposition. Every point was contested. The parties were represented by the ablest counsel then at the bar. No plea was omitted—no averment susceptible of proof was forgotten—every point was contested. In the proof every possible advantage was sought by the pursuer, and every objection to evidence which the pursuer or his advisers thought they might beneficially take was rigorously and even vexatiously insisted in. If the pursuer lost the case finally in 1846, it was not for want of strenuous litigation. Everything that skill and perseverance and energy could do for him was done, and if the judgment of 1846 is not to be final I can hardly conceive that finality can be predicated of any judgment whatever of any Court.

But the pursuer by his counsel boldly maintained that in a consistorial cause,

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such as a declarator of marriage or of legitimacy, or of bastardy, or of putting to silence, there is not and never can be any such thing as a *res judicata*, at least where the judgment denies or negatives the alleged marriage; and this contention was supported by an argument, the learning, the research, and the ingenuity of which I could not but admire, and my admiration was only increased when I felt the hopelessness of the effort.

The contention was that by the canon law in matrimonial suits there never is and never can be *res judicata*, at least where the judgment is against the alleged marriage, and it is urged that the canon law on such a subject is the law of Scotland. There is only one text on the subject in the canon law itself, that is in the Corpus Juris Canonicum. It occurs in Decretum, book ii. tit. 27, law 7, and although expressed in general terms, the case, and the only case, given is one of a collusive decree, obtained by the device of both the parties, who had combined in deceiving the ecclesiastical Court and in surreptitiously obtaining a decree. The general rule contended for by the pursuer can only be gathered from the *dicta* of certain canonists or commentators upon the canon law; and indeed the chief authority relied upon is that of Sanchez in his work De Matrimonio, and I think most, if not all, the writers quoted by Mr Fraser either merely follow the *dicta* of Sanchez or explain and modify or extend them. I do not think it necessary to enter upon the extremely interesting inquiry into which Mr Fraser led us as to the bearing and extent of the rule which certainly seems to have prevailed among the canonists, that in certain matrimonial causes, and in certain circumstances, the plea of *res judicata*—that is, the finality of the judgment of a Court—was not admitted. A distinction was taken between judgments in favour of marriage *pro matrimonio* and judgments against marriage *contra matrimonium*. In the former the matter *transit in rem judicatum*, in the latter not; but even in the former case there were exceptions, as where a marriage was affirmed or declared between parties alleged to be within the forbidden degrees. There seems to have been other exceptions and sub-exceptions, and, as usual in such cases, successive writers give play to their ingenuity and subtlety in refining and distinguishing the most shadowy differences. All this is very interesting, but it has really no bearing on the present case, for nothing is more hopeless than to maintain that the *dicta* or disquisitions of canonical commentators are or ever were the law of Scotland. Even the canon law itself, at least since the Reformation, forms no part of the law of Scotland. Even before the Reformation the weight of authority seems to shew that the canon law had not *per se* the force of law, at least where contradicted by local ordinances or customs; and since the Reformation I think it perfectly clear, in the words of Lord Stair, and no higher authority can be cited, that in Scotland the canon law and its rules and principles "have not the authority of law, and therefore are only received according to their equity and expediency *secundum bonum et æquum*,"—Stair i. 1, 16. If this be true of the canon law itself—of the Corpus Juris Canonicum—it is much more true of the treatises of the canonists and canonical commentators. Most certainly everything that Sanchez says is not the law of Scotland. It would be startling, indeed, if it were; and although in matrimonial questions, and in questions relating even indirectly to church law, the canon will always be listened to with respect, I am not sure that the same can always be said of the *dicta* of Sanchez, or of the crowd of commentators who either preceded or followed him. Speaking for myself, and without claiming more than a very slight acquaintance with this class

of writers, I am almost inclined to say that when a *dictum* or principle can only be supported by Sanchez or by his followers, it is rather a ground of suspicion and a call for scrutiny, than a reason for acceptance as part of the law of Scotland.

It is satisfactory to think that the reasons given for the alleged canonistic rule against the operation of *res judicata* have no place in the law of Scotland. The *salus animæ*, the safety or eternal welfare of the soul, the mitigation or the shortening of the pains of purgatory, and similar reasons, cannot be listened to here and now. Such considerations are foreign not only to our law, but to our modes of thinking, and *dicta* which rest upon such considerations have only to be examined to be laid aside. If the plea of *res judicata* is to be met and overcome it must be in a different manner and on far different grounds.

I am of opinion, then, that by the law of Scotland the rule of *res judicata* is as completely and as fully applicable to matrimonial, divorce, and consistorial causes as to any other class of causes whatever. No good reason can be given why there should be any difference. Nay, if the nature and specialties of consistorial suits, particularly suits having for their end to constitute, to negative, or to dissolve marriage, be taken into account, there is even more reason why, in a fairly and fully tried cause, honestly contested, and fought out to the end, the sentence should be definitive and final. Uncertainty, liability to question, doubt, possibility of change, or reversal, are far more to be deprecated in questions relating to marriage than almost anywhere else, and the social misery and confusion which would or which might result if it were impossible to fix and settle such questions can hardly be estimated. A mere pecuniary award, or even the adjudication of an estate, is or may be comparatively a small matter compared with the final knitting or the final severance of nuptial ties—the separation of families and the *status*, legitimate or otherwise, of innocent offspring.

Wherever, therefore, there has been an honest, fair, and fully fought litigation, as in the present case—wherever the proper parties, the only proper parties, and all the proper parties, have honestly and without collusion, whether obstinately or not, fought out their rights before a competent Court, and in a competent manner, then, as between these parties so litigating, I think the judgment obtained, acquiesced in, or affirmed on appeal, has and must have the force of *res judicata*. The question is settled, the judgment has gone forth, and that same question is not to be fought over again between the same parties, and in the same way, and thus judgment made not the ending but the beginning of strife. For the pursuer's contention really is that the suit is to be interminable; no matter how many judgments are pronounced, the pursuer (for he does not concede the same privilege to the defender) can simply try again, taking his chance of new evidence or variations in the mode of giving evidence, of new witnesses or the absence of old witnesses, of a new jury or a new Judge, of changes in the law or changes in opinion, and this not even to be ended by the death of the parties, but it may go on for ever as between their representatives.

I cannt listen to such a contention, and I reject without hesitation the pursuer's proposition that there can be no such thing as *res judicata* in matrimonial or divorce suits. In the present case I hold it perfectly clear that whatever was really and competently decided after full and honest litigation in the action of 1842 must now be held in the fullest sense of the words to be *res judicata* against the pursuer.

But the pursuer next contends that although the final decree of 1846 may be

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res judicata in so far as it finds that there was no marriage constituted by the interchange of present consent, it cannot constitute *res judicata* so as to find that there was no marriage constituted by promise *subsequente copula*, for the pursuer maintains that this separate ground of action was not competently embraced in the action of 1842, and was not competently adjudicated upon by the Court. He maintains that the averments which he himself made in his first action as to the alleged marriage having been consummated, and as to intercourse having taken place between the parties, were incompetently made—that all these averments should have been struck out of the record—that no proof should have been allowed regarding them, and that the Judges in the first action should have laid these averments and the proof by which they were attempted to be supported altogether out of view.

Now, I cannot agree with the pursuer in this view of the case. It is true that in the original summons no precise averment was made of consummation, and no particulars were given as to time or place. But there was a general averment that after the alleged marriage the pursuer and the late Miss Sinclair "considered themselves as married, and conducted themselves towards each other as husband and wife."

A general averment of this kind was all that was necessary to be made in a summons drawn according to the old form, and the very object of the condescendence, and the revised condescendence which were afterwards allowed, was that this general averment might be made specific, that full details might be supplied, and that the pleas in law arising upon the facts might be separately deduced, and I think it was perfectly competent for the pursuer to introduce into his revised condescendence, and to place upon the closed record, the specific allegations upon which he ultimately relied, and the pleas in law he deduced therefrom. No objection was taken to his doing so. Issue was distinctly joined between him and the late Miss Sinclair upon these very averments. In that proof the pursuer endeavoured to substantiate them, and although doubtless in this he signally failed, still I cannot doubt the competency of the averments and of the proof, and it is hardly possible to read the opinions of the Judges without feeling that, had the pursuer succeeded in establishing what he averred, the decision of the cause would probably have been quite different from what it was.

Still further, I think that the pursuer is now completely barred from maintaining that these averments were incompetently made in the first action. It was the pursuer himself who made them; he claimed right to do so, and his right was allowed. He asked a proof of them, and the proof was granted to him. He went to judgment upon those averments and upon that proof, and it is impossible now to allow him to plead that these averments were incompetent, that the proof relative thereto should have been excluded, and that the judgment thereon, which he himself demanded, was incompetently pronounced. I am not moved by the judgment in Dallas v. Mann. There the objection was taken in the original action, and was sustained in the original action, leaving it to the pursuer to bring a new action upon new grounds. It led to a simple dismissal of the cause—that is, the party was expressly allowed or required to bring a new action—and there never was or could be any *res judicata*. But the principle applied in Dallas v. Mann is inapplicable to the present case, in which the detailed averments were quite rightly and competently put upon the closed record.

I am of opinion, therefore, that the final judgment of 1846 forms, in the highest sense of the words, *res judicata* against the pursuer. It decided against

him the very questions which he now seeks to raise, and disposed definitively and precisely of all the grounds upon which he now seeks to rest the present action. His demand is—I think it is impossible to disguise it—to try over again in 1876 the very same questions, and upon the very same grounds, which were adjudicated upon *in foro contentiossimo* in 1846.

Now, without saying that a decree *in foro* can never be got rid of, it is enough to say that when once a proper *res judicata* is established, as in the present case, it can only be avoided on very special and specific grounds. What those grounds are belong to a subsequent branch of the pursuer's case.

There is another ground on which the defenders rely as excluding the present action, and that is, that under the Instructions to Commissaries issued in 1563 the lapse of a year and day from the date of the final decree excludes all subsequent challenge thereof. Now, I admit that there is great room for doubt as to the nature and effect of the Instructions to the Commissaries, and in particular of the special Instruction upon which this plea is founded. It is a general principle that decrees in absence may be opened up, even although proof has been led, for a decree in absence is not *res judicata* in the strict sense, or even although there be *causa cognita*, because there has been no contract of *litis contestatio*, there has been no appearance for the defender. Now, one can see the extreme importance of fixing at least some limit within which a party who does not choose to appear in a consistorial cause may be barred from appearing and challenging a decree after the other party has proceeded upon the faith of it. I think that was the actuating principle upon which the three decisions founded upon by the defenders were founded, and I cannot lay these decisions aside. I feel myself bound by them as establishing a most salutary rule. It is true the regulations apply to all kinds of actions in the Commissary Court, and appear to be applicable to other than mere matrimonial causes; and although, as to other causes, they are not now observed, still, as to matrimonial suits, there was a very great desirability in reducing finality within a fair period. I am not prepared to say that I would not apply these three cases as a fair rule to consistorial causes, fixing a year as the period after which a decree in absence at any rate should not be opened up, except on very special cause shewn indeed. But while I cannot discard the principle founded on the lapse of year and day, I think it does not apply to the present case, or to any case which has been decided between the parties as the present case has. For the moment a decree is pronounced *in foro contentioso* it is *res judicata*. It may be reviewed if a Court of review is open; it may be appealed if it is an appealable judgment; but it cannot be disregarded as a judgment. If it is affirmed on review or appeal then it is *res judicata*, though only a month has elapsed; or indeed it is *res judicata* the moment a final judgment is pronounced which is acquiesced in or not taken to review. Therefore this rule of year and day does not apply in the least to the judgment in the present case. Its effect upon other rules I shall not say anything of. I think that part of the Lord Ordinary's interlocutor need not enter into our judgment.

And this brings me to the next question in the case, which is this, has the pursuer set forth relevant and sufficient grounds upon which a valid or effectual *res judicata* can be got over? I quite agree with your Lordship in the chair on this part of the case. No doubt a decree *in foro* may sometimes be set aside and the cause be re-tried. The best instance is the case put in illustration—that of a decree or judgment *in foro* obtained by collusion of the parties. I entertain no doubt whatever that, if parties combine to get a judgment, the judgment so got by their collusion, or by deceiving the Judge by the appearance of a contest

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which does not really exist, will not stand as *res judicata* against any one, or against anybody. I also go along with your Lordship in holding that a judgment obtained by fraud cannot be pleaded upon by the party guilty of that fraud. And that raises what to my mind is the real difficulty in this case: Has the pursuer set forth specific averments of fraud, which, if he proves them, would entitle him to set aside this decree and to try the cause over again? Now, I agree with your Lordship in the chair in all the remarks which you have made upon this point. I do not think that any of the grounds relied upon by the pursuer are sufficient.

I think the grounds may be classified into four heads. He says the witnesses spoke falsely—were perjuring themselves by speaking what was not true. Now, it is quite plain that that by itself is not a ground for setting aside a judgment. There is contradictory evidence in almost every jury trial, and cases of perjury are not unfrequent in cases where strenuous disputes arise regarding matters of fact; but it is for the jury in each case to judge which of the witnesses to believe and which to disbelieve. And it is quite vain for a party who has been unsuccessful in one trial to say, I want another jury before whom I will prove that certain witnesses have perjured themselves. That must be settled not in a subsequent case but in the case itself, and means are provided by allowing additional or conjunct proof for exposing or detecting such perjury. Then the pursuer next says that at the time the first case was tried he could not get some witnesses. That is not a good ground for setting aside *res judicata*. He ought to have stated how he could not get them at the time. And it is extremely material to bear in mind, as several of your Lordships have noticed, that all the averments remitted to probation in this case were proper facts within the pursuer's own knowledge, about which he must have known fully and truly whether they were true. He cannot say therefore that in anything that was proved he was taken by surprise, although he may have been surprised at the testimony; and if he was taken by surprise at the testimony he ought to have protested for reprobators, as it is called, and claimed an opportunity of contradicting it. He actually had an abundant and long delay and a conjunct probation, and all that he now avers should have been brought out at the time. He says further that he could not get some witnesses, or that some witnesses were not adduced; but that was a thing he ought to have complained of at the time, and the proper remedy would have been applied. He would have got whatever time was necessary, and a *compulsitor* to secure the attendance of witnesses. And now, after the lapse of thirty years, he comes and says that he has got information which he did not possess before. I do not think that it is materially different from the last. Information as to the facts he cannot have got in the sense of their being new—what he means is that he has got new witnesses about them, and found out things afterwards which he might have brought forward in 1846, but did not bring. This is his own fault. It is quite plain upon this record that there were plenty of witnesses who could have proved most material points of his averments if they had been true, and if he had chosen to bring them—keepers, coachmen, ostlers, and others at Duntreath, regarding whom it must be presumed he should have known, and the Rev. M. Thoms and others, to whom it is said statements were made by Miss Janet Sinclair. He proposes to bring all these witnesses now because he did not bring them in 1846. It is impossible to sustain that as a ground for opening up *res judicata*. If he was taken by surprise, there was ground for moving for a new trial at that time; but now, after acquiescing in the judgment for a period of thirty years, he is moving for a

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new trial. The last ground upon which he asks this *res judicata* to be opened up—and that is the only ground upon which I have the least difficulty—is that Miss Janet Sinclair herself was guilty of subornation of perjury,—that is, in inducing her sister and aunt to swear to what they knew to be untrue. Now, I concur with your Lordships that this averment is not relevantly or sufficiently made. That they did conspire (as stated in the amendment which the pursuer has made) together to give false evidence is not nearly enough in an inquiry of this kind. It is not said that there was any bribe given them, or any inducement of any kind offered for them to come forward and swear falsely. All that can be said against Miss Janet Sinclair is that, perhaps, she sat by and heard, or that perhaps she knew, what they were to swear to from having conversation with them. Is that the proof we are going to? I do not think that is a sufficient allegation of subornation of perjury. Besides, it would require to be shewn that that perjured information was material in the judgment of 1846. Now, when I look at the opinions of the Judges in that case I find that they chiefly went upon the correspondence and upon what the parties meant by the interchange of these written *de præsenti* consents; for there was also a marriage-contract that passed between the parties. That was the chief averment in the case; and the opinions of all the Judges go upon the correspondence chiefly, as shewing that the parties by these *de præsenti* written consents did not intend *verum matrimonium*. That was the ground of decision in 1846—not any particular statement made by these witnesses, now said to be perjured, and to be suborned by Miss Janet Sinclair—and it is out of the question to allow this averment, even had it been much more specific in itself, to go to proof, to the effect of letting in a new case altogether, and thus to enable the pursuer to attack a judgment which did not rest on the alleged perjured testimony at all, but which was perfectly well supported on other and separate grounds. The conclusive answer to the pursuer getting into these matters now is lapse of time and the change of circumstances which have occurred. Why has this matter lain over for thirty years? Why has the pursuer waited until all the witnesses are dead? Why has he waited until death has covered with oblivion all the circumstances not recorded in the former proof, when no party materially acquainted with these facts can be got to speak to them, and he can only get proof of the alleged perjury of the two witnesses and of the alleged subornation by Miss Janet Sinclair by the hearsay evidence of other witnesses who are now dead. I think lapse of time here is sufficient. No party is entitled to lie by for thirty years, and then, when the other party is dead and circumstances have escaped the memory so that it has become impossible to prove them by essential witnesses, to raise the question in a new state of the law, under new circumstances, before new Judges, and with different parties. I think the lapse of time is a sufficient answer, even if the averments by which the pursuer seeks to get rid of *res judicata* had been far more definite and specific than they are, or the pursuer can possibly make them. Upon the whole of these grounds I think the judgment of the Lord Ordinary ought to be adhered to.

THE COURT pronounced this interlocutor:—"In respect it is unnecessary to decide the question raised by the defenders in their first plea in law, recall the interlocutor of the Lord Ordinary of 13th February 1876, in so far as it sustains that plea: *Quoad ultra* adhere to the interlocutor reclaimed against, with additional expenses, &c.

WILLIAM SPINK, S.S.C.—HAMILTON, KINNEAR, & BEATSON, W.S.—Agents.

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ALEXANDER BATCHELOR, Pursuer.—*Party.*
GEORGE HANDASYDE PATTISON, Defender.—*D.-F. Watson—Black.*
WILLIAM MACKERSY, Defender.—*Burnet.*

Advocate.—Held that a counsel in the conduct of a cause is entitled to use his own discretion even against the instructions of his client, and that an allegation by the client that he has sustained loss in consequence is not relevant to support a claim of damages against the counsel.

Agent and Client.—Although, generally, an agent is bound to follow the instructions of his client, when the conduct of a cause is in the hands of counsel the agent is bound to act according to the directions of counsel, and will not be answerable to his client for what he does *bona fide* in obedience to such directions.

Observations on the duties and liabilities of counsel and agents.

1ST DIVISION. Sheriff of Midlothian. M.

THIS was an action raised in the Sheriff Court of Midlothian by Alexander Batchelor against William Mackersy, W.S., and George Handasyde Pattison, advocate. The conclusions were for payment of £409, 15s., "being loss and damage sustained by the pursuer by and through the wilfulness, maliciousness, gross negligence, systematic disregard of instructions, and ill-guided recklessness, or one or other of them, on the part of the defenders, the said William Mackersy as agent, and the other defender employed by him as counsel, or of one or other of them, in their management or conduct of an action in the Court of Session."

The Sheriff-substitute having ordered condescendence and defences, the pursuer made the following statement:—The pursuer's father, who died in 1848, left a trust-disposition and settlement by which he directed his trustees, on his wife's death, to divide his property equally among his six children. His wife died in 1855, and therefore the pursuer became entitled to one-sixth of the trust-estate. The pursuer was then abroad, and did not return for many years. (Cond. 2.) "The pursuer had never received his one-sixth share of his father's estate, and being unable to get an accounting from the trustees of their intromissions therewith he instructed Mr Robert Broatch, writer, Dalbeattie, to get the necessary proceedings raised before the Court of Session for that purpose. Mr Broatch, consequently, employed the defender, William Mackersy, to raise an action before said Court in the year 1869. The said William Mackersy accepted of the employment." (Cond. 3.) "The pursuer had, for a consideration, on 14th April 1869, granted an assignation of his said one-sixth share to Francis Suttie—(Suttie granted a retrocession on 12th August 1873)—and Mr Mackersy, in pursuance of said employment, raised an action before the Court of Session at the said Francis Suttie's instance, as assignee of the pursuer, against the following parties, viz.—(1) John Robertson and Alexander Lindsay, the only surviving and accepting trustees, original and assumed, of the pursuer's father; and (2) the said Alexander Lindsay, as an individual." (Cond. 4.) "The truster left at his death certain moveable effects and considerable heritable property in Dundee. The heritable property was exposed to sale, by public roup, on 16th May 1855, and it was sold at a reduced value to the said Alexander Lindsay. In the course of the proceedings before Lord Ormidale the sale was, on 7th February 1871, found to be illegal, and his Lordship ordained the said Alexander Lindsay to lodge an account of his intromissions with the rents he had drawn from said property from Whitsunday 1855." (Cond. 5.) "About the time that said order was pronounced to account, the defender, William Mackersy, changed his counsel, and employed the other defender, George Handasyde Pattison, as counsel. It was about this time also that the wilfulness, maliciousness, gross negligence, systematic disregard of instructions, and ill-guided recklessness, in the manage-

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ment or conduct of said proceedings before the Court of Session, began, of one or more of which the defenders, or one or other of them, have been culpably guilty." (Cond. 6.) "In carrying out said accounting, and, with the view to the proper ascertainment of the pursuer's one-sixth share of his father's estate, the defender, William Mackersy, was instructed to get the heritable property sold by public roup, as directed by the trust-deed. Instead of obeying these instructions, the defenders did, both of them, wilfully and recklessly, consent to a remit to a pretended man of skill, to value and report upon the heritable subjects. Against this the pursuer remonstrated. Notwithstanding the defenders lodged a minute craving such a remit, and by interlocutor of 23d January 1872 the Lord Ordinary made a remit accordingly. The defender, George Handasyde Pattison, was well aware of the instructions that had been given for a sale of the subjects. The pursuer's interests were prejudiced by this remit, and it would have been greatly to his profit had there been a sale instead of a remit." (Cond. 7.) "After said remit had been made, and report obtained and lodged in process, the Lord Ordinary, by interlocutor of 14th May 1872, allowed the report to be seen, and the parties to lodge a note of objections thereto, within eight days. The pursuer . . . instructed the defender, William Mackersy, to lodge objections to the report, and crave a proof or a remit to another architect, if proof could not be got after the remit had once been made, so as to shew that the subjects had been undervalued to the extent of £252, and the alleged meliorations and additions thereon overvalued, to the extent of £121, all to the pursuer's loss to the extent of one-sixth of £373, and the profit of the defender, Alexander Lindsay, in said action. But these instructions the defender, William Mackersy, wilfully, recklessly, and negligently disregarded, and lodged no objections. These instructions were repeatedly given." (Cond. 8.) "In accounting for the rents, the said Alexander Lindsay debited himself with the amounts thereof, as appeared from the valuation-roll of the burgh of Dundee, amounting, from Whitsunday 1855, to £586, 19s. On inquiry at the tenants it was found that, in almost every instance, each tenant had paid much more than his rent was stated to be in the valuation-roll. The defender, William Mackersy, was consequently instructed to get a proof, or a remit, to examine the tenants and Lindsay, and recover receipts and rentals, so as to ascertain the true amounts of the rents Lindsay had drawn. After considerable and unaccountable delay a remit was made only to recover receipts and rentals, but not to examine the tenants. The pursuer remonstrated against such a limited remit, and again instructed that the remit should be extended to an examination. The other defender, G. H. Pattison, was made aware of this instruction, but would not, at least did not, obey it,—this most negligently, and wilfully, recklessly, and by *crassa negligentia*, and unskilfulness." (Cond. 9.) "A remit being thus obtained to recover receipts, rentals, and other documents, it was carried through by the said Robert Broatch, who succeeded in recovering a great variety of receipts and rentals; but many of the tenants had not receipts, and those and the rentals recovered were of a very confused nature, and instructions were again given to get a remit to examine the tenants orally, so as to supply the defects of the missing receipts, and explain those recovered. Still these instructions were disregarded by both defenders, most wilfully and recklessly, to the pursuer's loss to the extent of at least one-sixth of £200." (Cond. 10.) "The said William Mackersy laid the receipts, &c., recovered under said remit, before Messrs Robertson, chartered accountants, Edinburgh, who reported that the excess of rents amounted to £392, 10s. 5d., exclusive of interest as it accumulated from Whitsunday 1855." (Cond. 11.) "This the defender,

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William Mackersy, announced to the pursuer, who instructed him to get a judicial remit to an accountant, to report a state of accounts between the parties to the Court. This also the defender, William Mackersy, wilfully, recklessly, culpably, and negligently failed to do, and did not do. The instructions to get this done were given to the said William Mackersy repeatedly by letter." (Cond. 12.) "Instead of getting a remit to an accountant, in conformity with said instructions, the said William Mackersy by misrepresentations, prevailed on the said Robert Broatch to consent to the amount of rents accountable for by Lindsay being adjusted by counsel. Mr Broatch without any authority from his client, gave such consent, but in doing so stated that he had 'no authority to grant such a letter, and I grant it with great reluctance. It depends entirely on what Mr Pattison does whether the authority will be acquiesced in. If he proceeds on such a footing as not to meet with my client's approval my client will repudiate the authority, and engage the services of other agents and counsel.' After complaining that other things had been done in the cause contrary to express instructions the letter of authority proceeds,—'The result of Mr Pattison's adjustment is to be submitted to me before anything be done on it. That I condition in granting the authority.' The terms of this authority were duly communicated to the defender, G. H. Pattison. The pursuer was not aware that any such authority had been asked or given, and did not authorise it to be given. That authority, however, such as it was, was afterwards recalled, and instructions renewed to get a remit to an accountant as above stated. The defender, William Mackersy, wrote Mr Broatch that unless what counsel did was approved of it would not be acquiesced in, and, being unable to ascertain what was being done, so as to acquaint Mr Broatch therewith, he wrote Mr Broatch on 27th March 1873, with a copy letter he had sent Mr Pattison, recalling any authority he had to adjust the rents, and that anything he did would not be acquiesced in." (Cond. 13.) "Notwithstanding said recall of authority, or the terms in which it was granted, the defender, the said G. H. Pattison, most wilfully, maliciously, and recklessly, concurred in a joint minute which, in order to prevent the pursuer or his agent, Mr Broatch, seeing it, he lodged in process, on or about 2d April 1873, with his own hands, or by some one under his immediate directions and instructions, and paid the fee-fund dues thereof out of his own pocket. By said joint minute, which the pursuer and his agent repudiated so soon as they knew of its terms, the said excess of rents is admitted, by the said G. H. Pattison, to be only £120, without interest, instead of £392, 10s. 5d, as it was shewn by Messrs Robertson to be, with interest, and with whose report Mr Pattison was well acquainted, and he knew that said excess of rents was £392, 10s. 5d. at least. The interest on said £392, 10s. 5d. from Whitsunday 1855, calculated half-yearly, could not be less than £207, 9s. 7d. Instead of £120 it should thus have been £600, so that the pursuer's interests have been most wilfully, maliciously, and recklessly sacrificed, to the extent of at least one-sixth of £480, the difference." (Cond. 14.) "By said joint minute also, credit is given, most wilfully, and recklessly and maliciously, to the said Alexander Lindsay for alleged repairs on the said subjects, and alleged disbursements, which were neither justifiable by law, nor ever made nor vouched. This tended to diminish the pursuer's rights under said action to the extent of at least one-sixth of £200. The said William Mackersy was instructed and undertook to get said minute withdrawn from process, and he was put in funds to fee counsel for that purpose; but he wilfully failed to attend to this instruction, and did not even try to get the minute withdrawn, but allowed a remit to be made to an accountant to report a state of accounts, in terms

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of the said joint minute. The said G. H. Pattison was also written to on the subject, but he neither explained his conduct, nor tried to get the minute withdrawn; and he and Mr Mackersy were duly certiorated that they would be held liable in damages. . . . . The pursuer explains that at a meeting in Edinburgh between him, his agent Mr Broatch, and the defender Mackersy, on 6th May 1873, that defender undertook to get the minute withdrawn from process, and engage another counsel on being supplied with funds for that purpose. Money was sent for that purpose, but the defender Mackersy, instead of obeying these instructions, or notwithstanding the repudiation of the minute on 17th May 1873, procured a remit to Mr Jamieson, C.A., Edinburgh, to report a state of accounts in terms of said minute. The pursuer, Mr Suttie, and Mr Broatch, were in entire ignorance of this remit of 17th May 1873 till after it was pronounced. Thereafter the defender Mackersy's agency was recalled."

Both defenders lodged defences in which they denied the material averments of the pursuer. They both pleaded that the pursuer's allegations were not relevant.

Mr Pattison pleaded, *inter alia*;—(1) The pursuer has no title to sue. (2) The pursuer's allegations are irrelevant and insufficient to support the conclusions of the action. (3) This defender is entitled to absolvitor, in respect that his actings were not in any way contrary to or beyond his powers and duties as counsel.

Mr Mackersy pleaded, *inter alia*;—(6) The present defender having acted throughout under the instructions of counsel, and within his powers and duties as an agent, he ought to be assoilzied from the present action.

The Sheriff-substitute (Hallard) pronounced this interlocutor:—"Finds that the pursuer's allegations are irrelevant and insufficient to support the conclusions of the action: Therefore dismisses it, and decerns: Finds the defenders entitled to expenses, of which allows an account," &c.

The Sheriff (Davidson) adhered.

The pursuer appealed, and argued, that his counsel and agent had mismanaged his case, and were liable in damages.

Argued for the defender Pattison;—A counsel was not bound to obey every instruction of his client. He might act for his client in every way which was within a counsel's province. He was entitled to enter into a judicial reference. The pursuer had objected to three things—(1) that counsel consented to a remit to an architect to value the property instead of insisting on a sale; (2) that after a report had been made counsel refused to demand a remit to another valuator; (3) that counsel did not ask for a parole proof of the amount of rents received by the purchaser of the property, but consented to a minute fixing the amount. Counsel was entitled to decide on the expediency and propriety of all these questions.[1]

Mr Mackersy, the other defender, argued that he had acted under the advice of counsel, and so was not answerable.[2]

At advising,—

LORD PRESIDENT.—This is an action of damages raised by a client against his counsel and agent in respect of alleged misconduct in an action in which the client was interested. The Sheriff-substitute has found the action irrelevant, and that

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[1] Gilfillan v. Brown, March 8, 1833, 11 S. 548, 5 Scot. Jur. 597; Currie v. Glen, Dec. 19, 1846, 9 D. 308, 19 Scot. Jur. 101; Swinfen v. Lord Chelmsford, June 8, 1860, 5 Hurlston and Norman, 890, 2 L. J. Exch. 382.

[2] Megget v. Thomson, Feb. 2, 1827, 5 S. 275; Landale v. Tod, Jan. 13, 1831, 9 S. 268, 3 Scot. Jur. 162; Cates v. Indermaur, 1858, 1 Foster and Finlason, 259.

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judgment has been affirmed by the Sheriff. The case is now before this Court; and as the case is of a very rare description—one, I think, almost without a parallel in this Court—it is necessary to lay down the principles by which it must be decided.

An advocate in undertaking the conduct of a cause in this Court enters into no contract with his client, but takes on himself an office in the performance of which he owes a duty, not to his client only, but also to the Court, to the members of his own profession, and to the public. From this it follows that he is not at liberty to decline, except in very special circumstances, to act for any litigant who applies for his advice and aid, and that he is bound in any cause that comes into Court to take the retainer of the party who first applies to him. It follows, also, that he cannot demand or recover by action any remuneration for his services, though in practice he receives *honoraria* in consideration of these services. Another result is, that while the client may get rid of his counsel whenever he pleases, and employ another, it is by no means easy for a counsel to get rid of his client. On the other hand, the nature of the advocate's office makes it clear that in the performance of his duty he must be entirely independent, and act according to his own discretion and judgment in the conduct of the cause for his client. His legal right is to conduct the cause without any regard to the wishes of his client, so long as his mandate is unrecalled, and what he does *bona fide* according to his own judgment will bind his client, and will not expose him to any action for what he has done, even if the client's interests are thereby prejudiced. These legal powers of counsel are seldom, if ever, exercised to the full extent, because counsel are restrained by consideration of propriety and expediency from doing so. But in such a case as this it is necessary to have in view what is the full extent of their legal powers.

The position of an agent is somewhat different. There is a contract of employment between him and his client, by virtue of which the client, for certain settled rates of remuneration, is entitled to require from the agent the exercise of care and diligence, and professional skill and experience. The general rule may fairly be stated to be that the agent must follow the instructions of his client.

But the general rule is subject to several qualifications. The agent, of course, cannot be asked to follow the client's instructions beyond what is lawful and proper. For the agent, as well as the counsel, owes a duty to the Court, and must conform himself to the rules and practice of the Court in the conduct of every suit. He is also bound by that unwritten law of his profession which embodies the honourable understanding of the individual members as to their bearing and conduct towards each other. But above all in importance, as affecting the present question, is the undoubted special rule that when the conduct of a cause is in the hands of counsel, the agent is bound to act according to his directions, and will not be answerable to his client for what he does *bona fide* in obedience to such directions.

Such being the general rules, it is now necessary to examine the record in order to see if the defenders in this case have acted in accordance with these rules. The pursuer is one of six children of a person of the name of Robert Batchelor, who left some property behind him at his death in 1848. This property was in the hands of trustees, and it appears that, with a view to a division of the property, certain heritable estate which belonged to the defunct was brought to sale on the 16th of May 1855, and was then bought by one of the trustees.

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That sale and purchase were illegal, and although all the rest of the children of Mr Batchelor acquiesced in what was done and took their share of the estate, the pursuer, who had been absent from the country at the time, appeared after the lapse of a great many years, and insisted in having the sale declared to be illegal, with a view to ascertaining what his share of his father's property was. It is necessary to attend to the nature of the action said to be misconducted in order to judge of the force of the arguments made by and on behalf of the pursuer. There was a judgment pronounced in 1871 finding the sale to be illegal, and the consequence of that was undoubtedly that the pursuer was entitled to have an accounting upon the footing that the property was not properly valued at the price paid for it by the trustee who bought it, and to have the price divided as that should be ascertained. Now, the first complaint made upon the part of the pursuer is that his counsel and agent did not insist upon having the estate sold over again. That would, no doubt, have been one way to ascertain the true value of the estate; but it was not the only way, and it was not, in certain views, by any means the most expedient way of proceeding. Accordingly, it appears to me that it was quite a question for the consideration of the counsel in a case of this kind whether to insist upon a re-sale of the estate, or whether they should have a valuation; and the counsel, in the exercise of his discretion, thought that the latter course was preferable, and instructed the agent accordingly, and they both treated the case on the footing that there would be no re-sale, but a valuation. Now, this ground of complaint is an attempt by the client to make the counsel, and the agent acting under his instructions, answerable for the counsel's discretion in a matter eminently fitted for that discretion, and accordingly the irrelevancy of that complaint is at once apparent. I need hardly refer to the vituperative adjectives sprinkled so freely over the record, which do not add anything to the facts. If the facts are not of themselves sufficient, the mere use of abusive language will not have that effect. The next ground of complaint is this, that when a remit had been made to an architect to value the property, and the architect had made a report on the subject, the client and his country agent were anxious that that report should not be acquiesced in, but that the counsel and agent should ask the Lord Ordinary to allow proof, or to remit the matter to another architect—not for any reason alleged on record of any corruption or misconduct on the part of the architect to whom the remit had been made, but simply because the client had been dissatisfied. Now, I need hardly say to your Lordships that if any counsel had been so ill-advised as to make such a motion to the Lord Ordinary, he would not have succeeded, and that no proof would have been allowed, and no fresh remit made. If the Lord Ordinary's interlocutor had come before your Lordships for review, you would have expressed an opinion that no such demand should have been granted. The complaint resolves into this, that the counsel and agent both did their duty.

The next matter is, what was the amount of rents intromitted with by the purchaser of the property, and a question arose how that was to be ascertained. An account had been given in by the trustee, and it is alleged that it had been found that much more had been paid by the tenants than the rents which were stated by the trustee as the amount contained in the valuation-roll, and accordingly it was alleged that the agent was instructed to get a proof, or a remit to examine the tenants and recover the receipts and rentals, so as to ascertain the true amount of the rents which had been drawn; that a remit was obtained,

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but only to recover the receipts and rentals, and not to examine the tenants; that the pursuer instructed the agent that the remit should be extended to an examination, and that Mr Pattison was informed of this, but would not, or at least did not, obey. It is impossible not to see that there would have been a great difficulty in making out any case for a proof at large. The incompetency of proving the receipt of rents in this way is evident to everybody of experience, and this was plainly a very absurd demand upon the face of it; but supposing it had been ten times more reasonable, it was a matter of discretion for the counsel, which he was entitled to decide for himself and his client—and he did decide it. That he was entitled to decide it is a matter of clear law.

The next complaint is very much of the same description. It is alleged that the pursuer had ascertained, by inquiries of his own, from an accountant extra-judicially employed, that the report which had been made about the rents was by no means correct, and the pursuer says that he instructed Mr Mackersy to get a judicial remit to an accountant to report on this matter to the Court, but this he neglected to do. Without getting a remit in conformity with these instructions, as the pursuer alleges, Mr Mackersy prevailed on the country agent to consent to the amount of rents being adjusted by counsel—that is to say, by the counsel on each side. Mr Pattison was made fully aware of the pursuer's wishes, and yet, notwithstanding, he went on with the counsel on the other side to adjust the amount of rents for which Lindsay, the trustee, was to account. This is set out in the 12th article of the condescendence,—"Instead of getting a remit to an accountant, in conformity with said instructions, the said William Mackersy by misrepresentations prevailed on the said Robert Broatch to consent to the amount of rents accountable for by Lindsay being adjusted by counsel. Mr Broatch, without any authority from his client, gave such consent, but in doing so stated that he had 'no authority to grant such a letter, and I grant it with great reluctance. It depends entirely on what Mr Pattison does whether the authority will be acquiesced in. If he proceeds on such a footing as not to meet with my client's approval, my client will repudiate the authority, and engage the services of other agents and counsel.' After complaining that other things had been done in the cause contrary to express instructions, the letter of authority proceeds—'The result of Mr Pattison's adjustment is to be submitted to me before anything be done on it. That I condition in granting the authority.' The terms of this authority were duly communicated to the defender, G. H. Pattison." Then it is said that the authority was withdrawn, and that Mr Pattison was made aware of the withdrawal, yet that he went on to adjust the amount of rent for which Lindsay, the trustee, was to account. Now, here again there were several courses open. It was quite possible to have an inquiry, and to a certain extent there had been inquiry. Whether it was possible in the circumstances to carry any inquiry further we have not the means of knowing, but it was a very proper question to be settled by adjustment—there is no doubt about that—and that the counsel upon both sides should meet together and consider the matter upon fair and equitable grounds, and fix the amount for which the defender, the trustee, should be liable to the pursuer, was certainly a very advantageous and convenient mode of proceeding. That that was within the power of counsel, according to the exposition I have given regarding the powers of counsel, I do not suppose anybody can doubt. Mr Pattison was not only *bona fide* exercising his right, but he was doing it for the benefit and advantage of his client. Now, these are really the

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whole grounds of action. The conduct of the case was in the hands of Mr Pattison, who was entitled to decide what was to be done in regard to the whole of these matters. He did decide, and instructed Mr Mackersy to act according to his advice and direction. Mr Pattison himself is not answerable for the exercise of his own judgment in these matters; and Mr Mackersy, as agent, is not answerable because he acted under the instructions of Mr Pattison. Therefore I am clearly of opinion that the interlocutor of the Sheriff-substitute, and the Sheriff affirming it, were just and well founded.

LORD DEAS, LORD ARDMILLAN, and LORD MURE concurred.

THE COURT pronounced the following interlocutor:—"Refuse the appeal, and decern: Find the appellant liable in expenses; allow accounts," &c.

PARTY—WM. SAUNDERS, S.S.C.—GEO. BEGG, S.S.C.—Agents.

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ALEXANDER CUMSTIE, Pursuer.—*D.-F. Watson—Kinnear.*
DAVID PHILIP AND OTHERS (Arthur Cumstie's Trustees), Defenders.—*Thoms—J. A. Reid.*

Succession—Vesting—Fee and Liferent.—A testator conveyed heritage to his son in liferent, for his liferent use allenarly, and to his heirs whomsoever in fee. The son survived his father, and, after executing a disposition of the subjects to testamentary trustees, died without issue. In an action of declarator by his heir of line, *held* that the son's right was one of liferent only, and that the pursuer had right to the subject—(*diss.* Lord Deas, who held that the words "liferent use allenarly" were to be read as restricting the son's right to a liferent only for the protection of the heirs of his body and not of other heirs whomsoever who were not *personæ prædilectæ*, and that in the circumstances the son's disposition carried the subject.

1ST DIVISION. Lord Rutherfurd Clark. B.

WILLIAM CUMSTIE, merchant, died in 1852, possessed of two heritable subjects in Oban. He had purchased the first and taken a disposition from the seller in the following terms:—"To and in favour of the said William Cumstie, and Mrs Jean Harriot or Cumstie, his spouse, and the longest liver of them two, in liferent, for their liferent use allenarly, and after the death of the longest liver to and in favour of James Cumstie, merchant in Oban, Arthur Cumstie, merchant there, and Alexander Cumstie, merchant there [his sons], equally betwixt them, in liferent, for their liferent use allenarly, and the respective heirs whomsoever of the said James Cumstie, Arthur Cumstie, and Alexander Cumstie, equally betwixt them, in fee, heritably and irredeemably."

William Cumstie's title to the other subject was a feu-charter, and he executed a disposition of it, in which the destination was identical with the former, except that the name of another son Peter was substituted for that of Alexander.

Infeftment followed in William Cumstie's lifetime in favour of the parties in liferent and fee respectively.

Mrs Cumstie survived her husband only a few days, and she was survived by his four sons.

Arthur Cumstie died in 1874, leaving a widow but no issue. He had executed a disposition of his third share of both properties to trustees.

Alexander Cumstie, his immediate younger brother, raised this action against the trustees, concluding for declarator that he had right to the fee of the third share of the two subjects destined to the heirs whomsoever of Arthur.

The pursuer pleaded;—The pursuer, as heir of line of the deceased

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Arthur Cumstie, is entitled to the fee of the subjects, in respect that (1) under the destinations contained in the deeds of conveyance libelled, the said Arthur Cumstie was merely a fiduciary fiar, his heir of line being the beneficial fiar and disponee; (2) even if the said Arthur Cumstie was vested with the fee so as to open the same to the diligence of his onerous creditors, he was not entitled gratuitously to defeat the right of succession conferred upon his heirs, and therefore the conveyance of the said subjects by his trust-settlement was inept.

The pleas stated in defence were—(1) The said Arthur Cumstie was by feudal necessity the fiar of the subjects; or, otherwise, (2) Arthur Cumstie was a fiduciary fiar with a right to nominate the heirs to succeed him, and the defenders, as heirs so nominated, are entitled to the subjects in question.

The Lord Ordinary pronounced this interlocutor:—"Repels the defences: Finds and declares in terms of the conclusions of the libel: Finds the defenders, Arthur Cumstie's trustees, liable to the pursuer in expenses," &c.*

The defender reclaimed, and argued;—The fee was necessarily in the person of Arthur Cumstie. But it was said by the pursuers to be a fiduciary fee. The doctrine of a fiduciary fee was introduced by the case of Newlands.[1] But the principle of that case, and of Allardice,[2] only applied where the destination was to children *nascituri*. Then the testator selected his heir, and there was a necessity for a fiduciary fee to hold the subject for the heir. There could be no fiduciary fee unless there was a particular class of heirs in contemplation. Heirs whomsoever could not be regarded as *personæ prædilectæ*, and the present case fell rather within the principle followed in the case of Primrose,[3] where it was held that a tailzied destination came to an end when it opened to a person and his heirs whomsoever. Besides, "heirs whomsoever" included "*hæredes facti*."

The pursuer argued;—The Court will always give effect to a testator's intention if possible, and the clearly expressed intention here was to give Arthur Cumstie only a liferent. In the case of Frog's Creditors[4] that rule was to a certain extent departed from, owing to a supposed feudal necessity. But the subsequent case of Newlands decided that when the word "allenarly" was used the right would always be restricted to a liferent. There was no legal difficulty in a testator conferring a fee on the heirs whomsoever of a particular person either directly or through the means of a fiduciary fee. Assuming that there was a fiduciary fee in Arthur, it was unnecessary to discuss what effect that might have in a question with onerous creditors, who might plead that they found him apparently fiar on record. But at all events he could not alienate gratuitously.

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* "NOTE.—The only defenders who have appeared are the trustees of Arthur Cumstie. They maintained that from legal necessity Arthur Cumstie was absolute fiar of a *pro indiviso* third of each of the two properties mentioned on record, or that if he was fiduciary fiar there was no restriction in the trust, inasmuch as he held for such persons as he might appoint to be his heirs. The Lord Ordinary cannot adopt either of these views. He thinks that Arthur Cumstie had a bare right of liferent only, and that his trust-settlement was not effectual either as a conveyance of the property or as a nomination of heirs. The Lord Ordinary has therefore given decree of declarator as concluded for."

[1] Newlands v. Newlands' Creditors, Feb. 7, 1794, aff. April 26, 1798, M. 4294, Ross, L. C., 3 L. R. 634, Bell's Fo. Ca. 54.

[2] Allardice v. Allardice, March 5, 1795, Ross, L. C., 3 L. R. 655, Bell's Fo. Ca. 156.

[3] Primrose v. Primrose, Feb. 9, 1854, 16 D. 498.

[4] Frog's Creditors v. his Children, Nov. 25, 1735, M. 4262, Ross, L. C., 3 L. R. 602.

It was absurd to say, as the defenders must do, that Arthur held a fiduciary fee only if he died leaving heirs of his body, but that in the contrary event he had all along held a fee-simple. The more distant the relationship the less likely it was that the liferenter should be held to be fiar, and it never had been so held except in cases of parent and child.

At advising,—

LORD ARDMILLAN.—I am not aware that there is any question—certainly not any important question—of fact involved in this case. The question of law involved, raised on the construction of the titles flowing from the late William Cumstie, is very important. The subjects in dispute are heritable, and the competition which has arisen relates to the share of the late Arthur Cumstie in these heritable subjects situated at Oban. There are two subjects, but the language of the titles is substantially the same in regard to both. William Cumstie, merchant in Oban, died in November 1852. He acquired by purchase from one David Jardine one of the two subjects, and the other he acquired by feu-charter from the Marquis of Breadalbane. In regard to both subjects the title is taken or granted to and in favour of William Cumstie and Jean Harriot or Cumstie, his spouse, and the longest liver of them, in liferent, for their liferent use allenarly, and after the death of the longest liver the one subject is conveyed to James, Arthur, and Alexander Cumstie, sons of William, and the other subjects are conveyed to James, Arthur, and Peter Cumstie, sons of William. In both cases, and in regard to both subjects, the conveyance to these sons is "equally betwixt them in liferent, for their liferent use allenarly, and the respective heirs whomsoever" of the three sons respectively named in the said deeds. Infeftment followed on both dispositions in favour of the parties in liferent and fee respectively in terms of the destination. Mrs William Cumstie, the wife of the granter of the deeds, died a few days after her husband. They were survived by the four sons named.

Arthur Cumstie, who, in terms of the deeds, had a liferent right allenarly in one-third of each of the subjects, died in September 1874, leaving a widow but no family. Alexander Cumstie, the pursuer of this action, was at the date of Arthur's death, and is now, the next younger brother and heir-at-law of the deceased Arthur Cumstie, and he has been served heir of provision to him accordingly.

By trust-disposition and settlement dated in June 1872 Arthur Cumstie conveyed to the defenders, as trustees, his whole heritable and moveable estate. The question now before the Court is raised in a competition between the pursuer, as brother and heir-at-law of Arthur Cumstie, and the defenders, as trust-disponees of Arthur Cumstie. The point of law involved is, Whether the subjects in Oban belonged to Arthur Cumstie in fee, and were thus effectually disposed of by him; or, Whether they belonged to Arthur Cumstie only for liferent, and for liferent use allenarly, and could not be disposed of by him?

There is no doubt that this question is attended with difficulty. Many interesting and important authorities have been quoted to us, and very many decisions are in the books closely touching and instructively illustrating the general point involved, though not the precise point at issue.

William Cumstie, the father of the pursuer and of Arthur Cumstie and the other brothers, was the proprietor in fee of one of these subjects, and the purchaser of the other, taking the title as he thought fit. It has never been

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disputed that William Cumstie and his wife, apart from his prior ownership, had under these deeds, and in terms of this destination, a liferent right allenarly. Then the conveyance is, on the death of the longest liver of the two spouses, to the three sons equally in liferent, for their liferent use allenarly, and the respective heirs whomsoever of each. There is no clause of survivorship. The heirs whomsoever of each deceasing son take the fee whenever the liferent of their father ceases. The Lord Ordinary has decided the question in favour of the pursuer—the heir whomsoever—the heir-at-law—the immediate younger brother, of Arthur. His Lordship's opinion is that Arthur had a bare right of liferent only, and that his trust-settlement was not effectual either as a conveyance of the property or as a nomination of heirs.

I concur in this opinion. It appears to me clear that unless Arthur Cumstie had the fee—the true fee—the absolute fee—these trust-disponees from him can have no title. That the trust-disposition operated as a nomination of heirs has not been contended by the defenders, and could not be contended with success. The conveyance to trustees, however reasonably granted, was a voluntary alienation. Unless Arthur had such a right of fee as could have been attached by his creditors he could not, in my opinion, legally and effectually execute a voluntary conveyance of his estate. No man can give away an estate which his creditors could not attach. If he could bestow it effectually he could not withhold it from creditors. I do not, however, think it has been contended that the creditors of Arthur could have effectually attached the fee of the estate, carrying it away from the heir, who is his brother, and might have been his son.

But then it is contended that, according to the terms of these deeds, and especially bearing in mind that the ultimate destination is to the heirs whomsoever of the respective sons, the right conferred on Arthur, though in words a liferent, must be considered as truly a fee, the true and absolute fee of the estate, to the effect of entitling him and enabling him to dispose of it at pleasure.

After much anxious consideration of all the authorities touching this question I am satisfied that the defenders' argument is not well founded.

Where a subject is conveyed to a father in liferent and his children *nascituri* in fee, and where the word "allenarly" or some clearly equivalent word has not been used, it has been long settled that the fee is in the father, though he is termed liferenter in the deed. This has been so repeatedly decided that I need not detain you by referring to the authorities. The rule has been introduced in consequence of the feudal maxim that the fee cannot be *in pendente*, and that, the granter being divested, the fee can be nowhere else than in the liferenter, and thus a result, not always according to the intention of the maker of the deed, has been accomplished by the pressure of this nicety of feudal law. I am not surprised that some of the earlier judgments were given with hesitation; but the point is now completely settled.

Where, however, the right of the person to whom the liferent is given is expressly qualified and limited by the words "for liferent use allenarly," the question is very different. In my opinion the person whose liferent is thus qualified by the words "for liferent use allenarly" is not the fiar—by which I mean, is not the substantial and absolute fiar with the power of a fiar to dispose of the subjects. I shall afterwards advert to the recognition of a fiduciary fiar. In the meantime I may observe that a fiduciary fee would not support the defenders' plea, because a fiduciary fiar is a trustee, and cannot effectually alienate the subject of the trust.

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I think the word "allenarly" was selected because of its simplicity and its power. I read the word as creating a very marked and stringent limitation of the word "liferent," as meaning "only a liferent," "a mere liferent," or, still more accurately, "a liferent and nothing more," which is, I think, the true meaning of the expression. A feudal exigency arising from the rule that a fee cannot be *in pendente* had led to the result that in certain cases a conveyance or destination in liferent was construed as conferring a fee on the person called a liferenter. But the addition of the word "allenarly" excluded such a result, and fixed the character of the liferenter, by declaring it to be only a mere liferent—a liferent and nothing more. Any attempt to found on the feudal maxim that a fee cannot be *in pendente*, so as to convert a right conferred as a liferent into a right of fee, is met and defeated by the force of the word "allenarly," because if the right be a liferent and nothing more it cannot be converted into a right of fee without violating the express words and clear meaning of the deed. It is the *enixa voluntas* of the maker of the deed that the right of liferent conferred with the qualifying word "allenarly" shall be a liferent and nothing more.

The views which I have now ventured to express are, I think, in accordance with a series of decisions subsequent to the case of Frog's Creditors, 25th November 1735, where the successful argument for the creditors was, that "if the disponer had intended to give the parent a bare liferent she would have used the word 'allenarly.'" This decision in the case of Frog's Creditors was given with regret, and has been regretted frequently since. The case of Newlands v. Newlands' Creditors, of which there are several reports, and one of much interest by Mr Ross, is too well-known to render it necessary for me at present to do more than very briefly advert to it. The case was most deliberately considered, and the effect of the word "allenarly" as qualifying and limiting the right of liferent was, I think, fully recognised. There was a difference of opinion, and, in particular, one very distinguished Judge differed from the judgment; but in so far as regards the meaning and effect of the word "allenarly" the judgment was clear, and it was affirmed. I am humbly of opinion that the authority of the decision has never since been shaken, and must now be held as conclusive. When the liferent has been by force of the qualifying words restricted so as to limit it to a bare liferent, then the doctrine of a fiduciary fee for the benefit of those to whom the beneficial fee was destined came to be introduced, and in the case of Newlands, and in the case of Allardice, and other cases, effect was given to it. In the case of Allardice there was a succession of liferenters allenarly, and the heirs of two sons in succession were declared to be fiars, and yet the law laid down in the case of Newlands was applied. In many subsequent cases the authority of these decisions has been fully recognised. Eminent lawyers have expressed their concurrence and approval. The opinion of Lord Corehouse in Mein v. Taylor, on 8th June 1827, 3 Ross' Leading Cases, 696, is most instructive. His judgment was adhered to by this Court and in this Division, and was affirmed in the House of Lords. This is what Lord Corehouse says—"When a conveyance is made to one in liferent, and his children unnamed or unborn in fee, it is settled law that the fee is in the parent, and that the children have only a hope of succession, to prevent the infringement of the feudal maxim that a fee cannot be *in pendente*. It is perhaps to be regretted that the point was so settled, because the plain intention of the maker is in consequence often sacrificed to a mere form of expression, and the feudal

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maxim might have been saved by supposing a fiduciary fee in the parent, as is done when the word 'liferent' is restricted by the word 'allenarly' or 'only.' Upon this point, however, it is too late to go back, but certainly the principle ought not to be extended to cases which have not yet been brought under it. . . . But where a fiduciary fee is given to a person, and it is directed that he himself shall enjoy the liferent, and still more clearly when a fiduciary fee is vested in several persons collectively and the survivor or survivors, and each of them separately is to have a liferent, such liferent must be construed a naked usufruct, in the same manner as if it had been qualified by the word 'allenarly'—See the case of Seton v. The Creditors of Hugh Seton, March 6, 1793."[1] This opinion of a most distinguished lawyer is extremely interesting. I think it cannot be doubted that, both as regards the effect of the word "allenarly" and as regards the recognition of a fiduciary fee, the decision in the case of Newlands is law at this day. It is to be observed that it was a case with creditors who attempted to attach the interest of a liferenter with a fiduciary fee. The creditors did not succeed. The fiduciary fee was a trust. Now, I have already explained that unless creditors could attach the right of Arthur Cumstie he himself could not alienate the subject by his voluntary deed. Therefore, on this part of the case, there can, I think, be no doubt that the decision in the case of Newlands is conclusive, and that the trust-disponees of the liferenter cannot succeed against the heir. The meaning of William Cumstie's deed is not doubtful, and it is according to justice and common sense that his intention should receive effect.

But then it is maintained that the destination of the fee to the heirs whomsoever of Arthur Cumstie prevents the application of the law settled in regard to a liferent limited to a liferent allenarly. It is rightly urged that a destination to heirs whomsoever is just a destination to heirs as law may direct. That is quite true. A succession of heirs whomsoever is not a *successio prædilecta*. It is a *successio provisione legis* not *provisione hominis*. The flow of succession along the channel of heirs whomsoever is governed by law and not by the will of the maker of the deed. Thus there is no doubt that an entail is at an end when we come to heirs whomsoever. On this point there is abundance of authority. But it does not appear to me to follow from the admission of this law in regard to succession *provisione legis* that the heir-at-law, called under such a deed as this, is at the mercy of the party called as liferenter, and liferenter only. I fully accept the authority of cases such as Primrose[2] and many others in regard to a substitution in favour of heirs whomsoever. But that is not the question here. We have to deal with a question of liferent on which the meaning of the deed is not doubtful. The alternative is between the recognition, on the one hand, of the liferenter, who is restricted to a liferent allenarly as being, notwithstanding that restriction, a real and absolute fiar, whose creditors could attach the estate, and whose voluntary disposition could convey it,—and the recognition, on the other hand, of a fiduciary fee for the benefit of the heir-at-law. If Arthur Cumstie had had a child he would have been an heir whomsoever. The pursuer is his brother and his heir-at-law, and the trust-disponees of the liferenter are the only other competitors.

I appreciate the difficulty arising from the words "heirs whomsoever," for I have not been able to discover any case in which a fiduciary fee for the benefit of an heir-at-law—an heir whomsoever—has received effect. On the other

[1] M. 4219. [2] *Supra*, p. 922.

hand, I am not aware of any case—and certainly none has been quoted to us—where it has been rejected; so the difficulty must be met on principle. In the case of children and grandchildren, and in the case of a succession of liferenters, the theory of a fiduciary fee has been accepted in order to prevent the consequence, the unreasonable consequence, of making a person fiar who is declared to be liferenter "allenarly." I can see no sufficient reason why it should not be accepted in this case where the parties competing for the fee are the heir-at-law of the liferenter to whom as heir whomsoever the fee is destined by the deed, and the trust-disponees of that liferenter, who, in respect of the restriction and limitation of his liferent, could not effectually grant the disposition. Unless Arthur was absolute fiar the defenders can have no case. I cannot hold that he had an absolute fee.

A conveyance to A and his heirs whomsoever confers on A the fee. A conveyance to A in liferent, and his children *nascituri* in fee, has also been found to confer on A the fee. This result was effected by force of a feudal maxim of Scottish law which forbids the fee to float on poised wing till it finds fitting settlement, and which demands that from the first the fee shall have a local habitation as well as a name.

The enforcement of this maxim by converting the liferent into a fee was not according to the intention of the maker of the deed. It was the triumph of a legal subtlety over the intention of the maker of the deed, and this was judicially felt and acknowledged in several of the earlier cases. But when by the use of the word "allenarly" a liferent was restricted and limited as I have already explained, the converting of that limited liferent into a fee would be clearly and strikingly opposed to intention. Some remedy was required to sustain intention, to disarm subtlety, and to vindicate the essential equity of law. This remedy was found. A new subtlety was evoked to redress the balance disturbed by the regretted enforcement of the former subtlety. A fiduciary fee in the person of the liferenter was recognised in order to sustain the intention—as I think, the clear intention—of the deed. A liferenter declared expressly to be a liferenter allenarly can never be held to be an absolute fiar. He is held to be a trustee, with only so much of the character of a fiar as is required to sustain the trust. He cannot alienate the estate, nor can the fee be attached by his creditors.

Accordingly, there has been no judgment and no authority presented to us for refusing effect to the word "allenarly."

I am not aware of any decision—I really do not think there has been any decision—in which a person to whom a subject was disponed in liferent, for liferent use allenarly, was notwithstanding that limitation found to be fiar—by which I mean absolute fiar having the power to alienate the subject. The case of Falconer v. Wright[1] is not a precedent or authority on this point. No doubt there the liferenter's right was limited by the word "allenarly," but then he was himself the disponer of the lands, and the infeftment on the conveyance to himself in liferent, for his liferent use allenarly, and to his children in fee, was blundered, no mention of the children or of the fee being in the infeftment. In these circumstances the creditors of the father attached the lands, and the case is put by Lord Mackenzie on these grounds:—His Lordship particularly finds that "the sasine taken on the contract and disposition is so expressed that it cannot have the effect of conveying the fee out of the said Robert Macarthur, or even changing it into a fiduciary fee in his person." A similar decision, and on

[1] Jan. 22, 1824, 2 S. 633, and Jan. 20, 1825, 3 S. 317.

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similar grounds, was pronounced in the case of Spalding in 1847.[1] Then the case of Wilson v. Reid, 4th December 1827,[2] was quoted to us. I do not think that it supports the defenders' pleas. The question related to the disposal of the estate of Mrs Wilson. But she, though disponing to herself and her husband in conjunct fee and liferent, for their liferent use allenarly, and to the heirs to be procreated of the marriage, was herself at the date of the marriage the absolute and unlimited fiar, and was so described by Lord Balgray, who rested his opinion specially on that circumstance. There were no children of the marriage, and the decision rested mainly on the fact that her original fee was never taken out of her. The judgment was unanimous, and turned on this specialty. Besides, that deed was to a large extent *mortis causa*.

The more recent cases of Todd v. Mackenzie,[3] and of Ferguson,[4] do not seem to me to be applicable to the precise point before us. I may be permitted to say that I have no doubt of the soundness of both decisions. But the circumstances here are different, the deeds are different, and the question is different. Either we must here decide that a right, limited and restricted to a liferent, and nothing more, by the force of an unambiguous expression, adopted and used for the purpose of restriction and limitation, and now held to be a *vox signata*, is nevertheless, and in spite of that restriction, not a right of liferent but a right of substantial and absolute fee, or we must extend one step further the principle of fiduciary fee by applying it to the case of an heir-at-law to whom the fee is disponed by the clear words of the deed.

Between these two alternatives I cannot say that I have not had some little hesitation, for the question is certainly difficult, and I am aware that views differing from mine are held in a quarter which I highly respect; but I have not been sparing of time or labour in studying the question and the authorities, and the result is, that according to the best of my judgment I concur with the Lord Ordinary.

Lord Mure.—I concur in the result of the opinion that has just been delivered, and I have very little to add to what has fallen from Lord Ardmillan with regard to the series of decisions he has referred to as regulating the law as to destinations of this description. The destination in this case is, I think, substantially in terms of the destinations in the early cases of Newlands and of Allardice, which have been referred to. It is a destination first to Mr Cumstie and his wife in liferent, for their liferent use allenarly, and after the death of the longest liver, to and in favour of James Cumstie, Arthur Cumstie, &c., "equally betwixt them in liferent, for their liferent use allenarly, and the respective heirs whomsoever of the said James Cumstie, Arthur Cumstie, and Alexander Cumstie, equally betwixt them in fee, heritably and irredeemably." Now, there is here no express destination to the children of any of these liferenters. But I apprehend that under the words "heirs whatsoever" the children are necessarily included as children to be born; and the question that was put to us very distinctly by Mr Reid in opening was, whether the doctrine laid down in the cases of Newlands and Allardice could be extended to the case where the fee was not taken directly to the heirs of the body, but, as here, to the "heirs whatsoever." Now, the circumstance that a destination was taken to heirs whatsoever must necessarily have been before the Court in disposing of these cases; for in each of them, after the destination to liferenters in their order, there

[1] Houlditch v. Spalding, June 9, 1847, 9 D. 1204. [2] 6 S. 198.
[3] July 18, 1874, *ante*, vol. i. p. 1203.
[4] Ferguson v. Ferguson, March 19, 1875, *ante*, vol. ii. p. 627.

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was a destination to heirs whatsoever. Yet in looking over the reports of these decisions I do not find that there was any difficulty raised by any of the Judges founded upon the circumstance of that being the ultimate destination. But, with that destination before them, the majority of the Court came to the conclusion that a party holding a conveyance "for his liferent allenarly" was only a fiduciary fiar. So that in these circumstances the question we have here to decide is, whether there is such a difference in the destination in the present case as can warrant us in holding that from the failure of the children of Arthur Cumstie, he was (as is pleaded in the defences) in the position of a party who, in respect of a feudal necessity, had become the fiar of the subjects? That is the first plea in law for the defenders; and there is a second plea in law that he was a fiduciary fiar with a right to nominate the heirs to succeed to the subjects. No authority was referred to in support of that second proposition, as to there being such a right as that of a fiduciary fiar with a right to nominate the heir who is to succeed him; and in the absence of all authority on that point we have simply to consider the question, what was the nature of the right that Arthur Cumstie held? His right is described as that of a liferenter "allenarly." He was fiduciary fiar beyond all question, according to the earlier decisions, for any children who might be born to him. The question then resolves into this, did the non-existence of children at the death of Arthur Cumstie put an end to the fiduciary fee which had been created in him by the terms of the deed, and make the fee absolute in his person,—that is to say, did the fact of his having no children change the nature of his right to that of absolute fiar from that of a liferenter allenarly? Now, I am unable to find any authority for any such transformation of a right. According to the decisions in the cases of Newlands and Allardice, it appears to me to be settled that a party who is described as a liferenter allenarly is a liferenter and nothing more; that he remains a liferenter holding as fiduciary fiar for the heir who may be called on to succeed him at his death, and that in respect of those decisions, as approved of by Judges of the greatest eminence in subsequent cases, a party so situated never has any other right in him but that of a liferenter allenarly with a fiduciary fee. In addition to the opinion of Lord Corehouse, referred to by Lord Ardmillan, I find that in the case of Hutton's Trustees, 11th February 1847, the late Lord Justice-Clerk Hope and the late Lord Moncreiff, in dealing with this matter, mentioned the words "liferent allenarly" as the appropriate and technical term for constituting a liferent, and the right having been so constituted by that appropriate and technical term, I do not think such a liferenter can be held to have had any disposal of the subjects. We had occasion to consider this question not very long ago in the case of Ferguson, referred to by Lord Ardmillan, and also the case of Mrs Maule June 14, 1876, under an entail. In that case the words were "children of the marriage," and there was no specialty. But in Ferguson's case there was a succession of liferenters called, and the difficulty which occurred was whether there might not be some different rule applicable to a case of that sort; but all our difficulties in the case of Ferguson, at least all the difficulties I had, were obviated by an examination of the terms of the conveyance and the opinions of the Judges in the case of Allardice, where there was a succession of liferenters, and where the ultimate destination was to heirs whatsoever. The opinions of the Judges in that case, who had also disposed of the case of Newlands, are not unimportant in dealing with this question. For Lord Eskgrove says—"I remember in Newlands' case

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it was said that to support such deeds would be to authorise a series of liferents, and to introduce a new way of making an entail. Here we have an instance of it, but you did not think that a sufficient ground for setting aside the deed; you found that according to the principles of our law there must be a fee somewhere, and that the fee in the liferenter must be fiduciary; and I do not see how I can refuse my assent to the rule in that case also. There is no liferent given to any one not named; and although there be a succession of liferenters, yet if you find that there can be one liferenter possessed of this fiduciary right I see no difference betwixt that case and the present." There a liferenter who had no children was held to possess as fiduciary for a succession of liferenters, and with the words "heirs whatsoever" ultimately called; and there is not an observation to the effect that the words "heirs whatsoever" would make any difference in the matter. Lord President Campbell, who was in the minority in the case of Newlands, says,—"This differs from the case of Newlands in this respect, that the question here is with heirs, whereas in that case the question arose amongst creditors. In all questions with heirs or gratuitous claimants the destination must be strictly adhered to, and even had this question occurred with creditors I should have been of the opinion expressed in Newlands' case." I conceive it to be quite settled, therefore, by this series of decisions, that a party situated as Arthur Cumstie was is a liferenter, and nothing more; and I do not think that Arthur Cumstie, consistently with these authorities, can be held to have had any power to settle this right in the way that he has attempted to do.

Lord Deas.—The late William Cumstie, merchant in Oban, and Jean Harriot or Cumstie, his wife, both died in November 1852. They had four sons—James, Arthur, Alexander, and Peter, all of whom survived them. In August 1843 William Cumstie purchased certain subjects in George Street and Argyle Street of Oban, and took the disposition in favour of himself and his wife, "and the longest liver of them two in liferent for their liferent use allenarly, and after the death of the longest liver to and in favour of James Cumstie, merchant in Oban, Arthur Cumstie, merchant there, and Alexander Cumstie, merchant there, equally betwixt them, in liferent for their liferent use allenarly, and the respective heirs whomsoever of the said James Cumstie, Arthur Cumstie, and Alexander Cumstie, equally betwixt them in fee, heritably and irredeemably."

The disposition contained a declaration "that it shall be in the power of the said William Cumstie and Mrs Jean Harriot or Cumstie, and the longest liver of them, at any time of their lives, or of the survivor's life, or even on deathbed, to sell, alienate, and dispone the several subjects and others above described, contract debts thereupon, or even gratuitously to dispose thereof in the same manner and as freely in all respects as if the said several subjects and others had been disponed by these presents absolutely and irredeemably in fee to the said William Cumstie and Mrs Jean Harriot or Cumstie, and the survivor of them."

James, Arthur, and Alexander Cumstie were three of the four sons of William Cumstie and his wife, although they are not so described in the deed. Infeftment followed on the deed, in terms of the above-quoted dispositive clause, in September, and was recorded in October 1843.

On 25th January 1850 William Cumstie, on the narrative of "certain good and onerous causes and considerations," executed a disposition of certain other subjects belonging to him in Argyle Street and Tweeddale Street of Oban, the

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dispositive clause of which was in these terms:—"I hereby give, grant, alienate, and dispone from me, my heirs and successors, to and in favour of myself and Mrs Jean Harriot or Cumstie, my spouse, and the longest liver of us two, in liferent for our liferent use allenarly, and after the death of the longest liver to and in favour of James Cumstie, merchant in Oban, Arthur Cumstie, merchant there, and Peter Cumstie, merchant there, my sons, equally betwixt them, in liferent for their liferent use allenarly, and the respective heirs whomsoever of the said James Cumstie, Arthur Cumstie, and Peter Cumstie, equally betwixt them in fee, heritably and irredeemably, all and whole," &c.

In this deed the name of the disponer's son Peter is introduced instead of the name of his son Alexander in the other deed, and the term of entry is declared to be Martinmas 1849. In all other respects the clauses of the two deeds seem to be identical, except that this deed does not contain the clause of reservation above quoted in favour of the spouses and the survivor of them. Infeftment followed on this deed, and was recorded in January 1850.

Upon the death of the spouses in November 1852 the sons entered respectively into possession of the subjects. Arthur died in September 1874, leaving a widow, but no children. He left a trust-disposition and settlement, dated in June 1872, whereby he conveyed his whole heritable and moveable means and estate then belonging "or which shall belong and be addebted to me at the time of my death, or the succession to which after my death I have or may have power to regulate," to the present defenders, as trustees for the purposes therein mentioned, which may be shortly summarised as consisting, 1st, of the regulation of the rights of his wife and their children after his death, if they should have and leave any children; and 2d, a provision that, failing children, his wife, if she survived him (which she has done) should liferent his whole means and estate, subject to payment of debts and legacies (of which last it does not appear that he left any), and that the fee should be divided equally amongst his next of kin and their issue.

Arthur Cumstie's children were, of course, comprehended under the general description of his heirs whomsoever, and if he had left a child or children I do not doubt that it must have been held that a fiduciary fee had vested in him for behoof of such child or children. This, although not expressed, is plainly implied in the deed, and the destination is therefore, I think, to be read as if this had been expressed. It is only just and reasonable so to read the destination in a family deed, intended to regulate the succession of the granter amongst his descendants, which is the nature of both deeds here, although they are in an *inter vivos* form—the four sons having been, so far as appears, the whole family of the spouses. I therefore read the destination in each of the deeds as running thus, viz., to and in favour of the granter and his wife and longest liver of them in liferent for their liferent use allenarly, and, after the death of the longest liver of them, to and in favour of their three sons named in each deed respectively, equally betwixt them, in liferent for their liferent use allenarly, and the child or children born or to be born of the respective bodies of these sons, whom failing, the respective heirs whomsoever of these sons in fee.

In other words, so far as Arthur Cumstie's share is concerned it is to be held destined, after the death of his father and mother, to Arthur, in liferent for his liferent use allenarly, and the child or children born or to be born of his body, whom failing, to his heirs whomsoever, in fee.

Under such a destination I am of opinion that each of the sons, failing issue

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of his body (and, consequently, Arthur as one of these sons) became fiar of his equal share of the subjects so conveyed, and might dispose of that share at his pleasure, either by *inter vivos* or *mortis causa* deed, subject always to the condition (which the law would imply if not expressed in the deed) that the deed should take effect only failing issue of his own body.

The issue of Arthur Cumstie, the son, would necessarily have been at the same time the issue of the granter himself, and the deed cannot therefore reasonably be read without implying a fiduciary fee in Arthur, the son, for behoof of such issue, whatever may be said of the effect of the destination beyond. Suppose it had been argued, in opposition to the claim of such issue, that the issue could be in no better position than the heir whomsoever would have been, the answer would, I think, have been conclusive that the issue were entitled to the benefit of the presumption arising from nearness of blood, not only to their immediate parent but to their grandfather, the granter of the deed, by direct descent both from the one and the other, whereas the heir whomsoever might be a collateral, however distant, or possibly the Crown as *ultimus hæres*. The mere fact that the granter of the deed has comprehended both classes of heirs under one general description of heirs whomsoever could not have excluded the heirs of the body from the benefit of the protection of the fiduciary fee, however clearly it had been made out that no such protection had been extended to collateral or remoter heirs.

But while I thus concede readily that the issue of Arthur's body would have been in the same protected position in which all the cases, from the case of Newlands downwards, have placed issue of the body under a destination to a parent in liferent for his liferent use allenarly, and his child or children, born or to be born, in fee, I desiderate either principle or authority for extending or applying that protection and restriction so as to tie up the parent in a question with his own heir whomsoever.

The case is very different from what it might have been if the destination over (or what in this case may fairly be called the destination over) had been in favour of the heir-male in general, or of any particular class of heirs or persons short of heirs whomsoever, whether described as a class or as individuals. Hitherto, all the cases in which the words "liferent allenarly" have been held to create a fiduciary fee, when otherwise the fee would have been absolute, have been cases of parents and children, and I do not choose to speculate unnecessarily as to how far the same principle might be held to sanction or create a fiduciary fee for the benefit of a specified class of heirs or persons, or for the benefit of one of such specified class of heirs or persons, although not an heir or heirs of the body. For the purposes of this case I shall assume, in the fullest manner, that in all such cases there would be a fiduciary fee for behoof of the person or persons, or heir or heirs, for whom the granter had thus shewn his predilection; still, I remain of opinion that there can be no fiduciary fee beyond such *personæ prædilectæ* for behoof of the heir whomsoever.

It would be quite a fallacious mode of reasoning to say that you first find it fixed by the words "liferent allenarly" that the *nominatim* disponee is a liferenter merely, and then you go on to inquire who is the fiar. That would be against all feudal principle and against the rule followed in all the decisions in this class of cases. It is true that a conveyance in liferent allenarly, if no other words had followed, would have given Arthur Cumstie nothing but a bare liferent; but that would have been because the fee would have remained in

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hæreditate jacente of his father, the granter of the deeds. The case becomes very different where the granter, as here, has parted out and out with the fee after the death of himself and his wife, and has added to the liferent a conveyance of the fee to the heirs whomsoever of Arthur Cumstie, the so-called liferenter. You must consider both questions—the liferent and the fee—before you can determine either of them. If there be any difference in the order in which the two things ought to be considered the law would rather give the preference to the question of fee; for the feudal law imperatively demands a fiar, but does not at all demand a liferenter. The true view, however, is, that the one question cannot be solved without considering the other. What would be a bare liferent may be, and indeed in this class of cases must be, a fee, if there be no other fiar.

Here the intermediate destination to Arthur Cumstie's issue, which was conditional upon their coming into existence, has failed entirely by his having no issue. The word "allenarly" was necessary to protect and preserve the fee for his issue if they had come into existence. If that word had not been used Arthur Cumstie would have been absolute fiar in a question with his own issue. The word may, therefore, fairly be held to have served its purpose, without supposing that it was meant for a purpose never before attempted in any recorded instance, unless indeed in entails, and then attempted unsuccessfully. If this view were not of itself satisfactory or sufficient, the observation would remain, that as the last words used (viz., the destination to his heirs whomsoever) naturally imply a fee in the person of Arthur Cumstie, these must overrule and negative the effect of the prior words, which, if taken by themselves, might have limited his right to a liferent merely.

As Lord Brougham observed in the case of Gordon v. M'Intosh, H. L., April 17, 1845, 4 Bell's Ap. pp. 121, 122, and 3 Ross, p. 626, the word "allenarly" may be defeated in its operation by other words in the deed.

Of this we have an instance in the case of Reid or Wilson v. Reid, &c., Dec. 4, 1827, 6 S. and D., N. E. 198, and F. C. The conveyance by Margaret Reid was to herself and her husband "in conjunct fee and liferent, for our liferent use allenarly, and to the heirs to be procreated betwixt us, the said spouses, whom failing," one-half to her own heirs and one-half to her husband's heirs; and this conveyance bore to be in consideration of a conveyance by the husband's father of a different subject containing a precisely similar destination. After the marriage had subsisted for twenty-seven years, and the prospect of issue was considered hopeless, and the husband, although still alive, was in bankrupt circumstances, the wife brought an action against the heirs-presumptive both of herself and her husband, concluding, *inter alia*, to have it found and declared that "the pursuer has the only good and undoubted title, not only to the liferent, but also to the fee of the subjects belonging to her and conveyed as aforesaid."

The Lord Ordinary (Newton) found "that, on the principle of the case of Newlands, and the later cases founded on by the defenders, the right of the pursuer was, by her disposition of 14th May 1807, reduced to a liferent; at least, that if the fee remained in her person or that of her husband, it was a fiduciary fee for behoof of the chilren of the marriage, and, failing them, of the pursuer's heirs *quoad* the one-half, and of her husband's heirs *quoad* the other," and therefore assoilzied from the declaratory conclusions of the libel. But Mr Shaw's report bears—"The pursuer having reclaimed, the Court called on the

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counsel for the defenders to support the interlocutor, and, without hearing the counsel for the pursuer, unanimously altered"—the Lord President (Hope) observing, "it is quite impossible that the interlocutor can stand." The judgment, as the Faculty Report shews, decerned and declared in terms, *inter alia*, of the declaratory conclusion of the libel.

It is true that in that case it was an important fact that the subject had originally flowed from the wife, and that accounts for the fee being found to be in her and not in the husband. But it will be distinctly understood that I am not citing the case as a precedent in the present case (for direct precedent I know of none, either the one way or the other), but as an illustration of the principle that the use of the words "liferent allenarly" is not conclusive of the right being a bare liferent, but that we must look beyond, and in the present case must consider carefully the effect of the destination which follows in favour of Arthur Cumstie's heirs whomsoever before we can affirm that he is a liferenter merely. It is not immaterial, however, as bearing upon the present case, to observe the ground on which Lord Balgray (no inconsiderable feudalist) placed his judgment in Reid's case, as reported in the Faculty Collection. After observing that the deed was both *inter vivos* and *mortis causa*, and therefore that it was important to attend to the previous rights of the parties—that is, of the husband and wife respectively—his Lordship said—"So far as regards the heirs of the marriage the deed was onerous; but whenever the parties came to consider their heirs whatsoever it was a deed merely *mortis causa*, to which their heirs could not make up titles without serving heirs; and therefore (his Lordship thought) that the fee of the subjects still remained with the pursuer."

It is not, however, upon any supposed repugnance between the restrictive words "liferent allenarly" and the destination which follows in favour of Arthur Cumstie's heirs whomsoever that I rest my opinion in the present case. On the contrary, I think the two expressions are in this deed quite consistent, being applicable to two different contingencies,—the one, that of Arthur Cumstie having a child or children,—and the other of his having none. The first of the two deeds was unskilfully framed in not expressing this more fully, and the conveyancer in the second deed obviously followed the model of the first. But the meaning shines out clearly enough. It is easy to understand that the granter should intend the fee to go to his own grandchildren subject to their father's liferent, so that they, as well as their father, might be reasonably provided for; but it is not easy to understand that the granter should intend to prefer his son's heir whomsoever, however remote, to his son himself, to exclude his son's widow, if he left a widow (as he happens to have done) from the benefit of her terce or of any provision her husband might wish to make for her failing their having issue, and likewise to exclude the son, if he resolved to live and die a bachelor or a widower, from all power to dispose of the estate conditional on his having no issue, in order to preserve it for some unknown heir whomsoever, who was not himself to be under any limitation, and might possibly be the Crown as *ultimus hæres*. I think that would be an irrational construction of the deed, or at least a construction in support of which we are not justified in applying, for the first time in the history of our law, the fiction of a fiduciary fee.

The use of the words "liferent allenarly" in the deed is, as I have said, quite sufficiently accounted for without putting upon the deed any such improbable con-

struction. Arthur Cumstie might have had issue. Without the word "allenarly" his liferent would have been a fee, absolute and unlimited, in a question with his own issue. It was, therefore, necessary that the word should be used; but the purpose of using it is fully satisfied without supposing that, besides the protection of the issue, it was meant to serve a purpose to which it had never hitherto been held applicable, and which, if really entertained, should have been made the subject of an ordinary trust-deed, in which the granter could have expressed his purpose in plain and intelligible language, and without the risk of being misunderstood.

The cabalistic word "allenarly" is no such favourite in the law of conveyancing as to entitle it to receive effect in a case like the present, contrary to all the presumptions of intention on the part of the granter arising from the law of nature as between parent and child. Prior to the case of Newlands it had been immemorially the established law of Scotland that a conveyance to an individual in liferent and his issue, born or to be born, in fee, where nothing more appeared, gave the fee to the parent. This is still the undoubted law of Scotland. It might have been better that this had never been so, but the general law could not be gone back upon at the date of the case of Newlands without unsettling the titles to many valuable estates, and what the Court did in that case was to sanction an exception to the general law, of the occasional hardship of which the case before them, where the estate was being carried off by the father's creditors, presented a strong instance, although, as a general rule, the hardship is really not so great as it seems, for all that has to be done is, in place of resorting to the fiction, to execute a trust-deed for behoof of the disponee in liferent, and his issue born or to be born in fee, which effectually secures the fee to the children, although neither the word "allenarly" nor any corresponding word or expression occurs in the deed, as is well known to every conveyancer, and was long ago decided in the case of Seton v. Seton's Creditors, March 6, 1793, M. 4219. If the granter prefers it, I know nothing to prevent the father himself from being named as the trustee, and infeft under an appropriate precept of sasine in that express character.

It was with great hesitation and difficulty that the judgment in the case of Newlands was affirmed in the House of Lords. But the hesitation arose, not from any idea that the general law could or ought to be gone back upon, but from the more than doubtful expediency of sanctioning an exception to that law, so long settled and so well understood, that the rule had come to express the intention. The Lord Chancellor Loughborough (afterwards Lord Rosslyn) observed—"These propositions have been agreed on in the argument which has been maintained: If a conveyance is granted to a person in liferent, and thereafter to the heirs of his body in fee, then such person must of necessity be fiar. It is also an agreed principle, recognised in the law of Scotland, that a fee cannot be *in pendente;*" but if the word "allenarly" was added to liferent, it was then contended that the fee was to be somewhere—his Lordship said he could not tell where. "This distinction," he proceeded to say, "which the counsel admitted could not be maintained in reasoning or in principle, does not add one distinct idea to the limitation;" but as he had been assured that the exception had been very generally understood and acted on, and as "the judgment gives effect to the intention of the testator, which in equity ought always to be supported, as far as can be done consistently with the rules of law, and though I feel no conviction, though my mind inclines to doubt exceedingly that the judg-

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ment proceeded on safe grounds, yet I have not courage to venture on a reversal." —(M. 4294-5.)

In like manner Lord Eldon, in the case of Dewar v. M'Kinnon,[1] speaking of the ordinary rule that a conveyance in liferent to a parent and the issue, born or to born, in fee, gives the fee to the parent, says—"My Lords, in respect to the doctrine itself, I should take it to be clearly established (and whether right or wrong it is not of much consequence to inquire when the point is clearly established) that if there is a limitation in a conveyance of an interest *in præsenti*, and unconnected with any question of contract, to a man and his wife and the children of the marriage, on feudal principles the fee is in the parents—one of the parents is the fiar—which of the parents depends upon the circumstances—and it is impossible, in my view of the case, to read what fell from my Lord Rosslyn in the case of Newlands without seeing that it was his notion that, after that doctrine was once clearly established, it would have been infinitely better to have adhered to that doctrine than to deny the application of that doctrine because the word 'allenarly' was used." Lord Eldon added—"I am ready to go this length, namely, to say that as this House was advised by my Lord Rosslyn that the effect that was originally attributed to the word 'allenarly' ought in his judgment still to be attributed to it, so it ought to have that effect; at the same time I apprehend your Lordships will take great care not to extend the effect of that word farther, unless you are convinced that you ought to extend it farther."

The observation of Lord Brougham in Gordon v. M'Intosh, concurring with an observation of Lord Corehouse, to the effect that the feudal maxim might have been saved by supposing a fiduciary fee in the parent, equally whether the word "allenarly" was used or not, and expressing regret that it had not been so settled, cannot be regarded as conflicting with the observations of Lord Rosslyn and Lord Eldon in reference to the case of Newlands, but as referring to what might have been done at some period greatly more remote, when alone the general law could have been settled differently from what it had immemorially been. At the date of the judgment in the case of Newlands, while there was said to have been practice in support of the exception, it had become just as impracticable to go back upon the general law as it would be in the present day.

But it is one thing to sanction, as was done in the case of Newlands, an exception to the general law, in order to give effect to the predilection which the granter of the deed had intensified by the use of the word "allenarly" in favour of his son's issue, who were his own descendants, and quite another thing to sanction such an exception in a case like the present, where by the law of nature all the predilection is in favour of the son, and where, at the same time, by the law of the land, the son's heir whatsoever is not within the recognised category of *personæ prædilectæ* at all.

It has been suggested by my brother Lord Mure that the case of Allardice, 5th March 1795 (fully reported in Bell's Folio Cases, p. 156, and noticed briefly, and therefore imperfectly, by Mr Ross, vol. iii. 655), is more favourable for the heir whatsoever than the case of Newlands. I have been familiar with both these cases for more than half a century. I have renewed my study of them on the present occasion, and I own I am utterly unable to discover in the difference of details in the case of Allardice any difference in principle which can make it

[1] May 5, 1825, 1 W. and S. vol. i., and Ross, L. C., 3 L. R. 607.

an authority in this case for the heir whatsoever any more than the case of Newlands and the other cases of that class, all of which leave the present case untouched either one way or the other, except in so far as they stand in contrast to it.

The granter of the deed in the case of Allardice was understood to have been displeased with the then subsisting marriage of his eldest son Robert, of which there was a daughter, Jean, alive at the date of the deed. Consequently he destined his estate of Memus to Robert in liferent allenarly, and to the heirs of Robert's body by any future marriage he might enter into, which failing, to the granter's second son David in liferent allenarly and the heirs of his body in fee, which failing, to the granter's own nearest heirs or assignees whatsoever in fee.

Robert survived the granter, and accepted of the deed by taking infeftment upon it, and exercising a power conferred upon him to burden the estate with £200, and, indeed, as was observed on the bench, he had no power to have repudiated the deed. Afterwards, however, he obtained a precept of *clare constat*, and took infeftment thereon as his father's heir-at-law. Acting on this fee-simple title, he executed a disposition altering the destination in his father's deed so far as to substitute his own daughter Jean, *nominatim*, immediately after the heirs of any marriage he might subsequently enter into, and before his brother David, the *nominatim* substitute in the fiduciary fee, and the heirs of David's body.

David Allardice and his son, for whom he was the substituted fiduciary fiar, brought a reduction of Robert's deed, coupled with a declarator; and what the Court decided was that this deed was *ultra vires* of Robert, and could not affect the succession—a judgment in which I should have entirely concurred.

There was some alarm expressed among the Judges—particularly by Lord President Campbell—as to whether they had not, by their decision in Newlands' case, introduced a principle which would sanction a new kind of entail by a succession of liferents allenarly. It is unnecessary here to go into that speculation; but I may observe, in passing, that I think the President pretty well solved his own difficulty when he said—"Had Robert, the son, been succeeded by heirs of his own body of a subsequent marriage, I have some notion that the substitutions would have been at an end." He afterwards referred to Brown v. Coventry, Bell's 8vo Cases, p. 310, where this principle was applied in the case of a legacy, and said—"It is in some respects different, to be sure, but I should retain my opinion even in the case of a land estate."

The only doubt in the case of Allardice was that suggested by Lord Eskgrove, whether the fiduciary fee could be held by Robert not only for his own future issue, if he should marry and have any, but for his brother and his brother's children. This was not very accurately expressed by his Lordship, for it did not require a fiduciary fee in Robert to sanction the substitution or succession of David as a *nominatim* liferenter, whether allenarly or not; and none of the other Judges took any notice of this supposed difficulty. They thought it enough that the question was amongst heirs, and that the obvious intention of the granter of the deed, that David should be both liferenter and fiduciary fiar failing the existence of any objects for whom Robert could be fiduciary fiar, must therefore receive effect. Thus Lord Justice-Clerk Macqueen said—"I own I did not see a question in this case. The only difference betwixt it and Newlands is that there is here a succession of liferenters; but there is nothing

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in that." He then distinguishes the position of Robert, the son, from that of a stranger, and says—"There is nothing more clear than that an heir is bound by the settlements of his predecessor." That appears to me to be perfectly sound doctrine, and, indeed, I have no occasion for the purposes of the present case to impugn anything whatever affirmed in the case of Allardice.

My brother Lord Mure has farther said, and made it, I think, the keystone of his opinion, that in the cases of Newlands and of Allardice the Judges must have seen that there was a destination to heirs whomsoever failing heirs of the body, and yet that this fact did not influence the opinions which they formed, that the fee was fiduciary only. Now, in the first place, his Lordship has overlooked the fact that in both of these cases the destination, failing heirs of the body, was not to the heirs whomsoever of the fiduciary fiar, but to the heirs whomsoever of the granter of the deed. And, in the next place, he has overlooked the fact that in both of these cases, and indeed in all the cases of this class which have been decided, issue of the body existed, so that there was no room for raising any question as to what would have been the result if such issue had not existed, and the question had been either with the disponees of the fiduciary fiar or with his heirs whomsoever, or with the heirs whomsoever of the granter of the deed.

I do not, of course, mean to represent either the case of Newlands or the case of Allardice, or any of the other cases of that class, as authorities for my opinion in this case. But I may confidently affirm that none of them are authorities to the contrary. All of the cases related to the rights of the issue for whom the fiduciary fee was held, and none of them either raised or could have raised such a question as occurs in this case, where there is no issue, either *in esse* or *in posse*, to compete with the disponees of the deceased fiduciary fiar, and the party claiming is in the eye of the law *eadem persona cum defuncto*, to or through whom he must make up a title inferring that he represents him universally in his debts and deeds. The proposal to apply the exceptional doctrine of fiduciary fee to the case of that party by the use of the word "allenarly" brings up, in the most forcible of all ways, the caution given by Lord Eldon—"I apprehend your Lordships will take great care not to extend the effect of that word farther unless you are convinced that you ought to extend it farther."

I cannot but think it a startling extension of the effect of the word "allenarly" to attempt by means of it to bring within the category of *personæ prædilectæ* the heirs whomsoever of the granter's son, in competition with the son himself. Even in a deed of strict entail heirs whatsoever are never regarded as *personæ prædilectæ;* and it would be strange if they were to be so regarded in such a case as this of fiduciary fee. In Mackintosh v. Gordon (4 Bell's App. 120, and 3 Ross, 624) Lord Campbell said that "if the word 'allenarly' is added, this is tantamount to fencing clauses in a deed of entail, and prevents alienation, though still the parent would be fiar." But his Lordship did not suggest that the word "allenarly" was stronger than the fencing clauses of a strict entail. The case of Macgregor v. Gordon, December 1, 1864, 3 Macph. 148, settles the question which the case of Macalpine Leny had barely left open, that although heirs-portioners be expressly excluded by the deed of entail, the destination in favour of A B and his heirs whomsoever makes A B at once fee-simple proprietor. In that case it was the clear intention of the granter to fetter A B as in a question with A B's heir whomsoever, whereas in the present case there is not even probability in favour of such an intention. We could hardly have a stronger proof

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than this case of Macgregor v. Gordon that heirs whomsoever are not within the category of *personæ prædilectæ* by our law and practice, and it is for that alone that I here refer to it.

I may observe, in passing, that the late case of Todd v. Mackenzie, although too peculiar a case to allow of the judgment being directly applicable to any other, contains some suggestive matter, very proper to be considered in connection with this case. For instance, I agree with the observation of your Lordship in the chair in that case, that "a man's heir has no existence until he dies, and it never can be ascertained until he dies who is to be his heir." I farther agree with your Lordship, as I observe I stated at the time, that there was in that case no destination, in the event of Mr Todd surviving his daughter, to the person who should then be nearest in blood to Mr Todd. That might possibly have been regarded as a destination to a *persona prædilecta*, as distinguished from a destination to heirs whomsoever, a distinction to which we gave effect in the late case of Ferguson v. Ferguson's Trustees, March 19, 1875, 2 Rettie, 627.

The case of Jamieson, March 2, 1775, M. 4284, referred to in the case of Reid, which I have cited above, if it cannot be called a precedent in the present case, is at least highly instructive with reference to the question whether the fee given to the heirs whomsoever of Arthur Cumstie was or was not, in the event which has happened, given to himself. By the contract of marriage between Rachel Wilson and her first husband David Russel, her father assigned to her husband the sum of 5000 merks, which was accepted in full of all her legal claims. It was, however, conditioned in the contract that "in case there be no child alive at the time of the said Rachel Wilson her death, then there shall 1000 merks of her tocher return to her nearest heirs and executors. The marriage was dissolved by the death of David Russel without issue. Rachel Wilson, by a postnuptial contract with her second husband Andrew Jamieson, assigned to him the 1000 merks, and after her death Jamieson conveyed this sum and his other estate to a trustee for his creditors. In a multiplepoinding the above sum of 1000 merks was claimed, on the one hand, by the executors and nearest in kin of Rachel Wilson, and, on the other hand, by her second husband, Jamieson, as her assignee, and the trustee to whom he had conveyed his estates for behoof of his creditors. The report bears—"The Lord Ordinary gave a judgment preferring Jamieson, the husband, to the wife's next of kin, who reclaimed," and pleaded, that after Rachael Wilson's marriage to David Russel the fee of the whole tocher was in him, and as to the 1000 merks, part of that tocher, "the right never could be in Rachel, because the condition on which the sum was to return being her death without children it could not be purified during her life. Upon the death of Russel both the liferent and fee of this sum devolved upon his heir, burdened with the return thereof, at the death of Rachel Wilson, to her nearest heirs and executors, so that at no period whatever had Rachel either the liferent or the fee of this money."

To this it was answered—"By the words of the contract itself the fee of the 1000 merks must have been vested in Rachel Wilson, upon this ground, that where a sum of money is taken to a person's heirs and executors, such sum will undoubtedly belong to the person himself, and be at his disposal, unless it shall evidently appear that the designation of heirs and executors was intended to demonstrate and point out certain individuals intended to be favoured. The right to the 1000 merks must have been in somebody after the dissolution of marriage between Rachel Wilson and her husband by his death. It could not

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be in the husband's heirs, who had not right thereto by the contract. It could not be in the executors of Rachel, because till her death no such persons did exist. It must therefore have immediately vested in her own person, and become assignable at will. It is therefore evident that in the eye of law a right granted to the heirs and executors of any person is virtually granted to the person himself, and of consequence, that the 1000 merks in question were as much provided to return to Rachel Wilson as if she herself had been expressly mentioned in the clause of return."

It is obvious, I think, from the report that the Court, in adhering to the Lord Ordinary's interlocutor, adopted this reasoning, which I conceive to be sound in itself, and equally applicable to the present case as it was to the case of Jamieson. I need not say that it makes no difference in such questions whether the subject in dispute be heritable or moveable. (*Vide* observations as to the application of feudal principles equally to money and land, *per* Lords Brougham and Campbell in Gordon's case, already referred to).

My brother, Lord Ardmillan, has observed that the creditors of Arthur Cumstie could not have attached the fee of the subjects in Arthur Cumstie's lifetime, and unless they could have done so his Lordship concludes that there could have been no fee in Arthur Cumstie which could be carried by his *mortis causa* deed. But that conclusion does not follow at all. The creditors of Arthur Cumstie could not attach and sell the subjects in his lifetime, because Arthur Cumstie might have left issue; and it was on this principle that the subjects were struck out of the ranking and sale in the case of Newlands. But the creditors of Arthur Cumstie might have been entitled to inhibit him from disposing of the fee to their prejudice if, by the failure of issue, it should happen to come to him, and, in any view, they could not be excluded from vindicating their preference over his *mortis causa* disponees. This accordingly has not been attempted by Arthur Cumstie's trust-disposition and settlement, the leading purpose of which is for payment of all his just and lawful debts.

I need hardly say that if the destination to the heirs whomsoever of Arthur Cumstie, failing heirs of his body, was virtually a destination to himself failing heirs of his body, there is nothing either subtle or anomalous in holding that he might dispose of the subjects by *mortis causa* deed, subject to the implied condition that he should die childless. He was in this view substituted conditionally to the heirs of his own body, and, as the event shews, that the condition was purified, I am humbly of opinion that his trust-deed and settlement ought to receive effect. I am therefore for altering the interlocutor reclaimed against, and I shall greatly regret, for the sake of our general law of conveyancing (hitherto clear and consistent in this department), if your Lordships shall affirm a different result.

Lord President.—After the very full opinions which have been given on both sides of this question I shall endeavour to confine my observations within a reasonable limit. But the question is one undoubtedly of great importance, and involving principles of law, and considerations even of expediency and utility, which make the case more than usually interesting. The deeds here it is unnecessary to examine at any length, because I quite agree with my brother Lord Deas that the question really is, whether a conveyance to Arthur Cumstie in liferent for his liferent use allenarly and his heirs whomsoever in fee vests a right of fee in Arthur Cumstie. I am not sure that I can concur in holding

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the course of decisions they should have been of opinion that the son was not fiar but fiduciary for his children." That case of Lillie v. Riddell occurred just six years after the case of Frog's Creditors, and Lord Kilkerran, who was then upon the bench, must have been intimately acquainted with the sentiments of the Judges who decided both cases. Now, it appears to me that a rule so fixed is not to be extended. It is a rule which was settled in deference to a feudal difficulty, but that feudal difficulty, it has been more than once suggested, might have been got rid of afterwards without violating the apparent intention of the maker of the deed by the invention of that other subtlety, viz., a fiduciary fee, which after all had to be invented to prevent the farther progress of this unfortunate doctrine. The rule, if it had been absolutely applied, and if it had been understood as it was in Frog's Creditors that the only way of preventing a fee being *in pendente* when an estate was given to the parent in liferent and to his children in fee was to hold the fee to be in the liferenter,—if that had been carried out to its full consequences it would not have in the least mattered how plainly the maker of the deed had expressed his intention that the man he called a liferenter was intended to be a liferenter merely, because the feudal difficulty would still have remained. But it very soon became apparent, and in the case of Newlands more particularly, that the Court were not disposed to carry out the doctrine of Frog's case to its logical consequences, but, on the contrary, felt the necessity of stopping in that course. And accordingly the rule of Frog's Creditors received a very severe check, I think, in the case of Newlands, and all the class of cases to which it belongs; and there the rule remains to this day. It is applicable to a case of parent and child, and it is applicable to a case where no more is said than that the conveyance is made to the parent in liferent and to the children *nascituri* in fee; but it is not applicable to any other case whatever; and I, for one, am not prepared to carry that doctrine any farther. I am prepared to hold that when a testator says that he intends a person to hold a liferent, and nothing but a liferent, which is what is signified by the use of the words "liferent allenarly" or "liferent use allenarly," it is not the rule of law that that liferent shall under any circumstances be extended farther. My brother Lord Deas says that it is not the custom of the Court, and it would be inconsistent with feudal principle, to consider what is the intention of the maker of a deed in regard to the liferenter without considering at the same time what is to become of the fee, and I am quite sensible of the importance of that observation. But what I mean is this, that I will not construe the intention of the maker of the deed in regard to the fee in any sense inconsistent with his plainly expressed intention as to the nature of the liferent. For example, in the present case, if I could concur with my brother Lord Deas in holding that the conveyance of the fee here to the heirs whatsoever of Arthur Cumstie is not a good conveyance of the fee to them—as is the substance and result of his opinion—I should then seek for a solution of the difficulty, not by holding the liferenter to be fiar in contradiction to the expressed intention of the maker of the deed, but by holding that the fee was not disposed of at all; for that a liferent may be created without disposing of the fee at all, or that a liferent may be created while an ineffectual attempt is made to dispose of the fee, I suppose is quite a legal possibility. And therefore, if the fee is not well given in this case to the heirs whatsoever of Arthur Cumstie, then, in my humble opinion, it would remain with the granter—(I am not speaking now of the form of these particular deeds, but of the simple case which I supposed at the outset)—and in the event of his

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death it would be in his *hæreditas jacens*. Now, is it matter of doubt upon the face of this deed that when the truster said that he desired Arthur Cumstie to have a liferent for his liferent use allenarly he intended these words to convey the meaning which they have always been understood to convey for nearly a century? I cannot see any reason to doubt it. I cannot see the slightest reason to doubt that he had an *entra voluntas* that Arthur Cumstie should not be fiar of this estate; and I cannot see any reason for not giving effect to his intention. I think it must be conceded that the use of the word "allenarly" in connection with the liferent has always been held to have the effect of restricting to a bare liferent, as it is called, that is to say, preventing the possibility of its being construed to be a fee. The cases which have been noticed, apparently bearing somewhat to the opposite result, are all very easily explained. The case of Falconer v. Wright,[1] referred to by my brother Lord Ardmillan, is obviously a case where the fee was held to be in the party who, under the marriage-contract, had a liferent allenarly because of his pre-existing infeftment which was not discharged, and which made him absolute proprietor of the estate, and the Court said that the case was different from that of Newlands because Falconer had an unqualified title independent of that created by the contract of marriage, whereas Newlands had only one title, in which his right was expressly limited. And in the other case referred to by my brother Lord Deas, of Wilson v. Reid,[2] there also it was the pre-existing title of the wife, as absolute proprietrix of the estate, which was the determining consideration. In Lord Balgray's opinion, which has been referred to, this statement is made—"The disposition in question"—that was, the marriage-contract—"is of a mixed nature, being on the one hand onerous and *inter vivos*, and on the other *mortis causa*. The pursuer was at the date of the marriage the absolute and unlimited fiar of the subjects. Now, how was that fee taken out of her? She could not divest herself of the fee by a mere renunciation, or otherwise than by an actual conveyance to and vesting of it in another party. So again, as regarded the heirs of the marriage, this was an onerous deed, and bestowed upon them a *jus crediti*; but so far as regards the heirs whatsoever it is merely a *mortis causa* deed, not vesting in them any right whatever, but merely giving them a *spes successionis*, which could never vest the fee in them." Now, that is just, in my opinion, the position of the heirs whatsoever of Arthur Cumstie in this case. Under this deed, which is of a testamentary character, they have a *spes successionis* and nothing else during the lifetime of the granter, and they cannot have anything else. But why they should not, when the testament becomes confirmed by the death of the testator, receive that which, *ex figura verborum*, is given to them, I am not able to see. I do not dispute that it might be possible to get the better of what has hitherto been the universal effect of the use of the word "allenarly" by the use of other words in the deed inconsistent with the notion of a bare liferent, but then I rather apprehend that that would be a contradiction in terms. Suppose a man gets a liferent for his liferent use allenarly, with a full power of disposal, that is a plain contradiction in terms. That is not a liferent for his liferent use allenarly. It is a fee, and therefore it is a misuse of language altogether to call it by that name. The testator himself would in that case have given you the means of contradicting his own words. But without such contradictory expressions in the same deed I am quite unable to believe that a liferent for liferent

[1] *Supra*, p. 927.

[2] *Supra*, p. 928.

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use allenarly either has been or ever can be construed as a fee. Now, the reason which my brother Lord Deas assigns for arriving at the conclusion that this ought to be construed as a fee here is this, that after the children of Arthur Cumstie there is no *persona prædilecta* to take the fee. That may be so, but is it impossible to constitute a bare liferent and a fee to the heir of line either of the granter of the deed or of the liferenter? I do not see the legal difficulty there. The testator may choose to limit his son, or whoever the party is, to a bare liferent, from considerations which may very easily suggest themselves in many cases—the prodigality of the liferenter, or some other consideration of that kind—his unfitness to be entrusted with the power of disposal of the estate—and yet he may have no predilection for any one beyond that son, and may have no desire to interfere with the operation of the law of succession, but be quite willing that the estate shall go to the son's heirs after his liferent comes to an end. That is surely not an irrational purpose. I cannot believe it to be so. And if it is not an irrational purpose, why may a man not carry it out by such form of expression as is here used; for the literal and obvious meaning of the expression here used is unquestionably what I have just represented. Can there be the least doubt that it was the intention of this gentleman to limit his son to a bare liferent, and at the same time to provide that the fee should go to his heirs whatsoever? He has said so in so many words. I know no legal authority for giving his words any other construction than their obvious and literal meaning, and I know no legal difficulty which should prevent him from having that intention carried out. The notion on the part of my brother Lord Deas seems to be that this limitation of the right of Arthur Cumstie in the first instance was intended merely for the benefit of his issue. If it had been so I think it would have been so expressed, and that was what led me in the outset to say that I do not think the case is just the same as if this had been a liferent allenarly with the fee to the issue of the liferenter's body, and failing them to the heirs whatsoever, because in that case there might have been room for supposing that there was in the mind of the testator a difference between his feelings and desires as regarded the issue of the body of his son and the heirs whatsoever of his son. But it is the absence of any such words here that satisfies me that he intended to make no such distinction, and that he did not care, as regards the disposal of the fee, whether the heir of his son was the heir of his body or an heir of a more remote kind; and therefore it is that he expresses himself in the terms here used, and expresses himself in settling, not one estate only, but two separate subjects, in precisely the same language.

For these reasons, I am of opinion with the majority of the Court and with the Lord Ordinary. I cannot participate in the legal difficulties of my brother Lord Deas, nor see that there is any reason whatever for refusing effect to what appears to me to be the very plainly expressed intention of Mr Cumstie.

THIS interlocutor was pronounced:—"Recall the interlocutor: Repel the defences, and find, declare, and decern in terms of the conclusions of the libel as amended; and find the said Arthur Cumstie's Trustees liable in expenses," &c.

D. & W. SHIRESS, S.S.C.—PHILIP, LAING, & MONRO, W.S.—Agents.

WILLIAM MORRISON, Pursuer and Appellant.—*Fraser—Rhind.*
ABERNETHY SCHOOL BOARD, Defenders and Respondents.—*D.-F. Watson—Alison.*

No. 150.
July 3, 1876.
Morrison v. Abernethy School Board.

School—Stat. 35 *and* 36 *Vict. cap.* 62 (*Education Scotland Act*, 1872), *sec.* 55 *—Dismissal of Master—Notice.*—A schoolmaster appointed by a school board at a salary of £150, and with a free house and garden, was dismissed by the school board without notice, but received fifteen days' pay, being his salary to the end of the quarter current at the date of his dismissal. *Held* (*diss.* Lord Neaves and Lord Ormidale) (1) that although in terms of the Education Act, 1872, the pursuer held office only during the pleasure of the board, he was entitled at common law to reasonable notice before dismissal, or to a money payment in lieu thereof; and (2) that, in the circumstances, three months' notice would have been reasonable, and that the pursuer was entitled to £50 in lieu thereof.

Observations (*per* Lord Deas) as to the law and practice with regard to notice of dismissal.

Opinion (*per* Lord Neaves and Lord Gifford), that a school board cannot appoint a master otherwise than "during their pleasure."

2D DIVISION, with three consulted Judges. Sheriff of Perthshire.

ON 2d July 1873 the school board of the parish of Abernethy inserted the following advertisement in the "Scotsman" newspaper:—"Master (head) wanted for the public (late parish) school, Abernethy, Perthshire, to enter upon his duties 1st October next. Minimum salary £150, besides house and garden. Liberal encouragement will be given to an experienced energetic teacher," &c.

William Morrison, M.A., Edinburgh, was one of the applicants for the situation, and on 15th July he received a letter from the chairman of the board containing the following passage:—"With great pleasure indeed I have to inform you that you have been chosen *unanimously* head master of our public school."

Morrison entered on his duties on 1st October of that year, and continued to fill the position of head master of the school till 30th November 1874, when he received a letter from the clerk to the school board in these terms:—"Abernethy School Board, 30th November 1874.—Sir,—At a meeting of the board held this evening I have been instructed to inform you that you are now relieved of your engagement as head master of the Abernethy Public School. The board have agreed that you be paid the current quarter's salary in full.—Yours," &c.

While Morrison had been acting as head master his salary had been paid to him quarterly in instalments of £37, 10s. each, and he had also been allowed to occupy a free house and garden of the annual value of from £18 to £20. The quarter current at the time of his dismissal expired on 15th December, and he was then paid the quarter's salary. Morrison demanded a quarter's salary in lieu of a quarter's notice at the termination of his engagement, but this the school board refused to give him. He accordingly, on 28th December 1874, raised this action against the school board in the Sheriff Court of Perthshire, in which he concluded that "the defenders ought to be decerned to pay to the pursuer the sum of £50 sterling, being loss and damage sustained by the pursuer through the defenders having illegally and unjustifiably dismissed the pursuer on or about the 30th day of November last from his situation as head master of the school at Abernethy, in which situation he was entitled to £150 per annum, together with a free house and garden, with interest thereon at the rate of £5 per centum per annum from the said 30th day of November till payment; the pursuer having, on the 14th day of July 1873, been appointed by the defenders as head master foresaid for the year then ensuing, and having fulfilled his said engagement for a year, he, by tacit

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relocation, remained engaged as head master foresaid for another year, and entered upon and performed his duties until he was illegally and summarily dismissed as aforesaid without any notice, or a quarter's salary in lieu of notice, for which quarter of a year's salary and emoluments the £50 claimed is an equivalent, with expenses."

The school board defended the action, and contended that, as under the 15th clause of the 55th section of the Education (Scotland) Act, 1872,* the appointment of teachers of public schools was declared to be "during the pleasure of the school board," they were entitled to dismiss the pursuer without notice. They denied that the pursuer's engagement had been a yearly one. They averred that the pursuer had been dismissed for fault, but declined to condescend upon the details of his conduct unless called upon by the Court to do so.

The pursuer pleaded;—(1) The contract of service between the pursuer and defenders being constituted by said advertisement, minute of the board, and letter of appointment, and the terms thereof being that the pursuer was to have £150 per annum, and a free house and garden, the pursuer was engaged at first as a yearly servant. (2) The pursuer having entered upon and completed the contract of service for the first year, and having entered upon his second year without anything having been said about an alteration of its terms, said contract was renewed between the parties in all its entirety by tacit relocation. (3) A school board dismissing a teacher without fault on his part is bound either to give reasonable notice or pay corresponding compensation or damages. (4) The pursuer having been dismissed during the currency of his second year, without any just cause or previous notice, is entitled to damages for breach of said contract renewed as aforesaid.

The Sheriff-substitute (Barclay), on 22d June 1875, pronounced an interlocutor, which contained, *inter alia*, the following finding:—"Finds, considering the nature of the office, and the stipulation as to an annual salary, payable quarterly, with the occupancy of a house and garden, and in the absence of any contrary stipulation, the bargain was for a year certain, and which engagement was renewed by tacit relocation for the subsequent year; . . . . and orders the cause to the motion-roll, that parties may be heard as to the amount of damages to be awarded."

The defenders appealed to the Sheriff (Adam), who, on 20th August, recalled his Substitute's interlocutor, and made the following findings:—"Finds (1) that on or about the 14th July 1873 the pursuer was appointed by the defenders, the school board of Abernethy, teacher of the public school of Abernethy; (2) that such appointment was held by him during the pleasure of the school board; (3) that on or about the 30th November 1874 he was dismissed by the board from the said office of teacher of the public school of Abernethy: Finds in law that such dismissal was not illegal: Therefore assoilzies the defenders from the conclusions of the action: Finds them entitled to expenses," &c.

The pursuer appealed to the Court of Session.

The case was heard in March by the Second Division, and again in June, with three Judges of the First Division.

Argued for Morrison;—(1) The clause in the statute was meant merely to remove the inconvenience which had been felt from the appointments of parish schoolmasters being *ad vitam aut culpam*, and was never intended

* Sec. 55, clause 15.—". . . . After the passing of this Act the right and duty to appoint teachers of public schools shall be in the respective school boards having the management of the schools, who shall assign to them such salaries or emoluments as they think fit, and every appointment shall be during the pleasure of the school board."

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to legalise summary dismissal without any notice or compensation for want of notice. The code published by the Privy Council provided for six months' notice to pupil teachers,[1] so surely some sort of notice was due to teachers themselves. The interpretation clause, moreover, referred to pupil teachers. Formerly the parish schoolmasters had been public officers, and could not be removed without regular proceedings and on proper grounds,[2] and the Legislature could never have intended to completely alter and sweep away this altogether. (2) This was a contract of hiring for the year. Wherever the words "per annum" entered a contract of hiring the contract was for a year,[3] and this was even a stronger case, because he was to have a heritable subject—a house and garden—as part of his salary.[4] (3) There was a common law right to every person to have reasonable notice of his dismissal in order that he might look out for a fresh situation. This had been recognised in many cases by the Court.[5] The cases of Pollock's Trustees and Hayman, founded on by the defenders, were not in point, Pollock's Trustees being special, and in Hayman there was four months' notice.[6]

Argued for the school board;—The proviso in the Education Act as to appointments being held at pleasure must be read into every contract, and the school board could not contract itself out of the Act even if it wished.[7] The 55th section had done away with the whole *ad vitam aut culpam* holding, which had been the real question in dispute in the schoolmasters' cases cited for the pursuer.[8] Where there was a stipulation in a contract of service that the servant might be dismissed at will without cause assigned no claim for damages could arise when the servant was dismissed. It would be contrary to the policy of the statute to make notice necessary. The object of the statute was to enable school boards to supply the best education they could to the children. The right existed to dismiss without notice, but it was not to be exercised oppressively. There was, however, here no attempt to make out a case of oppression—it was a case of breach of contract.

At advising,—

LORD DEAS.—On 2d July 1873 the school board of Abernethy, acting under the Education Scotland Act, 1872 (35 and 36 Vict. c. 62), advertised for a head

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[1] Sellar's Educ. Act, Introduc., p. 33, note; Code, p. 120, sec. 2, rule 70.

[2] Duff v. Grant, Feb. 20, 1799, M. 9576; Magistrates of Montrose v. Strachan, Jan. 18, 1710, M. 13,118; Adam v. Direct. of Inverness Acad., July 7, 1815, reported 14 Sh. 714, footnote; Gibson v. Direct. of Tain Acad., March 11, 1836, 14 Sh. 710, and Dec. 22, 1837, 16 Sh. 301, aff. H. of L. March 2, 1840, 1 Rob. App. 16, 13 Scot. Jur. 3.

[3] Macfarlane v. Mochrum School Board, May 27, 1875, 12 S. L. R. 457.

[4] Cameron v. Fletcher, Jan. 9, 1872, 10 Macph. 301, 44 Scot. Jur. 169; Bentinck v. Macpherson, Feb. 26, 1869, 6 S. L. R. 376.

[5] Cameron v. Scott, Dec. 7, 1870, 9 Macph. 233, 43 Scot. Jur. 114; Mason v. Scott's Trustees, Jan. 14, 1836, 14 Sh. 343 (Lord Moncreiff, 349); Gordon v. Bell's Trustees, Dec. 13, 1843, 6 D. 222, 16 Scot. Jur. 148; Moffat v. Shedden, Feb. 8, 1839, 1 D. 468, 11 Scot. Jur. 309; Campbell v. Fyfe, June 5, 1851, 13 D. 1041, 23 Scot. Jur. 481.

[6] Pollock's Trustees v. Commercial Bank, H. of L., June 12, 1829, 3 W. and S. 430; Hayman v. Governors of Rugby School, March 21, 1874, L. R. 18 Eq. 28.

[7] Wray v. Darlington Free Grammar School, Nov. 27, 1844, 6 Adolph. and Ellis, Q. B. Rep. 682.

[8] Bell v. Mylne (Dollar Academy case), June 15, 1838, 16 S. 1136, aff. H. of L. May 4, 1841, 2 Rob. App. 286, 14 Scot Jur. 431.

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master for what was lately the parish school, and is now the public school of Abernethy. The advertisement bore:—"The minimum salary to be £150, besides house and garden. Liberal encouragement will be given to an experienced energetic teacher." The pursuer, Mr Morrison, then in Edinburgh, became a candidate for, and was unanimously elected to, the vacant office. He entered upon his duties on 1st October 1873. He occupied the house and garden assigned to him, which is said to have been worth £18 or £20 a-year. His salary of £150 was paid to him in quarterly instalments of £37, 10s. each. Matters continued in this position till 30th November 1875, when, at a meeting of the school board, and without any previous notice to Mr Morrison, a motion was made and carried, "that Mr Morrison be relieved of his engagement as head master of this school, and that his office be now declared vacant; also that Mr Morrison be allowed the salary for the current quarter." This resolution was officially intimated to Mr Morrison by the clerk of the board on the same day.

Mr Morrison shortly afterwards raised an action before the Sheriff of Perthshire against the school board. The summons sets forth in the outset, somewhat inconsistently with what follows, that the pursuer was entitled to damages on the footing of his engagement having been annual, and continued, by tacit relocation, for the year current at the date of his dismissal. But the concluding words of the summons restrict his claim distinctly to "a quarter's salary in lieu of notice, for which quarter of a year's salary and emoluments the £50 claimed is an equivalent." Accordingly, in the 4th article of his condescendence, the pursuer sets forth that he had intimated this claim to the defenders extrajudicially, "and that what he wanted, and still wants, is a quarter's salary in lieu of a quarter's notice." Consistently with his claim, as thus explained, the pursuer's 3d plea in law in the record is,—"A school board dismissing a teacher, without fault on his part, is bound either to give reasonable notice or pay corresponding compensation or damages." The counter plea of the defenders on the merits is—"The pursuer's engagement being only during the pleasure of the defenders, they were entitled to dismiss him at any time." Neither of these pleas are very accurately expressed. For the pursuer's claim, if he has one, is, in my opinion, not for damages but for an allowance, or, as he alternatively calls it, compensation in lieu of notice; and the defenders' plea, on the other hand, although it does not bear on what footing they were entitled to exercise their alleged power of dismissal, really means (and they have so contended at the bar) that they were entitled to dismiss the pursuer at any time without any notice, and without making any allowance to him in lieu of notice. The opposing pleas and statements may therefore fairly be assumed to be sufficient, in a case of this kind, to raise the only question which we are called upon to decide,—namely, whether the pursuer is entitled to any allowance in lieu of notice, and if so, what ought to be the measure of that allowance.

This being so, the first thing, I think, to be settled is, under what category of contracts or engagements does the contract between the pursuer and the school board fall?

In considering this question we must keep in view that the pursuer is not in the position of a parochial schoolmaster, who, under the law as it stood at the date of the Education Scotland Act, 1872, was one of that class of public officers, such as town clerks, &c., who, from the nature of their office, were understood to hold their appointments *ad vitam aut culpam*. We must also keep in view,

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that by the judgment of the House of Lords in the case of Gibson v. the Directors of the Tain Academy, 2d March 1840 (1 Robinson's App. 16), it was finally settled that teachers and rectors in high class schools and academies, although the institution may be incorporated by Act of Parliament or royal charter, and although these institutions may, in one sense, be called public schools, are not public schools in the sense in which our parochial schools were so, and this, as Lord Ivory observed in his note in Melvin v. the Governors of Gordon's Hospital, 4th December 1841 (4 D. p. 176), at once reduces the question of engagement and power of dismissal of the rectors and teachers in such schools to a mere ordinary question of contract between master and servant. It may or may not be desirable that this should be so, but this appears to me to be the relative position of the masters, whether head or subordinate, in all the public schools established under the authority of the Education Scotland Act, 1872, so far as regards the appointment and tenure of office of the teachers appointed since the passing of that Act. I think the enactment, in section 55 of the Act, that "every appointment shall be during the pleasure of the school board," whatever effect it may have otherwise, has at least the effect of taking the masters in these schools out of the category of public officers in the sense in which parochial teachers were public officers, and of placing them in no higher category, as respects appointment and dismissal, than the rector and teacher of the Tain Academy were held to be in the case of Gibson.

It does not necessarily follow from this that the school board can make no other appointment of a teacher than during pleasure,—that, however difficult or impracticable they may find it to be to obtain the services upon that footing of some high class man upon whom they have set their minds, they cannot appoint him for a year or some other fixed period, or agree that his appointment shall be held to be renewed from term to term, or year to year, failing a specified notice, or payment of a stipulated allowance in lieu of such notice. That is a different and important question upon which I do not enter here, as it is not necessary to do so for the purposes of this case.

There was no special contract in this case between the pursuer and the defenders as to the endurance of the pursuer's term of office. That being so, I think the appointment must be held to have been made in accordance with the 55th section of the Act. I have therefore no hesitation in holding that the pursuer's appointment must be considered to be an appointment during the pleasure of the board, whatever that may imply.

This, then, enables me to solve the first question I proposed to consider, namely, under what category the contract between the pursuer and the defenders falls. The answer I make to that question is, that it falls under the category of an ordinary contract of service for no specific period, and consequently terminable at pleasure.

The next question is, Does such a contract imply, in a case like the present, an obligation on the master or employer to give notice or to make a pecuniary allowance in lieu of notice when he means to terminate the contract, without alleging fault on the part of the servant? And my answer to that question is, that, by the law and practice of Scotland, such a contract does imply that obligation.

Even where the contract is for a stipulated period, such as for a year or half a year, notice falls, in the general case, to be given, or an allowance made in lieu of notice, otherwise tacit relocation takes place. I need not go over the

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list of familiar cases, including those of domestic and agricultural servants, gardeners, foresters, gamekeepers, and others, in which this has been decided. See, for instance, MacLean v. Fyfe (the case of a gardener), Feb. 4, 1813, F.C., and the case of an agricultural servant, Cameron v. Scott, Dec. 7, 1870, 9 Macph. 233. It appears to me, *a fortiori*, to follow that, when the contract is during pleasure, there must, in the general case, be notice, or a sum paid in lieu of notice.

The object in both classes of cases is the same,—to give the servant a fair opportunity of looking out for and obtaining another situation, instead of being thrown suddenly and unexpectedly upon the world, with, it may be a wife and family to support, and no means, either from savings or otherwise, of supporting either himself or them.

It is even more necessary that this rule should be applicable to the higher class of servants, such as managers and other officers of banks, insurance offices, railway companies, and many other companies and employers, than to those in an inferior position, because it is much more expedient and much more common that such persons should hold their appointments during pleasure than that servants of an inferior class should do so; and there is a more clear implication in the one case than in the other that a considerable period of employment is reasonably to be expected, although not actually stipulated for.

In all cases of exuberant trust it is important for the master or employer that he should be able at any moment to stop the actings and intromissions of his servant, and the higher the position of the servant the more necessary this power comes to be. But, on the other hand, the higher the position of the servant the greater is the expediency, on grounds of public policy, that he should not be discouraged from accepting and continuing in such precarious employment by the additional risk of being left at any moment without either time or means to enable him to look out for and obtain another situation.

All this applies, I think, in a high degree to a master or head master in a public school. To tempt men of learning and ability to agree to hold such an office at the pleasure of their employers—especially at the pleasure of a popular board,—it is expedient that they should feel assured that the law will allow them the means of subsistence for at least some limited period after they have been dismissed without cause assigned. The voluntary liberality with which the directors of many institutions treat their officials when they discontinue their services can hardly be expected from a school board. A schoolmaster, moreover, is peculiarly helpless if driven to seek employment out of his own element. His learning and his habits disqualify him rather than otherwise for many occupations to which other professional men might readily turn. On the other hand, it is highly expedient that the school board should be able to discontinue the employment of the schoolmaster at any moment, because they may have good reasons connected with the interests of the pupils and the welfare of the institution which they are not prepared to avow or to prove, and which it would not be expedient either to avow or to attempt to prove. The case of a schoolmaster is therefore a case to which it is peculiarly expedient that the rule should apply, that failing notice being given a reasonable allowance should be made in lieu of notice. It was at one time the practice of this Court to protect the better class of servants who held their offices at the pleasure of their employers, and particularly schoolmasters, not parochial, from being arbitrarily and oppressively dismissed, by requiring that there should appear to have been

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grounds for presuming fault—taking that word as including any reasonable cause for dissatisfaction,—of which we have instances in the cases of the Magistrates of Montrose v. Strachan, 18th January 1710 (M. 13,118); Kempt v. the Magistrates of Irvine (M. 13,136); The Schoolmaster of Dunsyre, 1777 (M. 131,377), and other cases.

Gradually, however, it came to be thought that the sounder and more expedient rule, where the appointment was one during pleasure, was to hold that all that was incumbent on the employer was either to give reasonable notice before dismissal, or to make a reasonable allowance to the schoolmaster or other party employed in lieu of notice.

The case of Pollock's Trustees v. The Commercial Bank of Scotland, decided in the House of Lords 12th June 1829 (3 W. and S. 430) did not raise any question of that kind, as the company had voluntarily allowed Mr Pollock his salary to the end of the year, which had five months to run at the date of his dismissal. Mr Pollock claimed to hold his office as manager of the bank *ad vitam aut culpam*, or alternatively by the year; and the point decided was that he held during pleasure only, and had been validly dismissed with the approval of two-thirds of the committee of management, as provided for by the constitution of the company.

The case of Mason v. Scott, 23d July 1836 (14 S. and D. 343), was the case of the master of a school on a private foundation, in connection with the Episcopal congregation of St James', Edinburgh. The only point directly raised was whether Mason held his office *ad vitam aut culpam*, which was ruled against him; but Lord Moncreiff, Ordinary, observed in his note that "the very utmost that can be made of the correspondence is that it was an indefinite hiring or employment, if it even admits of this construction, and though such employment might imply that the complainer was not to be removed without some reasonable notice, it never could import an appointment for his life, or such an appointment as to preclude the trustees from removing him upon reasonable notice."

The suggestion of his Lordship in this note is very valuable, for it lays the foundation of what is now, I think, recognised as the true principle applicable to such cases. Money is a universal solvent, and it was an easy transition from the necessity of reasonable notice to allowing the alternative of a reasonable allowance in lieu of such notice.

In the case of Mitchell v. Smith, 26th January 1836, 14 S. 358, Mitchell held his office of manager of the Western Bank on condition that it should be in the power of two-thirds of the ordinary directors to dismiss him when they saw occasion. They did dismiss him, but without assigning any cause, and the whole ground of action was that the directors could not legally do so without assigning special cause, of the sufficiency of which it was for the Court to judge. On this footing Mitchell concluded that the company should be ordained to "restore and reinstate" him in his office, or to pay damages, that is to say, damages for not reinstating him in his office, and this, of course, was disallowed.

In the Dollar Academy case, Bell v. Mylne, 15th June 1838, (16 S. and D. 1136, and F.C.), affirmed in the House of Lords 4th May 1841 (2 Robinson, 286), the appointment bore expressly to be during pleasure, and Mr Bell's claim to a life tenure was negatived. In April 1838 it had been intimated to Mr Bell that his services would not be required after the following Whitsunday, but that his salary would be paid up to 1st October, and his house rent up to

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Martinmas. In these respects, therefore, he had no cause of complaint, so that in this case again the question was avoided by a liberal allowance being made.

The recent case of Hayman v. The Governors of Rugby School, March 1874, 18 Law Rep., Equity Cases, p. 28, was mentioned at the bar, but in that case there was abundance of notice, and the other points involved, which alone were dealt with, have no application whatever to the present case.

The case of Moffat v. Shedden, 8th July 1839 (1 D. 468), in like manner did not raise the question, because the ground on which the family tutor there got three quarters of a year's salary and an allowance for bed and board was that his engagement was held to have been for a year. But the case is valuable for the opinion of Lord President Hope, who held the engagement to have been during pleasure, but who said,—"I apprehend that the connection of the parties might be brought to a close by either of them, upon reasonable and equitable notice being given of the period of its termination. If such notice were not given then compensation must be due in respect of the failure to give it." (P. 472.)

I think that the law as thus laid down by Lord President Hope is the general law of master and servant, where the employment is during pleasure, and contemplates some considerable period of endurance. I think, farther, that it is the law applicable to the present case.

There has been little occasion for direct decision upon the present point, because several of the cases I have cited, as well as the practice which we know to prevail in high class establishments, shew that the principle of the law has been voluntarily given effect to—I do not say because it was conceded to be the law, but certainly because it was considered to be equitable, and that of itself is by no means unimportant in a question of this kind.

The only remaining question is, what shall be held reasonable notice or a reasonable allowance in lieu of notice?

That is a question which does not admit of any general or abstract answer. It is necessarily, to a considerable extent, a question of circumstances. What the pursuer is entitled to is not damages for illegal dismissal. There was no breach of contract on the part of the defenders. The contract was that they should retain the pursuer in their service during pleasure, but it was an implied condition of that contract that, when they dispensed with his services without cause assigned, he should be allowed the means of livelihood for a period within which he might reasonably be expected to find another situation. That I think the fair and reasonable construction to be put upon such a contract. The nature of the office to which the pursuer was appointed implied the contemplation, on both sides, of a period of some endurance,—for the frequent shifting of the head master of a school is not a thing which would suit either the institution or the master, who may have given up for it another, although not a better, situation, and whose opportunity of obtaining another in its place is necessarily limited and precarious. The pursuer, although he says his engagement falls to be construed as a yearly engagement, does not conclude for or claim the salary and emoluments for the remainder of the year on which he was dismissed, some seven and a half months before its alleged termination, and that of itself is a conclusive answer to the footing on which the Sheriff-substitute seems to have contemplated assessing the sum due to him. He claims the salary and emoluments for three months only. At the same time it is a fact favourable to the pursuer's claim for a substantial amount, that part of his

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emoluments consisted of a dwelling-house and garden, and that fact militates strongly against the view of the Sheriff that he might be dismissed at any moment with no allowance whatever, for he could not, like the tortoise, carry away his house on his back, nor could he expect to find by remaining in it another situation to his mind in the ancient Pictish burgh of Abernethy.

The defenders have allowed the pursuer his salary to the end of the quarter current at the date of his dismissal, that is, as I understand it, for the period of fifteen days. The only hesitation I have felt in the case has been in interfering with the discretion which the defenders have exercised as to the amount of the allowance they have thus made to the pursuer, although they have not made it on the footing of its being in lieu of notice, but *ex gratia* merely. Where a school board or other employers recognise the principle on which the schoolmaster or other servant is entitled to an allowance on being dismissed without fault assigned from an employment during pleasure, I should be slow to interfere with their discretion fairly exercised as to the amount. Still I think they must in all cases be subject to the equitable control of the Court in that matter. If our estimation of the amount must necessarily be somewhat arbitrary, theirs must be equally so, and our judgment is likely to be at least as impartial as theirs. I think that, in this case, the fact that the pursuer's salary had been always paid quarterly is a fact to be taken into view along with the other circumstances, and, on the whole, I am of opinion that the allowance to be made to the pursuer in lieu of notice cannot fairly be estimated at less than what is concluded for, viz., a quarter's salary and emoluments from the date of dismissal, and, in that view, it is not said in the record, nor has it been contended at the bar, that these are otherwise than fairly represented by the sum of £50.

LORD NEAVES.—I am sorry that there should be a difference of opinion on the bench in this case; but I am obliged, after full consideration, to dissent from the judgment just expressed, and to hold that the action is wholly groundless. I think that any other decision would be an infringement of the new system established by the Education Act, and a great blow to that system, and I think that the grounds on which the judgment is supported are fraught with even greater danger than the judgment itself.

A new era in education was introduced by the Education Act of 1872. When parochial schools were established in Scotland the parochial schoolmasters were made public officers, which, according to the established rule of Scotch law, enabled them to hold office *ad vitam aut culpam*. Such a tenure of office was then thought necessary for every public officer, in order to secure a fearless discharge of duty. Fixity of tenure is a great thing to struggle for, whether in a tenant or a public officer, and it is often found to secure a better person than a more precarious tenure. In progress of time, however, it was found that the tenure of office by a parochial schoolmaster *ad vitam aut culpam* was attended with evils. It was seen that as men got old or old fashioned they became drones in the hive in which they had formerly made honey. In such cases it was difficult to get them out. It was possible to do so by alleging fault and proving it; but this was an operose proceeding, and attended with difficulty and uncertainty. The Legislature has thought fit that this system should come to an end. The 55th section of the Education Act thus enacts—"After the passing of this Act the right and duty to appoint teachers of public schools shall be in the respective school boards having the management of the schools, who shall assign

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to them such salaries or emoluments as they think fit, and every appointment shall be during the pleasure of the school board." The pursuer was a teacher of a public school, appointed after the passing of the Act, and therefore his appointment was during the pleasure of the school board. I do not think that a school board, even if they wish to do so, can appoint a teacher for a fixed period, to the effect of anticipating the powers of their successors. The tenure of the schoolmaster is the pleasure of the school board for the time being. The moment that it is their pleasure to dispense with his services, and that this is intimated to him, he ceases to be schoolmaster. Indeed, I do not think that my brother Lord Deas holds that in this case the pursuer can retain his office. The question, then, arises substantially in this form, whether, when there can be only one schoolmaster, there can be two salaries—whether a man can draw the schoolmaster's salary who is not the schoolmaster, so as either to make two salaries run contemporaneously, or whether the man who no longer holds the office can draw the salary while the man who holds it does not get the salary, or not the full salary. The grounds of action appear to me extravagant, and directly in the teeth of the statute. In his summons the pursuer says that he was appointed in July 1873 for a year, "and having fulfilled his said engagement for a year he, by tacit relocation, remained engaged as head master foresaid for another year, and entered upon and performed his duties until he was illegally and summarily dismissed as aforesaid without any notice, or a quarter's salary in lieu of notice." If the pursuer, as he says, continued to hold the office, and was illegally dismissed, that is an intelligible but an utterly untenable ground of claim. If, on the other hand, the pursuer's tenure of office has ceased by virtue of the very nature of his appointment, how comes the pursuer to have any claim for the salary of an office which he does not hold? It is said, however, that we may ignore what is stated as the grounds of action, viz., tacit relocation and illegal dismissal, and confine ourselves to the claim for a quarter's salary in lieu of notice. If it be said that the only way of dismissing a schoolmaster legally is to tell him that he is to go away after three months, I think this is at utter variance with the statute. A schoolmaster may commit the most grievous faults, and yet it may be highly inexpedient that any investigation should take place. I have not a doubt that one of the inducements which led the Legislature to pass this enactment was to render such investigations unnecessary. Take, then, the case of a schoolmaster dismissed upon grounds such as I have indicated, brought home to the convictions of the school board, but which they were not bound, and have no occasion or call to make the subject of public or judicial investigation: According to Lord Deas' view, one of three things must happen. Either the schoolmaster is to get three months' more law to corrupt the minds or pervert the scholarship of his pupils, if that is what he is doing, or he is to be dismissed expressly on cause shewn, and in order to escape liability the school board must enter upon an investigation before the Sheriff or other Court of the kind, which it was the object of the Legislature to avoid; or, in the last place, the school board must pay a quarter's salary to the teacher whom they thus consider, and are entitled to consider, as unfit for his office. I cannot hold that this is an admissible construction of the statute, and I do not think that any of the cases under the common law which have been cited are applicable. The warning of servants, for instance, is a thing which has existed at common law for centuries for the protection of the poorer classes; but that does not apply to higher appointments. I cannot hold that there was

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tacit relocation of the pursuer, or that he was entitled to notice. If there was no right to notice there could be no wrong in not giving notice, and no damages for dismissal, for damages can only be due when there has been a wrong done.

This is not a common law matter. We are dealing with a statute which has made a fundamental alteration in the tenure of a schoolmaster. The school board are bound to appoint during their pleasure, and when their *bene placitum* ceases they are bound to terminate the appointment.

Something has been said as to the hardship of hurrying a man out of his house at a moment's notice. There is, however, a difference between depriving a man of his office, and putting the executorials into force by actual ejection from possession of premises. The use of diligence is analogous. A creditor may have an undoubted warrant to poind, yet he cannot carry out the poinding in the middle of the night. He may have an undoubted warrant of incarceration, yet he cannot pull the debtor out of his bed when dying, or execute his diligence on Sunday. The execution of diligence is regulated by humanity, so as to give such indulgence, or such limited indulgence, as it would be shameful to refuse. But this has nothing to do with pecuniary rights, and would not extend as to physical possession beyond the period necessary for removal, from considerations of decency and good order. The right to use diligence or execute ejection is a matter of common law; but it has no bearing on the present case, and the summons gives no indication of any such ground of complaint.

Upon the whole, I am of opinion that the interlocutor of the Sheriff should be adhered to.

LORD ARDMILLAN.—I concur in the result of Lord Deas' opinion. I think it of importance that the judgment now given should be so guarded as to prevent misunderstanding, for there ought to be no doubt in regard to the relations existing between the school board and the teachers.

It appears to me clear that under this Education Act the teachers appointed since the date of the Act hold their office at the pleasure of the school board. These teachers are liable to be dismissed by the school board at any time, and without cause assigned. This is a change in the law; but it is intended to promote, and I do not doubt that it is calculated to promote, the efficiency of the schools and the interests of education, and we are administering the law as it now exists.

This teacher held his appointment at the pleasure of the board, and the board were entitled to dismiss him when they thought fit, and they have dismissed him. He stands dismissed, and there can be no doubt that he has been legally dismissed.

But, assuming this, the question remains, whether reasonable notice, or a reasonable payment in lieu of notice, ought not to be given; for it may be that the propriety and the duty of giving some notice may exist quite consistently with the right of dismissal at pleasure.

I am disposed to hold that this summons is not well framed, for I do not think that there was engagement for a year, or any term of engagement, or that there has been or could be any relocation. All that is quite out of the question. I doubt the right to make a special agreement limiting the power to dismiss. But, at anyrate, no such agreement is here. The teacher cannot, in my opinion, retain his position or his office for a day after his dismissal against the will of

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the school board. The teacher cannot hold his office in defiance of the school board. Their dismissal of him, when duly sanctioned, is conclusive. But a reasonable notice, to enable the teacher to look out for another situation, or at least for another home, is, I think, in fairness, required; or, instead of notice, a reasonable sum, proportioned to the notice, is just and proper. This appears to me to be in accordance with the opinion of Lord President Hope in the case of Moffat.

Your Lordships are disposed to hold three months to be reasonable notice, or three months' salary to be a reasonable allowance in place of notice. I do not differ from that conclusion.

The teacher is an educated man, suddenly dismissed, it may be without fault, at least without cause alleged. Some notice is due to a man dismissed under such circumstances, even though he holds his office at pleasure, for he is turned not only out of his situation, but out of his house and his garden; and while I think three months is a very liberal proposal, I am not prepared to say that three months' notice is unreasonable. In requiring reasonable notice, or reasonable compensation in lieu of notice, I concur with Lord Deas. I only add that I give this opinion in regard to the executorial procedure for enforcing removal without any compromise of my view—as decided as that of any of my brethren—that the teacher holds office at the pleasure of the school board, and that he may be dismissed by the board without cause assigned.

Lord Ormidale.—I entirely concur with Lord Neaves in his observations on the terms of the summons in this case, and as to the ground of action there libelled. And it is not unimportant to keep in view that by the statute which regulates the form of procedure in Sheriff Courts (16 and 17 Vict. cap. 80, sec. 1) the ground of action must be set out in the summons itself. It is there, and there alone, it must be looked for. This being so, I do not well see how the barrier to the appellant's succeeding in his present contention, interposed by the terms of his own summons, and his ground of action as there set out, can be got over. But, independently of that or any other objection of a technical nature, I think he has failed to shew any sufficient reason for disturbing the judgment of the Sheriff appealed against.

The leading question in the case is, what was the tenure, as respects endurance, of the appellant Mr Morrison's appointment as schoolmaster of the parish of Abernethy. Now, although at first it seemed to be contended in argument on the part of Mr Morrison that his appointment was, in accordance with his ground of action, as libelled, a yearly one, this contention was ultimately not pressed, and it was, as I understood, conceded that the appointment was at the pleasure of the board. But, at any rate, this is a matter, as it appears to me, so clear as to make it of no importance whether it was conceded on the part of the appellant or not. The appointment he held was that of schoolmaster of the parish of Abernethy, in terms of the Education (Scotland) Act, 1872, (35 and 36 Vict. cap. 62), which, by its 55th section, enacts that "after the passing of this Act the right and duty to appoint teachers of public schools shall be in the respective school boards having the management of the schools, who shall assign to them such salaries and emoluments as they think fit, and every appointment shall be during the pleasure of the school board." It would be idle therefore to contend that the appointment of the appellant, who undoubtedly received his appointment from the school board of the parish of Abernethy,

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acting under and in the exercise of the statutory powers thus conferred upon them, and who does not say that there was anything special in his engagement, but expressly admits in his answer to the third article of the defenders' statement of facts that there was not, now to dispute that the tenure of his apppointment, as regards its endurance depended entirely on the pleasure of the defenders, the school board. Indeed, it is very clear, according to any view I can take of the matter, that the defenders had not the power, even had they been disposed, to make any appointment of schoolmaster except during the pleasure of the school board.

Assuming, therefore, that the appellant held his appointment during the pleasure of the defenders as the school board of Abernethy, it seems necessarily to follow that they were entitled to bring it to a termination whenever they pleased, and without assigning any cause or establishing any fault as justifying the dismissal of the pursuer. The statute does not require anything of that kind, and I can very well understand that it might be very inexpedient that it should. From many circumstances, which cannot well be made the subject of a proof and might possibly not be capable of being judicially established, it might nevertheless be advisable, if not absolutely necessary, having regard to the interests of a school, that the teacher should be removed, and so the power of dismissal in their discretion and at their pleasure has been conferred on the school board. Nor can it be reasonably supposed that this is a power which is likely to be improperly exercised by a body of individuals elected by the ratepayers, presumably in respect of their integrity, and fitness generally, for the important duties they have to discharge. Neither, on the other hand, has the schoolmaster who accepts an appointment, subject to the contingency of his being dismissed at the pleasure of the school board, any right to complain of the exercise of their power, for it is to be presumed that his salary and emoluments were calculated and accepted of by him with a view to that contingency.

I am not, however, to be understood to mean that a schoolmaster may not be wrongously dismissed—that is to say, dismissed in such a way and under such circumstances as to entitle him to maintain a claim for damages against the wrongdoers; as, for example, in the case of the dismissal having been brought about by a conspiracy on the part of some of the members of the school board or others, and carried into effect by corrupt and fraudulent means; or of a dismissal accompanied by false and malicious statements injuriously affecting the character and conduct of the schoolmaster. But the present is not a case of that description. On the contrary, it is manifest, on the appellant's own shewing, having regard to his statements in the record, that assuming the defenders had the power of dismissing him at any time they pleased, the way and manner in which they exercised their power,—apart from absence of warning or previous notice, a point that will be immediately noticed,—was wholly unobjectionable.

But it was strenuously urged for the pursuer—and ultimately, as I understood, it was the sole foundation of his argument—that the defenders were at least bound to have given him a quarter of a year's warning or notice that he was to be dismissed, and that as they gave him no such warning or notice they are liable to him, in lieu thereof, in a quarter's salary. This claim, as made by the appellant in his summons and record, proceeds on the assumption that his appointment was for at least a year. Accordingly, in his summons he expressly states that on the 14th of July 1873 he was appointed by the defenders as head

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master of the school of Abernethy "for the year then ensuing, and having fulfilled his engagement for a year, he, by tacit relocation, remained engaged as head master foresaid for another year." Nor only so, but apparently apprehensive that he had not made this, his ground of action, quite clear, he, by the minute No. 25 of process, repeated his statement that his engagement had been a yearly one, and that he had been dismissed after the engagement had by tacit relocation been renewed for another year. Now, if the appellant's engagement had been a yearly one, his right to warning or notice might have been maintainable, although why it should be a quarter of a year is not so clear. But if the appellant's appointment was not a yearly one, but determinable at pleasure, as I hold it beyond all doubt to have been, the case of the appellant entirely fails. It would, indeed, be a contradiction in terms to say that his appointment was terminable at the pleasure of the school board, and at the same time to say that he was entitled to a quarter of a year's warning or notice.

Many decided cases were referred to on the part of the appellant, at the debate, as shewing that according to established law and practice individuals engaged in various departments of service were entitled to some warning or notice before their engagement could be terminated by the master or employer, but in all these cases the engagement was from its terms held to be for a year or other period of time; and consequently, by usage and common law, warning or notice of dismissal was in these cases necessary to prevent a renewal of the engagement by tacit relocation. But it is difficult to understand how tacit relocation could operate except in cases of that description. I do not, for example, see how it could operate at all in the case of an engagement terminable by express contract at the pleasure of the master or employer, for it is necessarily of the very essence of such an engagement that it may be brought to a conclusion at any time the master or employer thinks proper; and in such a case also the elements of usage and common law are excluded by the terms of the contract.

Accordingly, the precedents are, I think, conclusive to the effect that no warning or notice of dismissal is necessary where the engagement or appointment is during pleasure. In the case of The Commercial Bank v. Pollock's Trustees, as decided in the House of Lords, reversing, so far as the present point is considered, a judgment of this Court (2d June 1829, 3 Wilson and Shaw's App. p. 430) it was held that while the servant—in that case the manager of the bank—was in terms of his appointment dismissible at the pleasure of the directors of the bank, and without cause assigned, no allusion is made to previous warning or notice, and no point was attempted to be made as regards that matter. No doubt an allowance of some months' salary seems to have been given to the dismissed manager, but this was *ex gratia* of the bank directors, and not in respect of any obligation incumbent on them; and I think it obvious from the observations of the Lord Chancellor that he did not consider that any warning or notice of dismissal was necessary, or that there could be a claim for damages or compensation in lieu of it. His Lordship remarked, indeed, in reference to the dismissed manager's claim for compensation, that he could find "no stipulation whatever —no clause whatever—entitling Mr Pollock to the benefit of any compensation or any retiring provision in the event of his being removed. I find, therefore," his Lordship added, "no subsisting contract which entitles Mr Pollock to any compensation." And again, a little further on, the Lord Chancellor observes— "It appears to me that the committee of management had an absolute discretion to remove Mr Pollock when they thought proper, that they were not responsible

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for the manner in which they exercised that discretion, and that they were not bound to make any compensation or remuneration to Mr Pollock for the loss he sustained in consequence of that removal." So, in like manner in the case of another bank manager, the manager of the Western Bank (Mitchell v. Smith, 26th January 1836, 14 Sh. 358) which came before this Court soon after the judgment in the House of Lords in the Commercial Bank v. Pollock's Trustees, it was held that the appointment of the manager being one during the pleasure of the bank, they could dismiss him when they pleased, and were not bound to justify the dismissal. In that case the pursuer concluded for restoration to office, and alternatively for damages. Lord Moncreiff, who was Ordinary in the case, and whose judgment was adhered to by the Court, made the following important observations, which, I think, are equally applicable to the present case: —"There is no case of damages," his Lordship observed, "raised by the summons on the independent ground of injury arising from anything in the particular time, mode, or terms in which the dismissal took place, supposing there was otherwise power to do the act. And, indeed, it is plain that if the power existed the defenders might comply with the first alternative to the effect of restoring the pursuer, and so put an end to the action, and then immediately dismiss him in some more formal and simple manner according to their own view of the matter." This case of Mitchell v. Smith is all the more important as a precedent for the present inasmuch as I find from the session papers that there, as here, the dismissed manager had, besides his salary, a house and offices; and further, that not only no notice or warning of his dismissal was given to him, but also that he received no allowance whatever in lieu of such notice or warning.

Besides, these cases of the dismissals of bank managers, which appear to me to be precedents in point—for the circumstance of the dismissed employee in the present case being a schoolmaster cannot, I think, affect the legal principle—there are some cases of the dismissal of schoolmasters. I do not refer to the cases of the Tain Academy and others of the same description, where warning required to be given by the terms of the engagement. These cases are not in point. But in Bell v. Mylne and Others, 15th June 1838, 16 Sh. 1136 (the Dollar Academy case) a schoolmaster holding office merely during the pleasure of his employers was dismissed by them without any notice or warning; and I do not think it is of any consequence, as regards the legal principle, that an allowance of some months' salary appears to have been given to him through the liberality of his employers, but not in consequence of any obligation on them to do so. It was in that case distinctly ruled that the schoolmaster having accepted the appointment to be held during the pleasure of his employers, it was in their power to remove him whenever they pleased, without assigning any cause, and therefore that his plea for damages was unfounded. The learned Judges were unanimous in the case, and I find that Lord Corehouse remarked "that it is altogether new to me to hear it maintained that a power of dismissal at pleasure cannot be made the subject of legitimate stipulation at the appointment of a teacher. In the decisions which have been referred to by the pursuer there was nothing to warrant such doctrine. In the case of the Inverness Academy, for instance, there was no power of dismissal conferred on the managers by the charter except upon proper grounds. In the present instance it appears to have been quite right that the appointment was made during pleasure only; and in general, where there is a good body of judicious managers having the right to

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elect, I am not sure that it is wrong to qualify the appointment by a declaration that it shall be held only during pleasure."

There is also, in conformity with these views, the recent English case—and it has not been suggested that the laws of England and Scotland are different as regards such a question as the present—of Hayman v. The Governors of Rugby School, Law Reports, Equity Cases, vol. xviii. p. 68. In that case Vice-Chancellor Malins, whose judgment, I believe, was acquiesced in, stated—"It is in my opinion clear that the plaintiff and all the head masters of the public schools to which the Act of 1868 applies are subject to the control of the new governing body of each school, and that they hold their office at the pleasure merely of the new governing body, and are consequently liable to be dismissed without notice, and without any reason being assigned." If the principle as so expressed be sound and applicable to the present case—and I am not aware of any ground on which it is not, and certainly none was suggested at the debate—it is difficult to see any reason for interfering with the judgment appealed against.

The case may perhaps be a hard one for Mr Morrison, the appellant, and possibly other hard cases may occasionally occur in relation to the dismissal of schoolmasters holding appointments under the Education Acts, but these are not considerations by which the Court can be influenced. The contract between the appellant and the respondents cannot be re-formed; it must be given effect to as it stands. The only question, therefore, the Court has to determine is whether the appellant has in the present instance any maintainable claim for damages against the respondents in respect of breach of contract or other wrong done to him. Now, as I have been unable, for the reasons I have stated, and having regard to the authorities to which I have referred, to see that he has, it follows that, in my opinion, the interlocutor of the Sheriff appealed against ought to be affirmed, and the appeal dismissed.

Lord Mure.—The question which we have to decide, as I understand it, relates to the position of a schoolmaster appointed during the pleasure of a school board, under the 55th section of the Education Act, for such was the position of the pursuer. He has endeavoured, but has, I think, failed to bring himself within the category of persons holding office for a fixed period.

It has been maintained, on the one hand, that when a schoolmaster so appointed is dismissed, he is entitled to reasonable notice of the intention to remove him, or to compensation in lieu of notice. On the other hand, it has been maintained that the board has, by this statute, been authorised to dismiss a schoolmaster appointed under it without any notice, and to remove him at once not only from his office but also from his house and garden without any warning; and this power on the part of the board must, as it appears to me, involve a correlative right on the part of the schoolmaster to leave his situation at any time without notice to the board of his intention to take that step. Now, one object of this statute undoubtedly was to change the tenure of the office of schoolmasters from that of being *ad vitam aut culpam* to that of during pleasure, because considerable evils and inconveniences had been found to arise from the *ad vitam aut culpam* tenure; and one main object of the 55th section of the Act was to put an end to those evils. But while the Act did this, I cannot think that it was the intention of the Legislature to give any such power to school boards, as has here been contended, or to reduce the relative position of

parties to a state of uncertainty, which would in all probability lead to inconveniencies as great as any of those which the Act was intended to remedy. The words of the 55th section do not, I conceive, necessarily lead to such a result. It no doubt allows boards to act on their own will and pleasure, and to change a master without assigning any special grounds for doing so. But while it does this, it does not, as I read it, entitle school boards to act, in the matter of dismissal, except under the equitable considerations as to notice, which are, I think, applicable in all such cases.

By the rules of the law of Scotland I have always understood that in all cases between master and servant there must either be reasonable notice given of the intention to make a change or reasonable compensation. In the case of Moffat v. Shedden the law upon this subject was so laid down by Lord President Hope in regard to a tutor. In that case the party had not been engaged for any fixed time, in the view his Lordship took of the agreement, and he said,—"It was matter of implied understanding that though a salary at so much per annum, payable quarterly, was referred to in the letter, the continuance of the employment could only be in the event of the parties being mutually satisfied. So soon as there was no mutual satisfaction, no mutual confidence, I apprehend that the connection of the parties might be brought to a close by either of them, upon reasonable and equitable notice being given of the period of its termination. If such notice were not given, then compensation must be due in respect of the failure to give it." That opinion is, I think, applicable to contracts terminable at pleasure, and similar views were expressed by Lord President Boyle in Campbell v. Fyfe, June, 5, 1851, 13 D. 1041.

There is another branch of the law of Scotland in which it has been held that a contract at pleasure cannot be terminated without notice, viz., that of tenants at will. In the case of the Queensberry leases (March 11, 1756, M. p. 13,843), it was decided that the cottars of the principal tenant, though they paid no rent and held no leases, could not be removed without reasonable notice, which was fixed at fifteen days; and a similar rule was applied in Chirnside v. Park, March 8, 1843, 5 D. 864.

I have examined the cases of Pollock and Mitchell,[1] which were cited for the defenders, and I certainly had at first some difficulty in dealing with the question here raised, having regard to the opinion of Lord Moncreiff in the case of Mitchell. Both these cases proceeded on special contracts between the banks and their agents, and in neither of them was any question directly raised as to the sufficiency of notice. In the first, that question was obviated by the payment of five or six months' salary, and in the case of Mitchell the action proceeded on the assumption that the directors had no power to dismiss without special reasons, and the summons concluded for declarator to that effect, with an alternative conclusion for damages for dismissal without cause; and I see that Lord Moncreiff stated,—"There is no case of damages raised by the summons on the independent ground of injury arising from anything in the particular time, mode, or terms in which the dismissal took place, supposing that there was otherwise power to do the act." This observation as to the time and mode or terms of dismissal seems to me to be important, and to imply pretty clearly that if any question as to the necessity of some fair notice had there been raised

[1] Pollock v. Commercial Bank, June 12, 1829, 3 W. and S. App. 430; Smith v. Mitchell, Jan. 26, 1836, 14 S. 358.

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his Lordship would have been free to deal with it on the principles of the cases to which I have referred; and, upon the whole, I concur with the majority of your Lordships.

LORD GIFFORD.—I agree with Lord Deas and the majority of your Lordships.

I think that the true meaning and effect of section 55 of the Education Act of 1872 is that every schoolmaster appointed under the Act shall hold his office simply at the pleasure of the school board, and not either for life or for any fixed period. I think it quite impossible to read the enactment as providing that the school boards may fix "at their pleasure" any definite time during which the schoolmaster shall have a right to hold office,—in short, that the school board shall have liberty to contract according to circumstances. On the contrary, I think the statute deprives the school board of all power in the matter, and prevents them from making any time-engagement whatever with the teachers whom they may appoint. The statute appears to me to be imperative in its terms, and to fix in all cases the character of the employment and appointment. The words are,—"Every appointment shall be during the pleasure of the school board." It is not "for such period as the school board may fix"—it leaves the school board no discretion. They cannot elect for life, or *ad vitam aut culpam*, or for a period of years, but only "during pleasure." The school board is a varying body, and the board of any particular date cannot bind its successors, or even itself, for any time. The enactment seems to me to be that the office of teacher shall be precarious at the pleasure of the respective boards. With the policy of this provision I have no concern. If the enactment is clear it must receive effect,—and I read it as equivalent to a provision, that every schoolmaster under the Act may be dismissed at any time and at the mere pleasure of the school board. I cannot therefore agree with the Sheriff-substitute, who finds that the bargain was for a year certain, renewable by tacit relocation. On the contrary, I agree with the Sheriff-principal that the appointment was during pleasure, and terminable whenever the school board should choose.

But the question remains, and indeed it is the only question really at issue between the parties, whether a schoolmaster appointed under the Education Scotland Act, 1872, and holding office "during the pleasure of the school board," is entitled to reasonable notice of his dismissal where no fault is alleged or proved, or to a proportion of his salary and emoluments corresponding to such reasonable notice.

Of course the right of the school board to dispense with the teacher's services, and to deprive him, without any notice, of the control and superintendence of the school, is not disputed. This is a power which exists in every contract of employment of a personal nature, and belongs to every master or employer where there is a *delectus personæ*. The only question is the pecuniary question, whether the servant's or schoolmaster's emoluments are to run on for whatever time may be held to be reasonable notice.

Now, here I feel myself compelled to differ from the Sheriff-principal, and I am of opinion that a schoolmaster, although he holds his office simply "during the pleasure" of the school board, is yet entitled to reasonable notice on dismissal; or if the school board, without notice, insist upon his instantly giving up the school and ceasing to discharge his duties, that he shall have compensation equivalent to what he would have received had reasonable notice been given.

It does not follow that because an engagement is terminable "at pleasure"

that either party may terminate it without notice to the other. On the contrary, I think that wherever an office or employment is in itself of a permanent nature—that is, implying endurance or continuance for a considerable period of time—reasonable notice must be given by either party desirous of terminating it. The notice may be long or short, according to circumstances; but even a labourer, hired by the day is entitled at least to notice the previous day of his intended discharge. This seems not only in accordance with equity but to be absolutely necessary in most cases for the convenience or safety of both parties, and the rule is illustrated by many familiar cases. Thus, in the general hiring of domestic servants, where they are not hired for a fixed term, a month's notice or warning, or a month's wages in lieu thereof, seems to be the invariable practice recognised by decisions.[1] Even where the engagement is from term to term reasonable notice must be given before each term arrives, otherwise the engagement will be held renewed by tacit relocation for another term or another year.

There seems no reason why this rule should not apply to the case of a schoolmaster holding his office during pleasure. Undoubtedly the office is of a permanent nature,—that is, it contemplates an endurance for some considerable time. The schoolmaster is in possession of a dwelling-house and garden. He and his family cannot be required to give up possession of these without being allowed reasonable time to provide themselves with accommodation elsewhere. The arrangements of the school, and the management and regulation of the classes, have a certain permanence which cannot, without great injury and inconvenience, be interrupted without notice or preparation, and the teacher cannot provide himself with another school without reasonable, and, it may be, without some considerable delay.

Nor is the teacher the only party interested in insisting for reasonable notice. The school board also have perhaps as strong an interest in the same direction. The rights of the teacher, and those of the board, are corresponding and correlative. The utmost mischief might be done if the teacher, any morning, without notice, were entitled to desert his post,—and without providing a substitute, or giving any opportunity for doing so, leave his school untaught, and allow the whole pupils to be perhaps permanently scattered,—and yet this would be the result if the contention maintained by the Abernethy School Board is well founded; for if the board are not bound to give reasonable notice to the teacher, it would be impossible to hold that the teacher was bound to give reasonable notice to them. Both parties must be bound in this matter or neither, unless, of course, in the case of some very special and specific bargain.

Tenancy at will, or mere precarious possession of land, affords another instance of the necessity of reasonable notice to quit, and such notice must be longer or shorter, according to the nature of the subject possessed, and the mode of its use or cultivation.

The only other question is, what is reasonable notice? and on this point, and looking to the whole circumstances in which a schoolmaster, such as the present pursuer is placed, I agree with the majority of your Lordships that three months' notice, or three months' salary in lieu of notice, is a reasonable and suitable arrangement.

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[1] Cutter v. Powell, 6 Pr. 326; Robinson v. Hindman, 3 Esp. 235, 2 Selwyn, N. P. 1032, S. C.; Archard v. Horner, 3 C. and P. 349; Fawcett v. Cash, 5 B. and Ad. 904; Beeston v. Collyer, 4 Bing. 309.

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LORD JUSTICE-CLERK.—As I agree with the majority of your Lordships I did not intend to add anything to the exhaustive statement of Lord Deas. But in consequence of some observations which have been made I wish to add a few remarks.

I do not deny that the question is a difficult one; indeed the difference of opinion upon the bench shews its difficulty. But upon one matter I have no difficulty. If the question were, which of the two opinions is most in accordance with the spirit of the Education Act, and with the objects of the persons who promoted it, and who have the interests of education at heart, I have no hesitation in giving the preference to the result at which the majority of your Lordships have arrived. It will give stability to the position of school boards, and will remove difficulties in their path, by inducing men of ability to accept the office of schoolmaster. Lord Neaves has anticipated serious evils from our judgment. Not long ago similar vaticinations were uttered from the bench in regard to what would happen if any future generation should allow parish schoolmasters to hold their office on any other tenure than one *ad vitam aut culpam*. We have grown wiser since. I have no doubt that the present fears will meet with precisely the same fulfilment.

But with the policy of this statute we have no concern. The only question before us is, whether this action is well founded in principle, and if so, what is the principle on which it rests.

Lord Ormidale said that the grounds of action which we propose to sustain are not to be found in the summons. The summons is certainly a confused document, but what is concluded for is £50, as representing a quarter's salary and emoluments. There the pursuer pleads, no doubt alternatively, but quite distinctly,—"A school board dismissing a teacher without fault on his part is bound either to give reasonable notice, or pay corresponding compensation or damages." The question is, whether that is a sound plea. It seems to be thought that to sustain the plea is to question the tenure of the schoolmaster at the pleasure of the school board, and to go back to that tenure which the Legislature has abolished. So far from that being the ground on which I concur with the majority of your Lordships, my opinion proceeds on the opposite assumption, and is entirely founded on it. There is no doubt about the tenure. The only question is, what a tenure "at pleasure" implies. It is said that we cannot import the common law into the statute. From this I entirely dissent. The statute necessarily imports the common law by providing that the teacher shall hold office during the pleasure of the school board. We are compelled to resort to the common law to ascertain what are the incidents of a tenure at pleasure. I think that a tenure at pleasure, while it implies the right of the employer to dismiss the employed at any time without reason assigned lays upon him an obligation either to give reasonable notice or compensation in lieu of notice. It is not necessary to go into the principle of this rule, because it has been applied in so very many cases; but the rule is based on obvious equity. Our judgment will not allow a schoolmaster to retain his office one day longer than the board thinks fit; but it will secure to men offering their services as teachers to school boards that they will not be obliged to leave suddenly without compensation.

To remove all misapprehension, I may add that I have no idea that there was any gross fault on the part of this schoolmaster. I have no right to think that there was. All that we have before us is the fact that the school board

have dismissed him without assigning a reason, as they were unquestionably entitled to do. No. 150.

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THE COURT pronounced the following interlocutor:—"The Lords of the Second Division having, along with three Judges of the First Division, heard counsel for the parties, in respect of the opinions of a majority of the Judges present, sustain the appeal, and recall the judgment of the Sheriff appealed against: Find that the respondents were entitled to dismiss the appellant from his office of head master of the public school of Abernethy at their pleasure, but were bound either to give him reasonable notice or to compensate him for the want of it: Find that three months' notice would, in the present case, have been reasonable, and that the sum of £50, as concluded for, is a proper amount of compensation: Therefore decern against the respondents for payment to the appellant of the said sum of £50, under deduction of £5 received by him to account thereof: Find the appellant entitled to expenses in both Courts," &c.

ROBERT MENZIES, S.S.C.—MURRAY, BEITH, & MURRAY, W.S.—Agents.

COUNT JOSEPH VALERY, Pursuer.—*Balfour—J. P. B. Robertson.* No. 151.
JOHN SCOTT, Defender.—*D.-F. Watson—Trayner.*

July 4, 1876.
Valery v. Scott.

Contract—Foreign—Locus Solutionis—Revenue Laws.—A Scotch firm of shipbuilders entered into a contract, executed in Paris, to build certain steam packets for a French firm. At the same time and place a member of the Scotch firm gave a letter to a member of the French firm engaging to pay him a certain percentage on the contract price.

In an action for payment of the commission the Scotchman pleaded in defence that the letter fell to be construed according to the law of France, and was void in respect that it was not duly stamped.

Held that the letter constituted a Scotch contract, and plea repelled.

Observations (*per* the Lord President) on contracts executed in foreign countries.

1ST DIVISION. Lord Rutherfurd-Clark. M.

THIS was an action by Count Joseph Valery, partner of the firm of Valery Freres et Fils, shipowners, Marseilles and Paris, against John Scott, partner of the firm of Scott and Company, shipowners, Greenock, for payment of £4864, and interest.

The pursuer averred;—"On 28th July 1870 the firm of Valery Freres et Fils, and the firm of Scott and Company, entered into and executed in duplicate in Paris a contract in the French language, whereby the firm of Scott and Company undertook to build for and supply to the firm of Valery Freres et Fils eight new iron screw packet boats." . . . (Cond. 3) "Simultaneously with entering into the said contract, the defender undertook and agreed to pay to the pursuer commission at the rate of two per cent upon the amount of the said contract, and at the same time with the execution of the said contract the defender wrote and signed and delivered to the pursuer a letter or obligation in the French language, of which the following is a copy and accurate translation:—'Paris, the 27 July 1870.—Monsieur Joseph Valery,—As has been agreed between us, I engage myself to give to you two per cent upon the amount of the contract for the eight new packet boats for which I have signed a contract to-day.—Yours truly, JOHN SCOTT.'"

He averred that the contract was executed, and the price paid, and that the commission amounted to the sum concluded for.

In answer to Cond. 3 the defender stated;—"The said letter is not duly stamped, and according to the law of France, where said letter was written

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and granted, it is essential that the said letter should be stamped in order to make it valid or binding as an obligation."

He pleaded;—(1) The said letter falls to be considered and construed according to the law of France, where the same was made and granted, and by said law the said letter imposes no binding obligation upon the defender, but is null and void, in respect it is not duly stamped.

The Lord Ordinary pronounced this interlocutor:—"Repels the first plea in law stated for the defender, and appoints the cause to be put to the roll for further procedure." *

The defender reclaimed, and argued;—The constitution and validity of a contract was always governed by the *lex loci contractus*, and its interpretation was governed by the same law, unless it was plain that the parties had another place in view. It was only the remedy that was governed by the law of the place of performance.[1] The observations of the Judges in Stewart v. Gelot, with regard to revenue laws, were not borne out by the English cases. Contracts contrary to the revenue laws of a foreign country were not rejected as matter of evidence, but the revenue laws were recognised if they affected the constitution of the contract.[2]

The pursuer argued;—The *locus contractus*, in legal meaning, was not always the place where the contract was made—the *locus actus*. It might be the *locus solutionis*.[3] It would always be so, if that was apparently the intention of the parties, and that was so in the present case, where the contract was simultaneous with and relative to a purely Scotch contract for supplying steamships. (2) Even if Paris were the *locus contractus* the revenue laws of a foreign country were not binding.[4]

At advising,—

LORD PRESIDENT.—I am of opinion that this is a Scotch contract. We have heard a great deal on the one side about the place of making a contract, and a great deal on the other of the place of performing a contract. These are both circumstances to be taken into consideration as regards the nationality of a contract, but the place of performance is generally of more importance than the place of making.

The place of the making of a contract is in many cases indifferent. Take the case of two Scotchmen meeting in Paris, who contract regarding the disposal of a moveable in Scotland. It is of no consequence that they happen both to be in Paris. I merely put this as an example of how unimportant the place of making a contract often is. But the place of performance of a contract is never unimportant, for parties must always see that the law of the place where the

* "NOTE.—The contract, though made in France, was to be performed in Scotland, where the defender was domiciled. Hence any question raised as to its validity is, in the opinion of the Lord Ordinary, to be determined by the law of Scotland—See Story's Conflict of Laws, sec. 280."

[1] Ersk. Inst. iii. 2, 39; Lord Brougham in Warrender v. Warrender, Sept. 1835, 9 Bligh, N. R. 110; Story, Conflict of Laws, 282; Lawrence's Wheaton's Internat. Law, 179; Cooper v. Earl of Waldegrave, Feb. 14, 1840, 2 Beav. 282; Albion Insurance Co. v. Mills, June 27, 1828, 3 W. and S. 218; 3 Burge's Com. 758.

[2] Alves v. Hodgson, May 17, 1797, 7 Durnford and East, 241; Bristow v. Sequeville, May 7, 1850, 5 W. H. and G. 275.

[3] Story, Conflict of Laws, 280; Stewart v. Gelot, July 19, 1871, 9 Macph. 1057, 43 Scot. Jur. 583; Royal Bank of Scotland v. Scott, Jan. 20, 1813, F. C.

[4] Stewart v. Gelot, *supra*; Clements v. Macaulay, March 16, 1866, 4 Macph. 583; James v. Catherwood, June 3, 1823, 3 Dowl. and Ryl. 190; Wynne v. Jackson, July 25, 1826, 2 Russel, Ch. Ca. 351.

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contract is to be performed must affect them very much. Now, I think this is a Scotch contract to all intents and purposes. One of the contracting parties is a Frenchman, but that makes no difference; he might just as well have been a German. The party who undertakes the obligation, who is to perform the contract, is a Scotchman, whose place of business is in Scotland, and this obligation is in direct connection with another contract, viz., that of building the steamers, and the measure of liability under this contract can only be found by means of reference to that other. Now, that other contract is for building ships in Greenock, and by reference it is incorporated with this. Scott is only to be found at Greenock; the domicile, the residence, and the place of business of Scott are all Scotch. No place is contemplated in the contract except Greenock.

A good deal of misunderstanding has arisen from the way in which writers have treated this subject. By the term *locus contractus* is sometimes understood the place of making the contract, *i.e.*, the place where it is actually made out and signed; but, in general, what is meant is the locality, as ascertained from the nature of the contract itself, and what is to be done under it. In this sense the civil law says, *contraxisse unusquisque in eo loco intelligitur, in quo ut solveret, se obligavit*; that means, that the place of the contract is the place of performance. No doubt there are cases where the place of contracting is of importance, but generally the place of performing is of more. Here there is no room for serious argument on that point. Nothing here is French except the fact that the contracting parties happened to be in Paris. Of course the idea of a Scotch contract requiring a French stamp to make it binding is out of the question, and so I think the judgment of the Lord Ordinary should be affirmed.

D XLIV ^ tit 7. l. 2

I have also to add, that the passage in Erskine (iii. 2, 39–40) lays down a very important doctrine as regards the solemnities of deeds. A deed executed abroad may be good and valid here if made (1) according to the forms prescribed by our own statutes, or (2) according to the forms of the country where the deed is executed. But it does not follow that a deed falling under the second category is a foreign deed. It may be a Scotch deed, and the two cases referred to by Erskine are merely cases where the deeds were allowed to be held as if made in proper Scotch form, because they happened to have been executed in a foreign country. And I may mention that the doctrine there laid down was very fully considered in the case of Purvis, March 23, 1861, 23 D. 813, 33 Scot. Jur. 404, ~~D. 44, tit. 7, l. 21.~~

LORD DEAS.—The view of this case first presented to us was that this contract having been made in Paris was by the revenue laws of France not only inadmissible in evidence but actually void. That is not well averred in the record, for the only mention of it is in Ans. 3, which says,—"The said letter is not duly stamped, and according to the law of France, where said letter was written and granted, it is essential that the said letter should be stamped in order to make it valid or binding as an obligation." Now, foreign law is a matter of fact, and ought to be distinctly averred as such, and I think the record would have required to have been amended before that matter could have been gone into. It was a plausible argument, however, that by the law of the place where the contract was made it was null, and the plausibility was strengthened by the conflicting opinions of Judges and jurists which were cited to us. I was at one time disposed to allow inquiry, before answer, as to whether the contract was really null by the law of France. But so soon as the defender,

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in place of accepting that view, which would have left all farther questions open, insisted upon joining issue on the merits, and called upon us to decide that the contract was a French contract, it was evident he had no chance of success. Probably he had been advised that an objection under the stamp laws does not create an absolute and insuperable nullity in France any more than it does in this kingdom. It really does not matter, however, for if the contract was good according to the law of the place of performance, that is enough; and as it is good by that law, I am for giving it effect accordingly. I may also say, that my judgment would have been the same if this contract had stood by itself, without being connected with the other contract.

LORD ARDMILLAN concurred.

LORD MURE.—I have come to the same conclusion. If this question had depended upon the obligatory letter alone, without any reference to the contract entered into between the parties for the building of ships at Greenock, I should have had some hesitation, having regard to the passages in Erskine, iii., 2, 40, in pronouncing this to be a Scotch contract. But this letter, as I read it, is indissolubly connected with the other contract; and looking to the fact that they were both signed on the same day, and that the one refers to the other, I think that the letter must be dealt with as a Scotch contract.

THE COURT adhered.

MASON & SMITH, S.S.C.—WRIGHT & JOHNSTON, L.A.—Agents.

No. 152. July 4, 1876. British Shipowners' Co. (Limited) v. Grimond.

THE BRITISH SHIPOWNERS' COMPANY (Limited), Pursuers and Respondents. —*Jameson.*

J. AND A. D. GRIMOND, Defenders and Appellants.—*D.-F. Watson—Asher.*

Ship—Carriage of Goods—Delivery—Risk.—In an action for payment of the freight of part of a cargo of jute shipped for delivery "at the port of Dundee" the consignee alleged in defence that the shipowners had failed to implement their contract by delivering the goods in good condition, and stated a counter claim of damages on account of certain bales which had been injured by rain water while lying on the quay, where they had been deposited. The consignee led evidence to shew that by the custom of the port the bales were checked by the shipping clerk only when placed on the consignee's carts for removal, and contended that till that time no delivery had taken place. *Held* that the defender had failed to instruct any custom of the port at variance with the general rule according to which delivery of each bale was complete as soon as it passed over the ship's side into the hands of the harbour porters employed for the consignee, and, accordingly, that the shipowners were not liable for the damage in question.

2D DIVISION. Sheriff of Forfarshire. M.

~~(*Supra*, p. 604.)~~ Dele

This was an action raised in July 1875 in the Sheriff Court at Dundee, at the instance of the British Shipowners' Company (Limited) against J. and A. D. Grimond, merchants and manufacturers, Dundee, for £95, 2s. 2d., being the balance of the freight payable by the defenders to the pursuers for the carriage of 750 bales of jute from Calcutta to Dundee, in the pursuer's ship "British Princess," in the spring of 1875, under bills of lading, by which the jute was to be delivered "in the like good order and well conditioned," as shipped, "at the port of Dundee," "unto order or assigns" of James Duffus, and which bills of lading were endorsed to the defenders.

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The defenders admitted the delivery of part of the jute, and their liability for the freight thereof, but alleged (Stat. 2)—"The pursuers failed to perform the obligation incumbent on them by the said bills of lading, and as carriers by sea, inasmuch as they did not take due care of and give due delivery at the port of Dundee of ninety-one bales or thereby of the said parcels of jute. The pursuers, or others for whom they were and are responsible, unduly and improperly discharged said ninety-one bales in wet weather, and deposited the same on the open quay among wet mud, and unprotected, whereby the jute was injured by rain water."

The defenders accordingly set forth a counter claim of damages for loss on the ninety-one bales.

The defenders pleaded;—(1) The pursuers having failed to implement their contract under said bills of lading, and the defenders having sustained damage through the fault of the pursuers, or their servants, or others for whom they are responsible, are entitled to set off such damage against the freight, and they accordingly plead compensation.

A proof was allowed, which established the following facts:—The practice in regard to the delivery of jute cargoes at the port of Dundee was that after due notice to the various consignees of the ship's readiness to discharge, the bales, as they came out of the ship, were deposited on the quay, from which the consignees removed them in carts without delay. It was the custom to discharge the ship by "lumpers" in the pay of the shipowner, who brought the bales to the deck, from whence they were generally run down a plank on to the quay, where they were taken possession of by the harbour porters, whom the consignee was obliged by the harbour regulations to employ for this purpose, and who were paid by him.

The "British Princess," on arriving at Dundee in the beginning of June 1875, was berthed by the harbour-master at a quay where there was no shed accommodation. The discharge of the cargo, which consisted of upwards of 8000 bales of jute, consigned to four different firms, began on 5th June. By the evening of 10th June (Thursday) the defenders had removed 320 bales of the jute consigned to them. About forty more bales of the defenders' jute which had been landed that afternoon were lying on the quay not removed. The defenders' clerk was at the quay the next morning (Friday), but he did not have the bales removed; in consequence of instructions from his employers not to send up a load of bales composed of different marks, and there was not in the lot which he found lying on the quay a sufficient number of bales of any one mark to make up a load (five bales). About noon that day (Friday, 11th June) a thunderstorm, accompanied by heavy rain, came on, and the forty bales above mentioned, along with thirty or forty others, also forming part of the defenders' jute, which had been landed that morning, were exposed to the wet, and damaged by the rain water. A few more of the defenders' bales were, notwithstanding the remonstrances of their clerk, landed during the storm, or, at least, while the quay was still wet and dirty, and were also damaged. The whole of the damaged bales, ninety-one in number, were allowed to remain on the quay till 18th June, when the defenders removed them to their warehouse, and subsequently procured a judicial inspection.

Evidence was led for the defenders to prove a custom of the port (not alleged on record) that in the case of jute cargoes the number of bales was not checked by the ship's and consignee's clerks until they were placed in the carts, in lots of five, for removal, and the defenders argued that delivery did not take place until the number of bales was checked.

The Sheriff-substitute (Cheyne) pronounced an interlocutor in which

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he found "that the pursuers are not liable for the damage sustained as aforesaid by the goods landed on the Thursday evening in respect of the undue delay on defenders' part in removing them from the quay, but that they are liable for the damage done to the goods landed on the Friday by the rain of that day," assessed the damages at £25, to that extent sustained the defences, and found the defenders entitled to modified expenses.*

Both parties having appealed, the Sheriff (Maitland Heriot) altered his Substitute's interlocutor to the effect of finding that the pursuers were not liable for the damage sustained by the goods landed on the Friday morning before the rain came on, leaving them only liable for the damage done to the goods landed during the storm, which he assessed at £5, 7s., decerned against the defenders for the balance, £89, 15s. 2d., and found the pursuers entitled to expenses, subject to a deduction of one-sixth of the taxed amount.†

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* "NOTE.—. . . . The pursuers' agent very properly conceded at the recent discussion that his clients were liable in damages so far as the bales (from fifteen to twenty probably) landed on the Friday afternoon were concerned, in respect that they landed them during rain, or at least placed them upon the wet quay without protecting them from the wet by putting sawdust or planks below them; but he contended that their responsibility extended no further, and he rested this contention upon the broad ground that the moment the bales were placed on the quay they were under the control, and therefore at the risk of the consignees. It was argued, on the other hand, on behalf of the defenders, that until placed on the carts the goods were in the possession of the carriers, and that the latter must be held responsible for the damage done to the whole parcel by the shower, inasmuch as the whole parcel was still in their custody when the shower came on, and though the shower was the act of God, still but for their neglect of ordinary precautions no damage would have resulted. After full consideration the Sheriff-substitute has found himself unable to adopt either of these contradictory views. It seems to him that the true view as to the mutual obligations of parties under the practice which prevails here in regard to the landing of jute cargoes from what was really a general ship (and it need hardly be remarked that in such a matter the practice of the port governs—see Abbott on Shipping, p. 334, 11th ed.) is that the shipowners are not discharged by merely putting the goods over the side, but are bound to take charge of them for a reasonable time after they are landed (for it would be unreasonable to expect that the consignees should keep carts constantly in attendance waiting for their goods to come out), but that, on the other hand, if the consignees fail to remove their goods with due and reasonable despatch, they and not the shipowners must stand the consequences of such a *casus fortuitus* as occurred here, the question what is due and reasonable despatch being of course a jury question depending on the circumstances of each case." The Sheriff-substitute then proceeded to apply the principle laid down, with the result stated in his interlocutor.

† "NOTE.—. . . . . The question for consideration in such circumstances is, who is responsible for the damage done to the jute while on the quay during the Friday storm? This seems to the Sheriff to depend on another question, viz., at what precise period did delivery of the bales take place?

"The pursuers, on the one hand, contend that delivery took place as soon as—all connection between the ship and the bales being removed—they were put into the hands of the harbour porters. The defenders, on the other hand, contend that delivery did not take place until the bales, having been lifted from the quay, were placed in their carts. The Sheriff-substitute again has adopted a medium between these two periods, and considers that the defenders are entitled to a reasonable time after they have been placed on the quay to have them removed, and he has held accordingly that the pursuers are not liable for damage to the lot landed on Thursday afternoon, in respect that the defenders had had a reasonable time for their removal, and had not availed themselves of it, but

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The defenders appealed.

Argued for them;—Apart from any question of fault, the pursuers were liable for the damage caused by the rain on the Friday, in respect that delivery of the goods then lying on the quay was not then complete. Where the shipmaster, as here, came under a contract to deliver goods to a particular person at a particular place, he did not fulfil his contract by merely intimating to the consignee that the ship had arrived, and then,

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that the pursuers are liable for the damage to the lot landed on Friday forenoon, in respect that the defenders had not had such reasonable time.

"The Sheriff has carefully considered these three views, and is of opinion that the contention of the pursuers is the correct one. Such a ship is discharged by men called 'lumpers,' who are in the pay of the shipowners. These men bring the bales to the deck, whence they are generally 'run' down a plank on to the quay. At the bottom of this plank they are taken possession of by the harbour porters, who are in the pay of the merchant. The Sheriff is of opinion that as soon as each bale, after having been put over the ship's side on to the quay by means of a plank, or otherwise, is taken possession of by the harbour porters, it has been duly delivered to the merchants.

"These harbour porters are paid by the merchants, and in this question they must be reckoned their servants. Then this delivery to the harbour porters takes place in the presence of the merchant's clerk, who is either present or ought to be present during the course of delivery. The goods, after being disposed of by these porters, are 'under the dominion and control' of the merchants. (See Judge Willes in Meyerstein v. Barber, 24th Nov. 1866, L. R. 2 C. P. 38, 50.) The bales are placed by the porters at such part of the quay as the merchant's clerk directs. After having been handed over to the porters it is the merchants and not the shipowners who provide carts for the removal of the bales. It is the merchants or their clerks who have to determine how long the goods are to remain on the quay. . . . .

"The Sheriff concurs with the Sheriff-substitute in opinion that the pursuers are not liable in damages in respect of the bales landed on Thursday afternoon. The Sheriff, however, goes further, and holds that the pursuers are not liable in damages either in respect of the bales landed on the Friday forenoon. He arrives at this result on the ground that both lots had been duly delivered to the defenders, that after such delivery the pursuers had over them no further control, but that they lay on the quay as long as the defenders wished, at the defenders' own risk. It seems to have been decided in the case of Bannatyne, 15th Nov. 1814, F.C., as stated in Bell's Com. 2, 97, that lien existed over wood launched from the hold of a vessel on to a raft fastened to the ship's side only until the raft was finished and the connection with the ship cut away. In like manner, in this case, at the time when the storm came on, all connection between the ship and the bales had ceased. While the pursuers had lost all lien or other control over the delivered bales, they had also, as it seems to the Sheriff, lost all responsibility connected with them.

"It is no doubt true that the various clerks do not take a note of the bales in their respective books until they have been placed in the carts in lots of five for removal. This is what creates any difficulty that may exist in the case; but, on the whole, the Sheriff cannot regard that fact as determining the *punctum temporis* of delivery. The goods are large, and cannot be carried off, and it is easier for the clerks to note the goods after having been classified and arranged into lots of five all with the same mark; but that period of making their entries seems to the Sheriff, to be adopted for the mere convenience of the clerks, and not as affecting the question of delivery. Before the goods are so noted they have been, as Judge Willes expressed it, 'under the dominion and control of the merchants.' These very bales were not placed on the defenders' carts until the 18th of June, and would not be noted in the clerks' books until that day, but it can scarcely be contended that delivery had not taken place before that date. If so, delivery and the marking in the clerks' book are not identical."

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whether the consignee was there or not, putting the goods over the ship's side on to the quay. He must, in general, actually deliver the goods to the consignee or his servants. No doubt the consignee might be absent through no fault of the shipmaster; in that case the consignee would be liable to the shipmaster in any expenses incurred by him in warehousing or otherwise taking care of the goods, and the shipmaster would have a lien over the goods until such expenses were paid. Further, there was evidence to shew that according to the practice of the port of Dundee delivery of jute was not held to be complete until the bales were put upon the cart of the consignee. It was not till then that the number of bales was checked. If a bale was missing, clearly the ship would have to make it good, which shewed that the risk was still with the ship.[1]

The pursuers supported the judgment of the Sheriff.[2]

At advising,—

Lord Justice-Clerk.—The question of delivery is as much one of common sense as of technical rules. The general rule is that goods are delivered when they are so completely in the custody of the consignee that he may do as he pleases with them. In the present case, in the absence of any custom to the contrary, the goods must be held to have been delivered as soon as they were put over the ship's side and in the hands of the harbour porters, who were paid by the merchant. I do not say that where there is an obligation to deliver at a particular port, and where there are certain well defined rules uniformly and consistently acted upon at that port, compliance with the rules may not be a condition of delivery. If it had been alleged and proved that it is a uniform practice at the port of Dundee that before the consignee is entitled to take away any goods he is obliged to go through the form of checking the goods with the ship's clerk, this would have had an important bearing on the question of delivery. But I have come to be of opinion that the proof does not bring the practice up to this point, and that the carrier was discharged of his duty, and relinquished any lien over the goods when the goods were put over the ship's side.

Independently of this, I think that the defenders are not entitled to raise the question. They had no right to leave the goods on the quay for a week, and then, when it became impossible to separate the damage, to bring this claim.

Reserving entire the question as to the effect of the custom of the port, which does not, I think, arise in this case, and which, if it does arise, the defenders are barred from pleading, I am of opinion that we should adhere to the judgment of the Sheriff.

Lord Neaves and Lord Ormidale concurred.

Lord Gifford.—I entirely concur in the judgment of the Sheriff-principal, and very much on the grounds stated by him in his note. The whole damage done to these bales seems to have arisen from this,—that at the place where the vessel was discharging the jute in the harbour of Dundee there was not sufficient shed accommodation. The ship was ordered to a berth where there happened to be no shed. This is a matter as to which the merchant must take his chance,

[1] Abbott on Shipping, 11th ed., p. 334; Gatliffe v. Bourne, 4 Bing, N. C. 314; Addison on Contracts (ed. 1875), p. 481; Story on Bailments, 577, 545.

[2] Bell's Com. (M'L.'s ed.) vol. i. p. 605, and vol. ii. p. 97; Parsons on Shipping, vol. i. p. 152, cited with approval by Dr Lushington in "The Norway," 1865, 12 Law Times (N. S.), p. 61; Meyerstein v. Barber, Nov. 24, 1866, L. R., 2 C. P. 38 (Justice Willes, p. 50).

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and for which the shipowner is in no way responsible. The shipmaster was bound to discharge upon the open and exposed quay, for there was no other place for him at the harbour to which he had been ordered.

There is no question in this case about due notice having been given to the consignee of the arrival of the ship. The discharge had regularly begun some days before the Thursday when the first parcel of jute said to be damaged left the ship. The ship was in the course of discharging, all in due order. The merchant was there by his clerks and by the shore porters, who were receiving each bale as it was taken out of the ship, and all was going smoothly. If the consignee had not appeared at all a different duty would have been imposed on the shipmaster. He would have had to warehouse the goods for the consignee's behoof. But no case of this kind arises, for the consignee was on the spot all ready to receive his goods as they came out of the ship, and, accordingly, there is no question as to the jute discharged prior to the Thursday in question.

Now, as to the Thursday's discharge, I agree with the Sheriff that there is no sufficient evidence that the goods which were put out on that Thursday were improperly put out, and I think the only real question relates to the jute which was put out on Friday morning. I agree with the Sheriff that the *punctum temporis* when delivery of each bale took place (if it is necessary to determine this), is the moment when each bale passes over the ship's side, and sliding down the plank or swinging from the crane is there taken possession of and received by the harbour porters who, I hold, are acting for the consignee, and who are there for the very purpose of receiving each bale. No doubt there might be questions if the merchant is not there to receive his goods, in which case it may be the duty of the shipmaster to warehouse or otherwise take care of the goods. But the consignee in the present case got notice of the arrival of the ship, and he was in the course of receiving the goods. He was there by his clerk and by the shore porters, who in a question of this kind must be regarded as his servants. No doubt he must employ the shore porters, who have a monopoly of this duty, but still they are the consignee's servants, and he pays them, and the necessity of employing them and not other parties is a mere harbour arrangement. The moment the goods come into the hands of these porters, that is delivery in law, unless a custom is established to the contrary. Now, I am clearly of opinion that no contrary custom is established. No usage has been proved inconsistent with complete delivery taking place at the moment I have indicated. I do not think that it follows from what has been proved in regard to checking—which seems very much a matter of arrangement for the convenience of the merchants—that delivery is suspended till such checking takes place. There is no evidence whatever that the charge of the goods on the quay, or any expense connected with them, is laid upon the shipmaster—no proof that the risk of the goods until they are checked lies with the ship. In the present case the consignees did not choose to send for the bales as they came out of the ship. For their own convenience they allowed the bales to lie on the quay while they arranged them for convenience of forwarding to customers into parcels bearing the same mark, there being, it seems, sixteen different marks in the same consignment. Surely the ship had nothing to do with that.

In order to prove a custom adverse to the general rule it would be necessary to shew that it is the practice for the ship to provide tarpaulins to cover the goods while they lie on the quay before being checked, and that if goods are injured before being checked the ship is obliged to pay, and actually is in use

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to pay, for the damage. In the absence of such evidence, I agree with the Sheriff that we must apply the ordinary rule.

Another consideration which points to the same result is the difficulty of finding any other *punctum temporis* as the time of delivery. The Sheriff-substitute does not say that the time of checking is the moment of delivery. He puts it at a reasonable time after the goods are put out of the ship. This would be a very inconvenient test to apply, very vague and uncertain, and constantly varying in each particular case. It is very desirable that the point of delivery and the fact of delivery should be precise, definite, and easily ascertained, and in the absence of all evidence to the contrary I think the criterion adopted by the Sheriff is the true one.

THIS interlocutor was pronounced :—"Find that the goods discharged from the vessel on Thursday the 10th and Friday the 11th of June libelled were delivered to the defenders on those days respectively: Find that no reason has been established by the defenders that should have prevented the pursuers from discharging the goods from the vessel on those days: Therefore dismiss the appeal; affirm the judgment of the Sheriff appealed from: Find the appellants liable to the respondents in the expenses of the appeal," &c.

PETER DOUGLAS, L.A.—MACARA & CLARK, W.S.—Agents.

No. 153.
July 5, 1876.
Dudgeon v. Thomson and Donaldson.

RICHARD DUDGEON, Complainer.—*D.-F. Watson—Hunter.*
WILLIAM THOMSON AND BENJAMIN DONALDSON, Respondents.—*Supra p 604—Asher—Jameson.*

Process—Jury Trial—Proof—Breach of Interdict.—The holder of a patent having obtained an interdict against B infringing the same subsequently presented a petition and complaint against B, and C, his partner, for breach of interdict. *Held* that the case should be tried before the Lord Ordinary without a jury.

1ST DIVISION. Lord Rutherfurd-Clark. B.

RICHARD DUDGEON, who held a patent for improvements in apparatus used in expanding boiler tubes, and had obtained an interdict against William Thomson infringing the same, presented, with consent of the Lord Advocate, a petition and complaint to the First Division against William Thomson, and Benjamin Donaldson, whom Thomson had assumed as partner.

The respondents in their answers denied that any breach of interdict had been committed. The respondent Donaldson further maintained that as the interdict had no application to him personally he could not be guilty of breach of interdict.

After hearing counsel in the Summar Roll, the cause was remitted to Lord Rutherfurd-Clark (Ordinary) in terms of the Act of Sederunt 11th July 1828, sec. 86.

The Lord Ordinary thereafter closed the record, and pronounced an interlocutor on 14th June assigning a diet for the adjustment of issues.

Against that interlocutor the complainer reclaimed, with leave of the Lord Ordinary.

He argued that in a case of breach of interdict a jury trial was unusual.[1]

[1] Mackenzie v. Mags. of Dingwall, Feb. 12, 1839, 1 D. 487, 11 Scot. Jur. 319; Gray v. Petrie, Feb. 17, 1848, and March 10, 1849, 10 D. 718, and 11 D. 1021; Menzies v. Macdonald, Feb. 13, 1864, 2 Macph. 652, 36 Scot. Jur. 321; M'Neill v. Scott, March 17, 1866, 4 Macph. 608, 38 Scot. Jur. 316; Act 6 Geo. IV. cap. 120 (Judicature Act, 1825), sec. 28; Act 29 and 30 Vict. cap. 112 (Evidence Act, 1852), sec. 4.

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The respondents argued;—The case was fitted for jury trial (1) as being of a quasi-criminal nature; and (2) because the question of Donaldson's liability was one which a jury could best decide.

At advising,—

LORD PRESIDENT.—I am against a petition and complaint for breach of interdict being tried by a jury, for the very reasons which have been mentioned in support of that view by the counsel for the respondents. The first is, that it will come out in the course of the trial that this is a case of a quasi-penal character. If so, it is unsuited for a jury, for the mind of the jury might be prejudiced thereby. That is one reason; and the other is, that there may be a difficult question raised as to the liability of the defender Donaldson as a partner of Thomson, and the question will be, not whether Donaldson has infringed the patent so much as whether he is so involved as to have committed a contempt of Court. That is a question which is particularly well suited for the decision of the Court without the assistance of a jury.

LORD DEAS.—There is no doubt that breach of interdict involves a contempt of Court. We could hardly send this case to a jury without submitting to them the question whether a contempt of Court has been committed. That is a question which it is our duty to decide for ourselves.

LORD ARDMILLAN and LORD MURE concurred.

THE COURT pronounced the following interlocutor:—"Recall the interlocutor, and remit to the Lord Ordinary to appoint the cause to be tried before himself without a jury, reserving all questions of expenses."

D. CARSON, S.S.C.—AULD & MACDONALD, W.S.—Agents.

No. 154.
July 5, 1876.
Presbytery of Deer v. Heritors of Pitsligo.

THE PRESBYTERY OF DEER, Pursuers.—*Asher—Darling.*
THE HERITORS OF PITSLIGO, Defenders.—*D.-F. Watson—Jameson.*

Church—Manse—Presbytery—Expenses—Ecclesiastical Buildings Act, 1868 (31 *and* 32 *Vict. c.* 96), *secs.* 3 *and* 4.—A minister petitioned the presbytery to visit his manse with a view to repairs. The presbytery employed an architect, and pronounced findings in accordance with his report. The heritors appealed to the Sheriff under sec. 3 of the the Ecclesiastical Buildings Act, 1868, which enacts that an appeal "shall have the effect of staying the presbytery from taking any further steps in connection with" the proceedings, and the case was ultimately disposed of on further appeal to the Lord Ordinary on Teinds. The presbytery did not appear in the appeal, but decerned against the heritors for the amount of their architect's account, and, not receiving payment, raised an action for payment of the account, as duly incurred by them. *Held* that they were entitled to decree.

Observed—That the presbytery ought not to have pronounced decree for their expenses after the case had been appealed to the Sheriff.

1ST DIVISION. Lord Shand. B.

THE minister of Pitsligo presented a petition to the Presbytery of Deer praying for an inspection of his manse with a view to its repair. The presbytery, after due intimation, visited the manse, and employed Mr Rhind, architect, to report, and afterwards pronounced a finding in terms of his report. The heritors, who had been represented by agents during these proceedings, appealed to the Sheriff under the Ecclesiastical Buildings Act (31 and 32 Vict. c. 96), sec. 3. The case was further carried by appeal before the Lord Ordinary on Teinds, who, on a report by another architect, ordered certain operations to be made upon the manse, declared it to be free, and found the minister entitled to modified expenses.

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The presbytery did not appear in the appeal.

Mr Rhind having presented his account, the presbytery allocated the amount, together with a small sum of other expenses, in all £62, 4s. 8d., among the heritors according to their valued rent, and decerned against them. The heritors having refused to pay, the presbytery raised this action against them for payment of the amount in their several proportions.

The pursuers pleaded;—(2) The account sued for having been duly incurred by the Presbytery in connection with the manse of Pitsligo, and the heritors of the parish of Pitsligo being liable for the same, the pursuers are entitled to obtain decree as concluded for. (4) The heritors of the parish of Pitsligo being liable for all sums duly incurred in connection with the repairs and alterations necessary for putting the manse in a habitable condition, and the sums sued for having been duly incurred in that connection, the defenders are bound to make payment thereof in the proportions specified.

The defenders pleaded;—(4) Under the Ecclesiastical Buildings and Glebes (Scotland) Act, 1868, it was incompetent for the presbytery to take any steps in connection with the process regarding the repair of Pitsligo manse, or to pronounce any decerniture thereanent, after the cause had been appealed to the Sheriff, and the findings and decrees of the presbytery founded on by the pursuer are inept.* (5) The process regarding the repair of Pitsligo manse having been finally disposed of in the Court of Session, and the defenders having paid the whole expenses for which they were found liable in said process, no further liability can attach to them for expenses alleged to have been incurred in said process.

The Lord Ordinary, on 11th January 1876, pronounced this interlocutor:—"Having considered the cause, in respect of the defenders' fourth plea in law supersedes consideration of the cause, *in hoc statu*, to allow the pursuers an opportunity of appearing in the process of appeal mentioned on record, to the effect of claiming the expenses now sued for." †

His Lordship afterwards refused a motion to recall the sist, and granted leave to reclaim.

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* See section 3, quoted in the Lord Ordinary's note.

† "NOTE.—. . . The defenders maintain that the present proceeding by a separate action in the Court of Session for expenses incurred by the presbytery in the general application to them is incompetent, and that the course which the pursuers ought to adopt is to compear in the process of appeal. It appears to me this view is sound. The statute, section 3, provides that an appeal 'shall have the effect of staying the presbytery from taking any further steps in connection with said proceedings;' *i.e.*, *inter alia*, the proceedings before any presbytery relating to the repair of a manse. This provision, and the whole scope of the statute, seems to shew that it was the purpose of the Legislature that after an appeal taken all farther orders or decrees should be granted in the process of appeal only.

"In the argument the defenders have not maintained that all remedy is excluded, but only that they should not be exposed to the expense of a second process in the supreme Court. The clerk of the presbytery was cited as a respondent in the original appeal, but did not appear, apparently because the question at issue was really between the minister and the heritors. But if the presbytery, acting within their functions, competently employed Mr Rhind, and are entitled to relief, they were entitled to appear, and seem to me to be still entitled to appear, in the process of appeal, to be heard on their claim for the expenses incurred. I have thought it better merely to supersede consideration of the cause in the meantime, and not to dismiss it until it shall be seen whether the other mode of procedure is held competent, or conceded to be open to the pursuers in the proper process."

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The pursuers reclaimed, and argued;—These expenses were incurred by the presbytery in the exercise of their duty, and the heritors were liable for them.[1] The presbytery were not parties to the appeal, and were not bound to sist themselves.

Argued for the defenders;—The action was incompetent, because it was really a claim by separate action for expenses of process, which ought to have been claimed, if at all, in the principal process.

LORD PRESIDENT.—In November 1871 the minister of Pitsligo presented a petition to the presbytery praying for an inspection of the manse with a view to its repair. The presbytery considered the petition, and resolved to take the assistance of Mr Rhind, architect. They accordingly remitted to him to inspect the manse. He furnished a report, and afterwards a supplementary report, in terms of which the presbytery pronounced a finding. The proceedings were then removed from the presbytery to the Sheriff by an appeal taken by the heritors under the 3d section of the recent Ecclesiastical Buildings Act.

Now, if this appeal had not been taken, and the case had remained in the presbytery, or if the case had occurred before the recent statute, I cannot doubt that whatever the ultimate result of the case as between the minister and the heritors might have been the expenses incurred by the presbytery in employing an architect to advise them would have been expenses which they were entitled to charge against the heritors, and they could have proceeded under the old law to give decree against them in the proportions in which they were severally liable.

The relations of the heritors and the presbytery in a matter of this kind are peculiar. The heritors are bound to maintain the ecclesiastical buildings. The presbytery are the guardians and conservators of the benefice, and it is their office to see that all parties connected with the parish do their duty, and they may give orders to any one who is not doing his duty. They have control over the minister, over the church officers, and also over the heritors, in regard to their obligation to uphold the ecclesiastical buildings.

When a complaint was made that the manse was out of repair it was the duty of the presbytery to inform their minds on that subject, and if they required the advice of an expert they were entitled and bound to take it, and according to immemorial usage they were entitled to do so at the expense of the heritors. If the case had gone no further, and the parties had been agreed that the repairs were to be executed in accordance with Mr Rhind's report, there could not have been a doubt on the point; and to say that because the minister and the heritors differed on the report the presbytery are to pay the expenses out of their own pockets would be quite inconsistent with practice and authority.

The only question is whether anything has occurred to alter the result since the heritors appealed under the 3d and 4th sections. The effect of the appeal was to stay all further procedure in the presbytery, and transfer the cause to the Sheriff, and when the presbytery went on to allocate the expenses they had incurred, and give decree for them, they were doing what, in my opinion, they had no right to do. But that does not affect the present question. The case was appealed from the Sheriff to the Lord Ordinary on Teinds. The two parties litigant, the minister and heritors, maintained their respective views, and in the end the judgment was not in favour of either out and out. The Lord Ordinary dealt with the expenses in accordance with that judgment, finding the minister entitled to

[1] Erak. ii. 10, 58, 63 (Ivory's Note, 306); Cook's Styles, 171.

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expenses subject to modification. Now, it is to be observed that during the whole of this procedure the presbytery were not parties, and could not be. The moment the case was removed out of their hands they could not interfere either as a Court or a party litigant. That being so, the question is whether they are to be prevented from recovering from the heritors the expenses which they would have been entitled to recover if the case had remained before them. I cannot see why they should be.

It is said that these are part of the expenses of process, and that the rule is that expenses of process cannot be recovered in a separate action. I should be sorry to throw doubt on the universal application of that rule. But in a question between the presbytery and the heritors these are not the expenses of any process whatever. It is a sum due by the heritors to the presbytery because of the necessity of the presbytery calling in an expert to advise them in an important step of public duty. It is a debt fairly incurred, and I see no good ground of defence to the action.

LORD DEAS, LORD ARDMILLAN, and LORD MURE concurred.

THIS interlocutor was pronounced:—"Recall the said interlocutors: Repel the defences, and decern against the defenders for payment to the pursuer, the Reverend John Mitchell, as representing the Presbytery of Deer, of the sum of £62, 4s. 8d., and that in the proportions mentioned in the conclusions of the summons: Find the defenders liable in expenses," &c.

ALEXANDER MORISON, S.S.C.—STUART & CHEYNE, W.S.—Agents.

No. 155.

July 5, 1876. Robertson v. Adamson.

WILLIAM ROBERTSON, Pursuer.—*Rhind.*
ALEXANDER ADAMSON, Defender.—*Mair.*

Municipal Election—35 *and* 36 *Vict., cap.* 33 (*Ballot Act*, 1872), *secs.* 2 *and* 28—*Voter's Mark.*—*Held* (by a majority of seven Judges, *diss.* Lord Deas) that, in an election under the Ballot Act, 1872, a single stroke marked by a voter opposite the name of a candidate on a ballot paper was not equivalent to a cross as required by the Act, and was a mark by which the voter might be identified.

Municipal Election—35 *and* 36 *Vict., cap.* 33 (*Ballot Act*, 1872), *secs.* 2 *and* 28—*Voter's Mark.*—*Held* (1), in accordance with the decision in Haswell v. Stewart, May 23, 1874, *ante*, vol. i. 925, that crosses on a ballot paper to the right-hand side of the candidates' names, but not within the spaces marked off for them, were in compliance with the provisions of the Ballot Act; (2), in accordance with the same decision, that crosses to the left-hand side of the candidates' names were not in compliance with the provisions of the Ballot Act; (3) that certain marks in the proper spaces, which, though not crosses, involved the use of more than a single stroke, were sufficiently in compliance with the Ballot Act, and were admissible.

2D DIVISION, with three consulted Judges. Ld. Craighill. R.

IN November 1875 there were four vacancies in the town-council of the royal burgh of Musselburgh, and seven candidates were nominated for these vacancies. After a poll had been taken, in accordance with the provisions of the Ballot Act, 1872, William Brown, the senior bailie of the burgh, who officiated as returning officer, declared four of the candidates duly elected. William Robertson, the defeated candidate who had the largest number of votes, thereupon raised an action of reduction and declarator against Mr Brown, as returning officer, and the other members of the town-council, concluding to have the election of the two successful candidates with the smallest number of votes annulled and set aside, and himself declared duly elected a member of the town-council of Musselburgh.

The grounds upon which the action was based were objections to the

rulings of the returning-officer as to the rejection of ballot papers as not properly marked. Of these there were five classes, viz.:—1. Twenty-three ballot papers with the crosses on the right-hand side of the candidates' names, but not within the spaces marked off for them on the paper; 2. Ten ballot papers with the crosses on the left-hand side of the candidates' names; 3. A ballot paper (No. 327) with the following marks in the spaces containing the candidates' names, and on the right-hand side—

4	MACKINLAY (John Mackinlay, Blucher Hall, Musselburgh, Brick Manufacturer.)	
5	ROBERTSON (William Roberston, High Street, Musselburgh, Grocer and Baker.)	
6	SMART (Charles Smart, High Street, Fisherrow, Lathsplitter.)	
7	WILKIE (Alexander Wilkie, Hope Park, Levenhall, Residenter.)	

4. A ballot paper (No. 479) with the following marks in the proper spaces opposite the candidates' names—

3	LAURIE (George Laurie, 38 Bridge Street, Musselburgh, Surgeon.)	
4	MACKINLAY (John Mackinlay, Blucher Hall, Musselburgh, Brick Manufacturer.)	
5	ROBERTSON William Robertson, High Street, Musselburgh, Grocer and Baker.)	
6	SMART (Charles Smart, High Street, Fisherrow, Lathsplitter.)	
7	WILKIE (Alexander Wilkie, Hope Park, Levenhall, Residenter.)	

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5. A ballot paper (No. 415) with the following marks in the proper spaces opposite the candidates' names—

2	DICKSON (Robert Dickson, High Street, Musselburgh, Grocer.)	1
3	LAURIE (George Laurie, 38 Bridge Street, Musselburgh, Surgeon.)	1
4	MACKINLAY (John Mackinlay, Blucher Hall, Musselburgh, Brick Manufacturer.)	
5	ROBERTSON (William Robertson, High Street, Musselburgh, Grocer and Baker.)	1
6	SMART (Charles Smart, High Street, Fisherrow, Lathsplitter.)	
7	WILKIE (Alexander Wilkie, Hope Park, Levenhall, Residenter.)	1

And two ballot papers (Nos. 434 and 388) with merely single strokes or short straight lines in the proper spaces opposite the candidates' names.

These papers had all been rejected by the returning officer, and the pursuer maintained that if they had been counted he would have had more votes than one, at least, of the successful candidates.

The two candidates whose election was impugned, Messrs Adamson and Laurie, lodged defences, and contended that the returning officer's ruling was correct.

On 22d February the Lord Ordinary, in respect of a joint minute, assoilzied the defender Laurie.

A record was made up with Adamson, the remaining defender, and on 2d March 1876 the Lord Ordinary reported the cause to the Second Division.*

* "NOTE.—The present action has been raised for the purpose of setting aside the election of the defenders, George Laurie and Alexander Adamson, or one or other of them, as councillors of the burgh of Musselburgh, and of having it found that the pursuer ought to have been returned as one of the elected councillors on the occasion of the last election, which occurred on the 2d November 1875. The result depended upon a scrutiny. The ballot papers having been produced and examined, the pursuer became satisfied that the challenge of Mr

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On 9th March the Second Division appointed the cause to be heard before themselves with three Judges of the First Division. The cause was heard on 5th June, when the argument was restricted to the admissibility of the papers in the 5th class (Nos. 434 and 388), which were marked by single strokes only.

Argued for the pursuer;—According to the most recent decision in England under the Ballot Act,[1] any indication of the voter's intention was held to be sufficient compliance with the provisions of the statute, provided there was no appearance of previous concert on the face of the paper. This case had been approved by the Parliamentary Committee on the Ballot Act.[2] The Wigtown Burghs case[3] had been commented upon as having taken too strict a view of the provisions of the statute. There was nothing in the body of the statute rendering a cross necessary. It was only in the directions to voters annexed to the Act that a cross was mentioned. These were only suggestions, not imperative instructions which had to be complied with to the letter.[4]

Argued for the defender;—The instructions to voters were part of the statute, and imperative. They must be complied with. In Haswell v. Stewart[5] the Court had been unanimous against votes by single straight strokes.

On 3d July the cause was advised on this point as follows:—

LORD JUSTICE-CLERK.—But for the recent judgment in the case of Woodward v. Sarsons in the English Court of Common Pleas we should probably not

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Laurie's election was groundless, and the latter accordingly, with the consent of the pursuer, has been assoilzied.

"But the litigation between the pursuer and Mr Adamson is still maintained; and the question whether the latter was duly elected, or whether the pursuer ought not to have been returned, depends on the validity or invalidity of the votes, as evidenced by the ballot papers, to which parties on the one side and on the other take exception. The questions which have been raised seem to be—(1) Whether the cross or mark, when placed on the *left*-hand side of the ballot paper, is, in the sense of the Ballot Act, a mark by which the elector has marked his vote? (2) Whether marks, which are not in the form of a cross, and obviously were not intended to be in the form of a cross, are sufficient? and (3) Whether marks not in the form of a cross, and obviously not intended to resemble or to be parts of a cross, are things written or marked on the ballot papers by which the voters can be identified, and therefore are things by which the ballot papers whereon they appear are rendered void?

"Upon two of these questions, at any rate, the Second Division of the Court of Session gave judgment in the case of Haswell v. Stewart (Wigtown Burghs Election), May 23, 1874, 1 Rettie, p. 925. But since that case was decided the case of Woodward v. Sarsons, Law Rep. (10 C. P.), p. 733, has been decided by the Court of Common Pleas in England; and the two decisions, in the opinion of the Lord Ordinary, cannot be reconciled. In these circumstances, he considers it better to report the present case, that it may be decided at once by the Inner-House. The adoption of this course, it may be added, is likely to conduce to the saving of time, which, in a case like the present, is a material consideration. The parties therefore were not only willing, but anxious, that the case should be reported."

[1] Woodward v. Sarsons, July 9, 1875, L. R. 10 C. P. 733, 44 L. J., C. P. 293 (Ballot papers lithographed there).

[2] Blue Book, April 6, 1876.

[3] Haswell v. Stewart, May 23, 1874, *ante*, vol. i. 925.

[4] 35 and 36 Vict. cap. 33, secs. 2 and 28, schedule 1, rule 36.

[5] *Supra*, note 3.

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have requested your Lordships of the First Division to aid in the decision of the present question, but should, as matter of course, have followed the direct precedent of the previous judgment of the Second Division in the case of Haswell v. Stewart. But we thought it right, out of respect to the judgment in the English Court, as well as regard to the inexpediency of having a conflict of decisions in the two parts of the island on such a matter, to have the question raised in this case deliberately reconsidered. I took no part in the previous judgment, and I have now very attentively studied the unquestionably grave and authoritative exposition of the views of the English Judges in Woodward's case; but I have formed an opinion that, notwithstanding the difficulties attending the subject, the former decision of this Court was right, and should be followed in the present action.

The only question with which I mean to deal in delivering my opinion is that to which the case was ultimately narrowed, namely, whether five ballot papers which were tendered at the municipal election at Musselburgh in November 1875 for one of the candidates were invalid by reason of their being marked by a straight line and not by a cross as directed by the Ballot Act.

The provisions of the Act which appear to be material are the following:—(Reads secs. 2, 13, 28; schedule 1, rules 22, 25, 36). It is argued that these provisions are directory only, and not imperative; and that therefore substantial and not implicit compliance with them is all that is required. I do not differ from this as a general proposition, for in regulating the practical exercise of the popular right of election there must of necessity be many things directed in which it would be inexpedient and mischievous to exact literal obedience to the mere words of the direction when the substance and intent of the provision have been fulfilled. But in considering whether the directions of the schedules, which form part of the statutory enactment, have been substantially followed, regard must be had to the nature and scope of the specific direction, and to the object of the statute in exacting it. Some of these provisions, such as the mere forms of the writs to be used, the election writ itself, the direction, the certificate and indorsement, the notice of election, and the nomination paper, even the form of the ballot paper, and such like, being matters purely of form, are to be as nearly in the forms given in the schedule as circumstances will permit. But the directions given to the elector and to the returning officer as to what he is to do, or what he is not to do, are of a different class, and some of them, at least, in order to be substantially, must be implicitly followed, especially in those matters which are prohibited. Thus, for example, it is provided that nothing is to be printed on the ballot paper, excepting in accordance with the schedule, and, again, that the voter is not to vote for more than the proper number of candidates, and the returning officer is to reject voting papers which present certain appearances. These and other similar enactments are injunctions and prohibitions which must be as specifically complied with as if they had been specially provided in the body of the statute.

The objections which have been taken to the voting papers before us are two. The first is, that the voter has not, as directed by the schedule, placed a cross opposite the name of the candidate for whom he voted, and has therefore not indicated, in terms of the statute, the person for whom he intended to vote. The second is, that, even if he have indicated for whom he meant to vote, he has placed a mark on the paper by which he may be afterwards identified, which is expressly prohibited by the injunctions in the schedule.

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If the only object of the direction given to the voter to place a cross opposite the name of the candidate for whom he votes (which is expressed in imperative terms), had been to ascertain for whom he intended to vote, the provision would have been construed favourably for the voter, and any mark which sufficiently indicated his intention might have been sufficient. Apart from the direction of the statute one could have had no difficulty in coming to the conclusion that the straight lines in the voting papers before us were meant to indicate, and do indicate, for whom the elector intended to vote. But we must take this direction along with the prohibition which follows, for if a mark which is not that prescribed in the statute be a mark by which the voter may be afterwards identified, it follows that the object of providing a special mark, and enjoining its use, was not only to enable the voter to indicate for whom he voted, but, by prescribing uniformity in such marks, to prevent the secrecy of the vote from being violated. In regard to this most vital prohibition it seems clear, first, that it is not necessary in order to bring a mark placed on the ballot paper within the scope of the prohibition that it should disclose the identity of the voter on the face of it. Such a provision would have been futile, for nothing but a signature and designation would have that effect. Even a signature by itself would not do so, as there might be other electors of the same name, and identification by handwriting requires extrinsic evidence. If, in addition to the cross required, the elector places a numeral or a letter in the corner of his paper, that of itself would, in my opinion, be sufficient to violate the prohibition, although, without inquiry, no one could tell who the voter was who had so marked his paper.

It must be remembered that this is not an enfranchising statute; it is an Act to regulate, and, in some measure to restrict, for great public objects, the way in which an existing franchise is to be exercised, and while we are not to read these restrictions in a narrow and vexatious spirit we are bound to construe them so as to accomplish the object in view. That object was to secure the secrecy of the elector's vote, to enable him for his own benefit to vote in secret, so as to free him from molestation or undue pressure in the exercise of his right; and, for the benefit of the other electors and of the public, to oblige him to vote in secret, in order to prevent his using his vote corruptly. It is for that reason that he is prohibited from putting any mark on the voting paper by which he may be afterwards identified.

In the second place, the only question which seems contemplated by the direction is, whether, on the inspection of the ballot paper, it bears a mark by which the voter may be afterwards identified. It is here that, with the greatest respect, I chiefly differ from the learned Judges in the case of Woodward. They say that the prohibition means that the voter is not to vote "so as to make it possible, by seeing the paper itself, or by reference to other available facts, to identify the way in which he has voted,"—that is to say, that if he cannot be identified by seeing the paper itself, and if no other facts are available, it is immaterial what marks appear on the paper.

I find no such qualification in the words of the statute, nor do I think it harmonises with the reason of the prohibition. The statute does not appear to me to contemplate that the presiding officer shall refer to any facts excepting those which he finds in the paper itself. He is to look at it, and if he finds (1) that it is without the official mark, or (2) that the voter has voted for more candidates than he should, or (3) that it has a mark on it by which the voter

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can (or may) be identified, or (4) that it is uncertain, he is then and there to reject the vote. With the intent or object of these things, save what the paper discloses, he has, and can have, no concern. In regard to marks, he is to decide merely on their character, and if he finds that they are such as can or may lead to the voter being afterwards identified, he is to reject the vote, and if he does not so find, on inspection of the paper, he is to admit the vote. Whether the mark would, in point of fact, enable him to identify the voter, is of no consequence, and he can have no means of knowing. A committee of the House of Commons, or a Court of justice, might inquire for months into the identity of the voter and not discover it; and yet all the time the mark on the paper may have disclosed it to the only person to whom the facts were available, and for whose information it was placed there.

To hold that before this prohibition is to receive effect there must be proof, either absolute or *prima facie*, of the intent with which the paper was so marked, would be to nullify altogether a provision which seems vital to the operation of the statute. The direction is not designed against the public notoriety of the voter's identity, but against those occult and concealed arrangements which might so easily frustrate the design of the Ballot Act,—such devices, in short, as, while the identity of the voter is concealed from the public, may lead to its being disclosed to a confederate—a confederate, it may be, who has paid the voter for his vote, and wishes to be assured that he has received value for his money, or one who has unduly used the influence of his position to compel the voter to take this way of informing him how he voted. A provision that these arrangements, when disclosed and proved, should nullify the vote, would have been entirely illusory; for the ballot was resorted to mainly because these secret and corrupt transactions could not be detected; and the provision I am now considering had, in my opinion, no other object but to baffle such practices by prohibiting absolutely, whatever the motive of the voter, marks which might aid in their perpetration.

It is this view which gives importance to the present case, but if it is well founded, it follows that the only mark which the voter is permitted to place on his voting paper is the simple and easy, but uniform one, of a cross, and that the direction to this effect is imperative. In cases in which it is plain, from inspecting the paper, that the voter had attempted, although ineffectually or imperfectly, to follow the direction of the statute, such misadventure should not invalidate his vote; but in the present case the paper discloses an intention not to follow the directions of the statute, but to substitute a different mark for that directed. I am of opinion that this is such a mark as may lead to the voter being afterwards identified, and that, therefore, the voting paper is invalid, and I am glad to find that in coming to that conclusion I not only concur with the views of Lord Neaves and Lord Ormidale in the Wigtown case, but with those of Lord Benholme also, for, while the latter differed in regard to some of the votes which were rejected by the majority, he concurred in thinking that a voter who had placed a straight line opposite the name of the candidate had not thereby indicated for whom he intended to vote in terms of the statute.

Lord Deas.—The desire of your Lordship to confine the argument and the opinions in this case to a single point places me in some perplexity. I should

have liked to have heard a full argument upon all the points in connection with each other, and particularly as to the effect attributed to a two-legged stroke and a one-legged stroke, or, in other words, the difference between a straight stroke and an angular, or what has been said to be a double stroke. But as yet I have been unable to find any substantial difference between the two.

I have no doubt that the instructions in the schedule annexed to the Act are directory merely, but that does not solve the present case, because, even though directory, they must be substantially complied with. The difficulty is, what is substantial compliance?

The construction of the Act was very fully discussed and considered in the Wigtown Burghs case in this Division of the Court, and in the English case of Woodward v. Sarsons. In the imperfect shape in which the matter is now placed before us I shall not resume the consideration of it at any length, but shall content myself with saying that I have come to the same conclusion with that which was come to in the English case of Woodward. I do not, of course, regard that decision as a precedent which we are bound to follow; but I adopt the reasons judicially assigned for it, which are much more satisfactory to my mind than those on the other side.

LORD NEAVES.—I concur in the view of your Lordship in the chair that we must dispose of the point which at the discussion was said to be the test of the case. Whether it may afterwards appear not to be the turning point I do not anticipate. Our judgment falls now to be given on the point raised in argument and taken to avizandum.

I take it, the best example of the point to be decided is on the ballot paper No. 434, where we have on the right-hand side of the candidate's name a straight stroke.

The effect of directions in such a statute as this requires to be carefully considered. It is impossible to say that they are there for nothing. We must, indeed, allow for such deviations as ignorant men might make, and so must construe these directions with some latitude. On the other hand, this is an important Act, contrived to secure the freedom of voters from interference before or after an election by those who have influence over them. Whatever we may say as to strictness to be observed in enforcing these directions we cannot say that they are not part of the Act. They are expressly made so.

A cross is enjoined to be made, and the question before us is whether a line, such as we have here, is or is not a cross in compliance with the statute. I should have great difficulty in saying that it was in compliance with the statute. I cannot imagine that a man who votes at either a parliamentary or a municipal election does not know what a cross is. It is unquestionably made up of two lines. What can have been the meaning of the man who, being enjoined to make a cross, and knowing what a cross is, makes only a straight line? He may never have meant to make a cross at all—he may never have meant to vote at all, but only to appear to vote. He may have been driven to the poll, and have been obliged to appear to vote, and yet never intended to vote, but wished to evade the duty. A man who is presumably capable of making a cross and makes a line must either have forgotten what he had to do, or must have wilfully abstained from doing it. The vote is not a complete one. What is required for that purpose is no act of calligraphy, but merely to make what is the simplest

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and best known sign all over the world. Where that is not made there is no *enixa voluntas* to complete the vote.

Such a deviation may also come under another part of the statute which provides against any mark by which a voter may be identified. The provision does not bear "can be" or "is," but "may be." One can quite understand that such a system of marking as there is here might have been prearranged. It is an unnecessary and inexcusable deviation from the statute, and an inexplicable one, unless as a means of enabling some one to indentify the voter.

I think the purpose of the statute would be defeated in a matter of essential importance if we sustained these papers. I adhere to my opinion in the Wigtown case, and think generally that the marking of such a line is only explainable in two ways, either that the voter did not intend to vote at all, or that he made this mark to shew some one that he had voted according to a prearranged plan.

LORD ARDMILLAN.—It appears to me that in the present position of this case, as placed before us, we have nothing else to decide except what is the effect on the validity of the vote when a straight line is put on the ballot paper in place of a cross. I concur with your Lordship that it was quite understood in the discussion that if we decided that point the whole matter would be settled. If it will not have that effect we may regret but cannot help it. In the meantime we must decide the point before us.

I concur with your Lordship that this not an enfranchising statute; it is a procedure Act. The object is to protect voters from undue influence, and the mode adopted is to secure secrecy of voting.

The Act lays down rules for voting, partly in the body of the Act itself, and partly in schedules. The distinction is a just one, that what is in the body of the Act is absolutely imperative, while what is in the schedules may be directory only. In this case I do not think that the schedules are absolutely imperative. I cannot say that no deviations, however trifling, can be permitted. Where, for instance, a person has tried to make a cross according to the best of his ability, I do not say that a slight slip in making the cross will render the vote bad. But where he makes a figure, or a mark, which is most emphatically not a cross, the result is different. Besides, where a person makes a mark different from a cross, whereby he may be identified, the vote is bad. The object of the statute is that every mark should be a cross,—that all the marks should be as nearly alike as possible,—so that no single paper can be so identified as to trace the voter.

Here, instead of a cross, a line has been made, plainly not in the attempt to make a cross, but quite a different mark. This might have been a mark made by arrangement,—agreed on between the voter and a confederate, and intended to promote discovery of the vote, if that should be desired, contrary to the principle of the statute. This would defeat the secrecy which the Act was intended to secure.

I therefore concur in the opinion of the Lord Justice-Clerk that we should sustain the objection, so far as it regards these voting papers marked with a single stroke or line. I indicate no opinion as to the value of the marks more nearly resembling a cross, and more likely to have been made with the intent of forming a cross.

I am satisfied that these marks before us, with a line or stroke, are not even an attempt to fulfil the directions of the statute.

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LORD ORMIDALE.—In this action the pursuer concludes for a reduction of the election of the defenders Adamson and Laurie as town-councillors of the burgh of Musselburgh, on the ground that according to the true meaning and effect of the Ballot Act, 1872, he had a majority of votes over both, or at any rate over one of them. The case having been given up as against Laurie, it now depends between the pursuer and the other defender Adamson.

No objection has been taken to the competency or form of the action; and indeed there is no other form of action provided by statute or otherwise, so far as I am aware, in relation to a municipal election in Scotland which could have been adopted by the pursuer.

The question to be determined is one of importance and interest, and all the more considering the conflicting judgments on the points upon which it turns of this Court in the Wigtown Burghs Parliamentary Election case, Haswell v. Stewart, vol. i. 4th series of Court of Session Cases, 925, and of the Court of Common Pleas in the Birmingham Municipal Election case, Woodward v. Sarsons, July 9, 1875, Law Reports, Com. Pleas, vol. x. p. 733. In consequence of this conflict I have very carefully examined the grounds upon which the two Courts have proceeded, and although I was one of the majority of the Court by which the Wigtown case was decided I need scarcely say that I should, if satisfied I was then wrong, have had no hesitation in now deciding differently.

In the Wigtown case this Court held that according to the sound construction of the Ballot Act it is obligatory on a voter to mark the ballot paper with a cross to the right of the candidate's name for whom he intends to vote, while in the Birmingham Municipal Election case it was held by the Court of Common Pleas that this was not obligatory, but merely directory, and that it was sufficient if the voter indicated the candidate for whom he intended to vote by a mark, whether a cross or not, on the front or face of the ballot paper. Again, while it was decided by this Court that any substantive writing or mark by the voter other than a cross,—making allowance for what might reasonably be held the various ways in which different persons, from age or otherwise, might make such a mark on the ballot paper,—would invalidate it, the Court of Common Pleas held that other marks, whatever might be their form, made by the voter on the ballot paper, would not void the vote, provided it was not marked so as to shew that he intended to vote for more candidates that he was entitled to vote for, or so as to leave it uncertain whether he intended to vote at all, or for which candidate he intended to vote.

Such is, stated generally, the difference betwixt the decisions of this Court and the Court of Common Pleas in regard to the marking of ballot papers by voters. But another and a very important difference—one indeed upon which the question which of them is right very much, if not entirely, depends—arises in regard to the true interpretation and effect of that part of section 2d of the Ballot Act, which enacts that the ballot paper on "which anything except the number on the back is written or marked by which the voter can be identified shall be void and not counted." It was held by this Court that according to the sound construction of this enactment it was enough to invalidate the vote that the mark other than a cross in some reasonable form is of a description whereby the voter might be identified, not that he shall be identified, which of course could only be done by a separate proof or investigation, in which a great deal of evidence on the one side and the other might be necessary to be gone into; while, according to the contention of the pursuer, the Court of Common

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Pleas held that such proof or investigation was indispensable, and must be gone into, and be found sufficient to identify the voter. Whether this is the construction put upon the Act by the Court of Common Pleas does not appear to me to be clear; and that it is a sound construction I am not prepared to admit. As to this matter I shall afterwards have some observations to make.

But let us see what is the nature of the ballot papers which the pursuer says were improperly rejected in the municipal election at Musselburgh, and which, if counted, would have resulted in his election in place of the defender Adamson. There are numerous ballot papers having marks upon them of various descriptions other than a cross, and on parts of the paper other than to the right of the candidate's name intended to be voted for—all as set out and exhibited by the state in the appendix to the closed record. It is unnecessary at present to inquire whether all of these marks are of a character to invalidate the votes. We can only at present deal with the papers having a straight line, thus | on them in place of a X to the right of the favoured candidate's name. That was the only matter which has as yet been argued at the bar; but how far that may be sufficient to determine the case may require consideration afterwards. The result, however, at which the Court may now arrive will not unlikely be of much service, if not conclusive, of any other point or points which may yet be raised.

According to the decision of this Court in the Wigtown case voting papers not having a cross on them at all, but merely a single straight line, are invalid, and have been properly rejected; while, according to the decision of the Court of Common Pleas in the Birmingham municipal case they are valid and ought to have been counted.

In considering the conflicting question which has thus arisen I think it is of much importance that it should be kept in view that the object of the Ballot Act is not to enfranchise or admit voters to the electoral roll, but to enable those who are already on the roll to give their votes in secrecy, and in that way to afford them what was thought to be a necessary protection in the exercise of the franchise. In this view, the Ballot Act ought, I think, to be construed so as its object may be accomplished as far as practicable. This, as it appears to me, for the reasons stated at length by the majority of the Court in the Wigtown case, may be done by a cross on the right-hand of the candidate's name intended to be voted for—a mark which, in the words of Lord Neaves, is "well devised for the purpose, easy of execution by men of the most moderate intelligence, and at the same time perfectly neutral in its character, so as to be practically incapable of betraying its authorship by its appearance." But if various other marks, quite different from a cross, or even one on the left, were, according to the judgment of the Court of Common Pleas, admissible, it cannot, I think, be doubted that the identification of the voters might thereby be established, and the great object of the Ballot Act entirely defeated. For example, let it be supposed that by prearrangement an understanding has been come to between a candidate, or some party acting for him, and a number of the electors, that they should put upon their voting papers a mark different from a cross, or even a cross, but on the left-hand side in place of the right-hand side of the candidate's name, it is plain that the candidates, or their agents present, as they are entitled to be, at the counting of the votes, could easily see how the electors with whom the arrangement had been made voted, and whether they had, or had not, adhered to that arrangement. In this way the voters might be identified, and the protection intended

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to be afforded by the Ballot Act defeated. Nor do I see how it would be possible for any party, other than those participant in the improper arrangement, to know anything about it, so as to be able by the necessary evidence to expose and frustrate its object.

I cannot help thinking, therefore, that the interpretation adopted by this Court in the Wigtown case, of clause 2d in the Ballot Act, to which I have referred, is the sound one. Nor am I able with certainty to discover from the report whether this may not have been also the view of the Court of Common Pleas in the Birmingham case, for while in some parts of the judgment in that case extrinsic evidence of the identification of voters would appear to have been desiderated, in other parts this would rather seem not to have been considered necessary. Thus, I find that two voting papers having the name of one of the candidates written upon them were held to be bad without any extrinsic evidence of the actual identification of the voter who so wrote on the papers, merely because it "might give too much facility by reason of the handwriting to identify the voter."

Without entering further into the matter, which is amply explained in the reports of the two conflicting decisions in question, I have merely to add that I continue to be of opinion that the rules of construction of the Ballot Act given effect to in the Wigtown Parliamentary Election case, although stricter than those adopted in the Birmingham Municipal Election case, are sound, and not too strict, and therefore ought to be adhered to.

LORD MURE.—The only question we have now to consider is whether a single straight line marked on a ballot paper at the place where the voter is directed to put a cross is a sufficient compliance with the statute? Taking the 28th section along with the directions in the schedule I am of opinion that it is not, and I entirely concur with the exposition of the statute which has been given by your Lordship in the chair. I do not think it necessary to repeat at length the grounds on which I have come to the same conclusion. Where an Act of Parliament enacts, as it does here, that a schedule thereto shall be construed and have effect as part of the Act, we are, I conceive, bound to read the schedule as embodied in the Act; and when a clause in an Act of Parliament says—"The voter . . . will place a cross on the right-hand side" (of a ballot paper of which the form is given) "opposite the name of each candidate for whom he votes,"—thus X, I am unable to hold that the Legislature intended that it should be sufficient to place a single straight line. If it had been intended that any such mark should be sufficient, it would have been easy to say "a cross, or other distinctive mark." That, however, has not been done; and I cannot give the words as they stand any such interpretation.

LORD GIFFORD.—If the purpose of the Ballot Act had been to confer an electoral franchise, or even to provide a convenient mode in which electors exercising the franchise should record their votes, I should have been disposed to hold that the directions as to filling up the voting papers were rather directory than imperative, and that if it fairly appeared upon the face of the ballot paper who the candidates were for whom the voter intended to vote I would be disposed to sustain the vote, even although the voter had to a considerable extent deviated from or failed to comply with the provisions or directions of the statute.

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But I cannot lay out of view that one of the principal objects of the statute, if not the leading end which it had in view, was to secure absolute secrecy in voting, so that it should not be known for which candidate or candidates any elector voted, and that this should not be discoverable from the voting papers either by the candidates or their agents, although necessarily for the purpose of checking the counting and otherwise the voting papers are open within certain limits to the scrutiny of those interested.

Now, in this point of view, I agree with the majority of your Lordships. I think that the directions for filling up the voting papers, so far as necessary to or conducive to secrecy of voting, are not merely directory, but really imperative, and therefore must be at least substantially observed. I agree that much in the statute may be directory, but wherever non-observance does or may destroy secrecy I think the case is different. If a variation is made in the mode of marking the votes of such a nature that it possibly, and by means of preconcerted arrangement may identify the voter to the candidates or their agents, I think this is enough to vitiate the vote, although there be no actual proof of such preconcerted arrangement. Thus, it is admitted on all hands that if the voter write his own name or initials, or even write the candidate's name, instead of marking a cross, the vote will be bad, and I think the same principle will apply to any other mark differing substantially and essentially from the cross required by the statute. I agree that if there be substantially a cross, or an obvious effort to make a cross, this will be enough, and the Court will always incline to sustain rather than to reject a vote *in dubio;* but I am of opinion that it is not too strict a reading of the statute to hold that the voter who refuses to make the statutory cross, but substitutes therefor a line, or a circle, or a square, or a triangle, or any other figure which may obviously be made the means of identification, loses his vote.

I concur, therefore, in the result reached by the majority of the Court that a mere straight stroke is not equivalent to the cross required by the statute.

> On 5th July this interlocutor was pronounced:—"In conformity with the opinion of a majority of the seven Judges, find that, in an election under the Ballot Act, the use of a straight line by the voter, thus |, on the ballot paper, is not equivalent to a cross as required by the said Act, and is a mark by which the voter can or may be identified."

The Second Division thereafter resumed consideration of the whole questions raised. The twenty-three ballot papers mentioned as class I., *supra*, were sustained. The ten ballot papers, class II. *supra*, were, in accordance with the decision in the Wigtown Burghs case,[1] rejected. The ballot paper, No. 327, class III., was sustained, as also was that, No. 479, class IV. In class V. the two papers, No. 434 and 388, bearing only strokes, were, in accordance with the finding of the majority of the seven Judges, rejected. With regard to No. 415, the remaining paper in this class, the following opinions were delivered:—

Lord Justice-Clerk.—In the case of this paper there is wanting that clear determination not to make a cross, which is obvious in the case of the other two papers which we have rejected. It is not necessary to go into any subtle questions. That broad distinction, I think, is sufficient.

[1] Haswell v. Stewart, May 23, 1874, *ante*, vol. i. p. 925.

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LORD NEAVES.—We have here, instead of a single stroke, two lines, which puts this paper in a different class from the other two. I think it should be sustained.

LORD ORMIDALE.—I will not differ from your Lordships. But I may observe that, although there are what may be called two strokes, I can discover no trace of an attempt to cross them. We must, however, make large allowances. In the Wigtown Burghs case Lord Neaves and I observed that large allowances should be made, and I think we should make such an allowance now.

LORD GIFFORD.—I am of the same opinion. Although this is not exactly a cross, still it is quite distinguishable from the marks which we have rejected.

The result of these findings was that Adamson remained in a majority of one.

THIS interlocutor was pronounced:—"The Lords having resumed consideration of the cause with the classified state, No. 25 of process, and heard counsel upon applying the finding contained in the above interlocutor of this date, sustain the votes under class I. of the said state; reject the votes under class II.; sustain the vote under class III.; sustain the vote under class IV.; under class V. sustain the vote under ballot paper No. 415; reject the votes under ballot papers Nos. 434 and 388: Find that the result of applying these findings to the election in dispute is to leave the defender Adamson in a majority of one: Therefore sustain the defences for the defender Alexander Adamson, and assoilzie him from the whole conclusions of the summons, and find him entitled to expenses," &c.

LEGAT & SHIELD, W.S.—FERGUSON & JUNNER, W.S.—Agents.

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ROBERT YOUNG AND OTHERS, Pursuers.—*D.-F. Watson—Alison.*
THOMAS FERGUSSON SMITH AND OTHES (Commissioners of the Harbour of Dumfries and the Navigation of the River Nith), Defenders.—*R. Johnstone—Mackintosh.*

Expenses—Public Trust—Personal Liability for Expenses.—A body of statutory navigation commissioners unsuccessfully defended an action of damages for injury to a vessel caused by their operations on the channel of a river. The defenders themselves stated on record that the only source of income belonging to them were the rates which they were authorised to levy, and that the whole of these rates had been assigned in security of money borrowed, and were insufficient to pay the interest. The Court found the pursuers (the owners of the vessel) entitled to decree for expenses against the defenders *qua* commissioners, reserving all questions of personal liability in the event of the funds of the trust being insufficient to satisfy the decree for expenses.

2D DIVISION. Lord Shand. R.

THIS was an action by Robert Young and others, the owners of the steam-tug "Arabian," against Thomas Fergusson Smith, provost of Dumfries, and others, "Commissioners of the Harbour of Dumfries and the Navigation of the River Nith, acting under the statute 51 Geo. III., cap. cxlvii.," * and Thomas Anderson, their clerk.

The summons concluded for £200 of damages, in consequence of in-

* The statute is a local and personal Act, but declared to be public, to be judicially noticed.

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juries sustained by the "Arabian" having struck against a stone dyke, erected by the defenders in the channel of the river Nith, and covered at high water, which the defenders had failed to mark by a buoy or other mark to warn persons navigating the river of its existence.

The commissioners defended the action. They denied liability, on the ground, *inter alia*, that the accident was caused, as they averred, by the fault of those on board the "Arabian." They also stated that the rates and duties authorised to be levied by them formed their only source of income, and that the whole of these had been assigned, in virtue of powers conferred by their statute, in security of money borrowed, and were insufficient to pay the interest thereof.

The Lord Ordinary, after a proof, pronounced an interlocutor, finding that the stranding of the "Arabian" was caused by the fault of the defenders in having failed to have any mark on or in the neighbourhood of the dyke to warn navigators of its existence: "Therefore decerns against the defenders, Thomas Fergusson Smith, provost of the burgh of Dumfries, and others, as 'Commissioners of the Harbour of Dumfries and the Navigation of the River Nith,' under the statute mentioned in the summons, and Thomas B. Anderson, as their clerk, for the said sum of £150 sterling: Further, finds the defenders, as commissioners and clerk foresaid, and also the defenders, commissioners foresaid, personally liable in expenses, and remits," &c.

The defenders reclaimed.

Parties having been heard both on the merits and upon the personal decerniture for expenses against the defenders, the Court intimated that they concurred with the Lord Ordinary on the merits.

Argued for the defenders on the question of expenses;—Even testamentary trustees were not made personally liable in expenses if they litigated *in bona fide*.[1] *A fortiori* public trustees should not be subjected in personal liability. If they incurred such liability the result would be that no one would act on a public trust; and even if persons could be got to act, the trust would have to submit to any random claim brought against it, as the trustees would not be in safety to defend the action. The case of a trustee in a sequestration was exceptional. His personal liability rested on his duty to consult his constituents before embarking in litigation, whereas the defenders had no constituents to consult. This was the first instance, so far as it appeared from the reports, in which personal liability for expenses was sought to be attached to public trustees.

Argued for the pursuers;—By entering into the contract of litiscontestation the defenders must be held to have come under an obligation to make good the expenses of process if they proved unsuccessful. In most of the cases of testamentary trustees the question occurred with beneficiaries, and was whether trustees, who had litigated unsuccessfully, should be found personally liable in expenses, notwithstanding that there were trust-funds sufficient to meet the expenses. But this was a different question from whether, when there was a deficiency of trust-funds, the trustees were not bound to make good that deficiency. In such cases testamentary trustees had been made liable.[2] All that the pursuers asked was a decree against the defenders reserving their relief against the trust-funds. The absence of any direct authority on the subject was explained, first, by the fact that a public trust so impecunious as the present was

[1] Dickson v. Bonar's Trustees, Nov. 20, 1829, 8 S. 99, 2 Scot. Jur. 40; Kirkland v. Crighton, Feb. 3, 1842, 4 D. 613, 14 Scot. Jur. 239.

[2] Raeburn v. Dawson, June 14, 1831, 9 S. 728, 3 Scot. Jur. 493; Kay v. Wilson's Trustees, March 6, 1850, 12 D. 845, 22 Scot. Jur. 363.

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not often met with, and secondly, that after the decision of the House of Lords in Duncan v. Findlater, August 23, 1839,[1] until the recent case of Virtue v. Commissioners of Police of Alloa, Dec. 12, 1873,[2] a question like the present could not have arisen.

At advising,—

LORD JUSTICE-CLERK.—I think that the portion of the Lord Ordinary's interlocutor finding the defenders personally liable in expenses must be recalled. I am not prepared to say whether in certain circumstances a body of public trustees might not render themselves liable for the expenses of an action unsuccessfully maintained by them, nor to say what effect the knowledge that they had no funds might have on the question of liability. Perhaps there may be a distinction between actions brought by trustees and those in which they are called into Court. Here the claim against the defenders is directed against them *qua* commissioners, and accordingly the appropriate decree for expenses is, in the first instance at least, in the same terms as the decree for damages. I am disposed to reserve any question of personal liability for expenses in the event of the statutory funds proving insufficient.

LORD NEAVES, LORD ORMIDALE, and LORD GIFFORD concurred.

THIS interlocutor was pronounced:—"Having heard counsel on the reclaiming note for the commissioners for the harbour of Dumfries, &c., against Lord Shand's interlocutor of 1st February 1876, adhere thereto on the merits: Recall the finding as to expenses: Find the pursuers entitled to expenses against the defenders *qua* commissioners, reserving all questions of personal liability in the event of the funds of the trust being insufficient to implement this decree: Remit to the Auditor to tax the expenses now found due," &c.

WEBSTER & WILL, S.S.C.—J. C. & A. STEUART, W.S.—Agents.

No. 157.
July 7, 1876.
Kirriemuir Police Commissioners v. Reid's Trustees.

THE COMMISSIONERS OF POLICE OF KIRRIEMUIR, Appellants.—*D.-F. Watson—Kinnear—Harper.*
DUNCAN WILKIE AND OTHERS (Reid's Trustees), Respondents.—*Balfour—J. P. B. Robertson.*

Police and Improvement Act, 1862 (25 *and* 26 *Vict. c.* 101), *sec.* 35.—In 1875 the burgh of Kirriemuir adopted the General Police Act of 1862, the 35th section of which provides that, if the Act is adopted, "any general or local Police Act within such burgh shall be repealed, excepting in so far as it may relate to matters not provided for in this Act." *Held* that the clause did not apply to provisions in the Forfarshire Roads Act, passed in 1874, imposing the burden of maintaining existing foot pavements of streets in the burgh upon the police commissioners.

1ST DIVISION.
Sheriff of Forfarshire.
M.

IN the burgh of Kirriemuir in Forfarshire, prior to 1874, the burden of maintaining footways in the streets was laid by the Police Act of 1833 upon the owners of property abutting thereon. By the Forfarshire Roads Act, 1874 (37 and 38 Vict. c. cxlvii.), certain roads, including the High Street of Kirriemuir, were transferred from the road trustees to the police commissioners. By section 25 the burden of maintaining existing footways was laid upon the commissioners, and by section 27 certain powers

[1] 1 Rob. App. 911.

[2] *Ante*, vol. i., p. 285.

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of assessment were given to raise money to be applied for this and certain other purposes specified, and for no other purposes.

In 1875 the burgh adopted the General Police Act of 1862. In October 1875 the police commissioners served an order on Reid's trustees, owners of property in the High Street of the burgh, in terms of the 149th clause of the General Police and Improvement Act, 1862,* requiring them to repair the footway in front of their property according to a specification.

Reid's trustees appealed to the Sheriff.

They averred that at the date of the passing of the Act of 1874 there was existing a footway of dressed flag pavement, and that the commissioners were levying the maximum rate of assessment authorised by that Act.

These averments were not disputed.

Reid's trustees maintained that they were exempt, under secs. 22 and 25 of the Forfarshire Roads Act,† and that the commissioners were bound to maintain the footways out of the rates.

The Sheriff-substitute (Robertson), and, on appeal, the Sheriff (Maitland Heriot), recalled and quashed the order.

The commissioners appealed to the Court of Session, and argued;—The adoption in 1875 of the General Police Act of 1862 had the effect of repealing the Forfarshire Roads Act, 1874, in regard to all matters of police.

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* 25 and 26 Vict., c. 101, sec. 149.—"The owners of all lands or premises fronting or abutting on any street shall, at their own expense, when required by the commissioners, cause footways before their property respectively on the sides of such street to be made, and to be well and sufficiently paved with flat hewn or other stones, or to be constructed in such other manner and form and of such breadth as the commissioners shall direct, and shall thereafter from time to time, as occasion may require, repair and uphold such footways."

† 37 and 38 Vict. c. cxlvii. sec. 22.—"The owners of all lands fronting or abutting on any road transferred to the commissioners of any burgh by or under the provisions of this Act shall, at their own expense, when required by such commissioners, cause footways to be constructed on the sides of such road in front of their respective properties, and to be well and sufficiently paved with flag-stones or other flat hewn stones, or to be constructed in such other manner and form and of such breadth as such commissioners shall direct, but subject to the following provisions, viz.—wherever, before the commencement of this Act, footways of dressed flag pavement have been constructed and are existing along any parts of the sides of any such roads, these footways shall exempt the owners of lands and heritages along which they are constructed, so far as the length of these footways extend, from all obligation to construct footways, or to alter the existing footways, but such commissioners may, in their own discretion, reconstruct or alter such existing footways as to them may appear expedient for the public interest, and defray the cost out of the moneys to be raised by them under this Act."

Sec. 25.—"Subject to the provisions of this Act as to the obligations of owners to construct footways, and as to the powers of the commissioners in relation to the construction of footways, the commissioners of each burgh shall manage and maintain the roads transferred to them by or under the provisions of this Act, and all footways of dressed flagged pavement, or other footways forming parts of such roads at the passing of this Act, or the date of such transference, . . . and shall keep such roads and footways at all times in a proper and sufficient state of repair, and the expense incurred by such commissioners in managing and maintaining such roads and footways shall be defrayed by them from and out of the monies to be raised and received by them under the authority of this Act."

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LORD PRESIDENT.—The respondents are the owners of property in the High Street of Kirriemuir. It is not disputed that the footway in front of their property was before these proceedings laid with dressed flag pavement, and had been in existence for some time. In particular it was in use before 1874. But on 27th October last the police commissioners served a notice on the respondents ordering them to relay the pavement. The notice sets out that it requires to be repaired and relaid, and there follows a specification of what is to be done. This order bears to proceed on the authority of the 149th clause of the General Police and Improvement Act, 1862, and it is not said to be otherwise than regular in point of form. But it is said by the respondents that the obligation to relay the footway is not regulated by that Act, but by the Forfarshire Roads Act, 1874, and particularly the 22d section.

The history of this matter is rather peculiar. The Forfarshire Roads Act proceeds on the plan of transferring from the statute-labour trustees of the county all roads within the boundaries of burghs to the commissioners of police of those burghs, and of course imposes on them the burden of maintenance. In 1874 the Police Act in force in Kirriemuir was the Act of 1833, and under it (section 105) footways were to be maintained and relaid at the expense of the owner. [The provision was almost in words the same as the 149th section of the Act of 1862]. But that was altered by the 22d and 25th sections of the Road Act of 1874, which throws the burden of maintaining existing pavements upon the commissioners.

Now, it is not contended that when that Act was passed the commissioners could have made the charge they have done, because the Act of 1874 being subsequent, and in terms applicable to the case, was the governing statute. But it seems that in 1875 the Police Act of 1862 was adopted, and the effect of that was to put an end to the Act of 1833, and to substitute the more recent Act. But it is said that it has done more,—that it has the effect of repealing the 22d section of the Forfarshire Roads Act. It rather appears to me that if the adoption of the Act of 1862 has any repealing effect *quoad* the Act of 1874, it must operate a repeal of it *in toto*, for I can find no words which justify the notion of partial repeal. The section founded on is the 35th, which provides that if the Act is adopted "any general or local police Act in operation within such burgh shall be repealed, excepting in so far as it may relate to matters not provided for in this Act." If the Road Act of 1874 comes within the meaning of these words, then for all police purposes that Act must stand repealed. But so far as the commissioners of police are concerned their interest in the Road Act is entirely in regard to police purposes, and it is not in their mouth to say that the Act is repealed, because they are levying under its authority an assessment for police purposes to the maximum amount of 6d. in the pound.

But perhaps it would not be right to say that any one is personally barred from having the true meaning of an Act of Parliament ascertained. So it is necessary to inquire whether the effect attributed to the 35th section of the Act of 1862 is really consistent with its meaning and object. Now, in the first place, I doubt whether the Act of 1874 is a local Police Act within the meaning of the clause. The object of the clause plainly was to say,—"If you adopt this new statute any general Act that you have previously adopted is repealed as regards your burgh, and any local Police Act which enabled you to manage your police without a general Act is also repealed." Now, their police matters were regu-

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lated by the general Act of 1833, but not by any local Act. Therefore the effect of the clause was to repeal, *quoad* Kirriemuir, the Act of 1833, and nothing more.

Section 1 of the Act of 1862 provides that previous general Police Acts are repealed, except in those burghs where they have been adopted. In these the old Acts are not repealed by the mere passing of the Act of 1862. But then it is necessary that section 35 should be taken in connection with section 1. If these burghs go on to adopt the Act then the old Act is repealed.

But, secondly, while I am of opinion that the Act of 1874 is not a local Police Act, if it could be so described, I should say it was impossible to hold that it is repealed by the 35th clause, because it was plainly intended to be a permanent Act affecting the burgh, whatever may be the Act for the time regulating its police matters. The 22d clause itself affords sufficient evidence of that, for in the end of it there is found the provision "for carrying into effect the provisions of this section such commissioners shall have and may exercise and enforce all the powers and authorities conferred on them by the Police Act in force within such burgh at the time for carrying into effect the provisions of that Act in reference to footways on the streets of each burgh." Accordingly, this Act was intended to stand along with any Police Act in force at the time. The two Acts must be read together, and consistently with each other. There is another clause in the Act of 1874 which would go to the same effect, the 38th, which provides that as to Dundee and Broughty Ferry nothing in the Roads Act shall alter or affect the provisions of certain other Acts, and among them the general Police Act of 1862. It is not said that that is to be so in Kirriemuir, and the reason of the omission is plain. It was thought that if the Act of 1862 should be afterwards adopted there it would not do to say that the Roads Act was not to affect it, because in Kirriemuir it does most materially affect it. The omission therefore is accounted for and goes to aid the construction.

In addition to these considerations I am not sure whether the 149th clause of the Act of 1862 applies to a case of the kind at all. That section is in the part of the Act called part iv. sec. 3, the subject of which is "Paving and maintaining of streets," and which includes clauses 146 to 157. Now, while the 149th clause provides that owners are to pave the footways, the 156th clause, treating of the same subject-matter, and belonging to the same series, contains a provision that nothing in the Act shall affect any right of relief in regard to paving, &c.; and then, "nor shall any liability attaching in law to the trustees of any turnpike or other road, or other persons liable to make, pave, or causeway, maintain, or cleanse streets or the footways thereof, be affected, altered, or abridged thereby." It seems to me that the commissioners of police are within the description of persons by statute obliged to make, pave, and causeway the footways of Kirriemuir, and therefore that their liability was not to be affected by sec. 149.

It is satisfactory that we are able to come clearly to this conclusion, because otherwise a gross injustice would be done. The commissioners are levying a general assessment for the purposes of the Act of 1874, and one of those very purposes is that which they are now asking the owners of the adjoining properties to execute. I am clearly of opinion that the appeal should be dismissed.

Lord Deas, Lord Ardmillan, and Lord Mure concurred.

This interlocutor was pronounced:—"Refuse the appeal, and decern: Find the appellants liable in expenses," &c.

Irons & Roberts, S.S.C.—Webster & Will, S.S.C.—Agents.

JANE OR JANET HENDERSON, Pursuer and Appellant.—*Rhind.*
JAMES SOMERS OR SUMMERS, Defender and Respondent.—*Black.*

No. 158.

July 7, 1876.

Henderson v. Somers.

Parent and Child—Illegitimate Child—Proof—Presumption.—The defender in an action of filiation admitted intercourse with the pursuer 311 days before the birth of the child, and the pursuer did not allege any subsequent intercourse. *Held*, notwithstanding some evidence which tended to shew that the period of gestation was exceptionally long, that the pursuer had failed to overcome the presumption against so long a period of gestation, and the defender assoilzied.

2D DIVISION. Sheriff of Fife. I.

THIS was an action for the aliment of an illegitimate child, of which the pursuer was delivered on 26th September 1874.

The defender admitted having had connection with the pursuer on the night between the 17th and 18th November 1873, 311 days before the birth of the child; and the pursuer did not allege that any subsequent connection took place between them.

The only witnesses adduced for the pursuer were the defender herself and her mother. The material parts of the evidence bearing upon the period of gestation are given in the subjoined note.*

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* James Somers or Summers, the defender,—. . . "In April 1874 I received a letter from the pursuer. I have not got it. It is destroyed. I burned it. It said that she had been dismissed from service because she was in the family-way."

Jane or Janet Henderson, the pursuer, after stating that she entered the service of Mr Berwick, Stravithy Mill, at Martinmas 1873, deponed,—"I left Mr Berwick's service on the 11th March, and on the 26th September 1874 I gave birth to a girl. It is still alive. I swear that the defender is the father. That child was begotten on the night of the 17th or the morning of the 18th November. The defender is the only man I ever had connection with, and the child born on the 26th September is the only child I ever had. . . . My mother told him my state. I never had my courses after I went to Stravithy Mill. Dr Craig gave me a dozen of powders. I took these powders and was very unwell. I went to Kennoway to reside with my cousins, whose mother had died. That was in May. I stayed there till August. I had to leave and come home. It was a month and three or four days before my child was born. I came home because I was so unwell. I thought I was going to have the child then. I felt the pains of labour. The pains continued less or more all the time till I had the child. Dr Morris, of Kennoway, attended me when the child was born. I do not think he saw me till the morning the child was born. Cross-examined—Mrs Berwick dismissed me because I was in the family-way, and I went home. It was nearly a month after I left Stravithy that I wrote the defender. I never told the defender before that I was with child; I did not know where he lived till then. . . . By the Court—The first person I told I was with child was my mother; I told her when I went home in March. I did not say when I expected the child to be born, but I told her the night when I had been with the defender, namely, the 17th November; and I told her I thought it was gotten that night. No one was present but our two selves. My mother made preparations of baby-linen; I did not tell her when they were to be ready. I never felt the movement of the child within me at all. I told no one but my mother that I was with child. My mistress asked me about it, but I did not answer her."

The pursuer's mother deponed,— . . . "My daughter went to Mr Berwick's service at Martinmas 1873. She came home to me on the 11th March 1874. She told me she had been sent away because she was in the family-way to James Summers. She said the child was begotten about the Old Term. She said that she did not know where Summers was living. I came to know his address, and gave it to my daughter, and she then wrote to him; several letters passed between them, and all that my daughter got were destroyed. . . . My daughter

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July 7, 1876. Henderson v. Somers.

The Sheriff-substitute (Beatson Bell) found the paternity proved, and gave decree in favour of the pursuer.*

Upon appeal, the Sheriff (Crichton) recalled his Substitute's interlocutor, found that the pursuer had failed to prove that the defender was the father of the child, and assoilzied the defender.†

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was very unwell from the time she came home till last harvest; she did not work a day all that time. I took her to Dr Craig's at Markinch, and explained she was with child. Dr Craig did not think so, and prescribed for her. Shortly after that my sister in Kennoway died, and the pursuer went there to look after her family; she came back to me in August very unwell, and I thought she was then going to have a child; she never was well again till the birth of the child. It was born on the 26th September. It is a girl, and still alive. (Q.) How long did your pregnancy continue before the birth of the pursuer? Question objected to. (A.) Three weeks more than the nine months. The pursuer is the only child I ever had."

* "NOTE.—The pursuer depones that her child was begotten by the defender on the night between the 17th and 18th November 1873, and the defender admits connection upon the occasion. If the pursuer is speaking the truth this involves a gestation of 311 days. The question then arises, is this such an incredible circumstance that the pursuer must necessarily be perjuring herself. There was no medical evidence brought upon either side, and I have great doubt as to the competency of referring to works on medical jurisprudence upon the point in the absence of such evidence; but both parties did appeal to Dr Taylor's work, and it appears from it that no judicial decision in this country or England has established the possibility of such a protracted gestation, but that in the American Courts even longer periods have been held established—(see Taylor, pp. 817 and 831 of edition of 1865). It humbly appears to me that there is no fixed limit in the law as to what is a possible and what an impossible period of gestation. In the language of Lord Jeffrey—'The period is not a rule of law, but a canon of evidence capable of limitation or extension.'—(Boyd v. Kerr, 17th June 1843, 5 D. 1216.) In the present case certain circumstances favour the pursuer. In the first place, her manner was perfectly truthful; but for the improbability of the matter of her deposition I should have believed her without hesitation. In the next place she consistently from the first announced to her mother the date of the child's conception, and she was actually taken ill with, what she thought, the pains of labour at the proper time, and these pains continued more or less till the birth of the child. If this be so, the question resolves rather into the possibility of unusually protracted parturition than into that of protracted gestation. It is undoubtedly a case of a very exceptional nature, but on the whole I think the paternity is established."

† "NOTE.—The pursuer depones that the last time the defender had intercourse with her was on the night between the 17th and 18th November 1873. The defender admits that he had intercourse with her on that occasion. The child was born on 26th September 1874. There is thus a period of 311 days between the time of the last intercourse and the birth of the pursuer's child. The question therefore arises whether, with such a lapse of time between the intercourse and the birth, the defender can be held to be the father of the pursuer's child.

"The usual period of gestation is from 275 to 280 days. It may, however, be protracted beyond that time, and there is one case which occurred in America, referred to by Mr Fraser in his treatise on the Law of Parent and Child, p. 12, in which it was held that a period of gestation protracted 313 days is not impossible.

"The Sheriff is not aware of any case in this country of filiation of a bastard child where, with such a lengthened period of gestation, the Court have held the paternity established. On the contrary, in the case of Boyd v. Kerr, 17th June 1843, 5 D. 1213, where the defender in an action for the aliment of a bastard having, on reference to his oath, admitted connection with the pursuer on one

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The pursuer appealed to the Court of Session.

Argued for her;—In addition to the facts noted by the Sheriff-substitute, there was this strong corroboration of the pursuer's story, that she was so obviously pregnant by the beginning of March 1874 that it excited the notice of her mistress, and led to her dismissal, which shewed that she must have then been at least three months pregnant. The evidence of her mother as to her own pregnancy was also important, as shewing a hereditary tendency to protracted gestation.

The Court, without pronouncing a period of gestation of 311 days to be impossible, were of opinion that the pursuer necessarily undertook to shew that hers was an extraordinary case, and that the evidence adduced was too vague and too slight to overcome the strong presumption against her. Their Lordships therefore affirmed the judgment of the Sheriff.

M'CAUL & ARMSTRONG, S.S.C.—MACRAE & FLETT, W.S.—Agents.

No. 159.

July 8, 1876.
Macleay v. Campbell.

RODERICK MACLEAY, Pursuer.—*Strachan.*
DONALD CAMPBELL, Defender.—*J. C. Smith.*

Oath on Reference—Evidence Act, 1853 (16 *Vict. c.* 20), *sec.* 5.—Where a pursuer had been examined as a witness for himself, and had been cross-examined on the merits of the cause by the defender, the Court refused to sustain a reference to the pursuer's oath.

Observations on the Evidence Act, 1853, sec. 5.

1ST DIVISION.
Ld. Craighill.
M.

CAMPBELL and M'INTOSH, drapers, Dingwall, and Donald Campbell, feuar, Saltburn, who was father of the senior partner of Campbell and M'Intosh, granted a promissory-note for £100 to Roderick Macleay, draper, Tain. It was indorsed by Macleay, and paid as cash to a creditor of Campbell and M'Intosh. The firm afterwards got into difficulties, and Macleay was obliged to pay the balance of the note, amounting to £54, to the creditor. He raised this action against Donald Campbell for repayment.

The defence was that the note was granted for the accommodation of Campbell and M'Intosh only, and that Donald Campbell, though one of the promissors, was, in the knowledge of the pursuer, only a surety, like the pursuer himself.

A proof was led, in which the pursuer was examined as a witness on his own behalf, and cross-examined by the defender on the subject of the above defence.*

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occasion 306 days previous to the birth of the child, but denied all other intercourse, the Court held that the oath was negative. In the recent case of Gibson v. M'Fagan, 20th March 1874, 1 Rettie, 853, the Court, assuming that intercourse had taken place 312 days before the birth of the child, held that this lapse of time negatived the presumption of the defender's paternity. The Lord President observed,—"If their (*i.e.* the pursuer's and defender's) one solitary meeting took place on the 22d January, as the defender says, then it is clear that he cannot be the father of the pursuer's child, at least it is in the highest degree improbable that he should be so. It would give the duration of the period of gestation as ten months and one week.'"

* Cross-examined.—"The defender was not due me any money at the time I signed the promissory-notes libelled. (Q.) Were Campbell and M'Intosh due you £100 at the date of that promissory-note? (A.) I signed it for them and for the defender. (Q.) But were they not due you money at that date? (A.) The bill was not given in consideration of a sum due to me. It was signed by me for the accommodation of the promissors. (Q.) Was it for the accommodation of the defender that you signed it? (A.) Yes, it was for the accommodation

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The defender led no parole proof.

The Lord Ordinary pronounced this interlocutor, to which the Court, on a reclaiming note, adhered:—"Finds it not proved 'that the promissory-note sued on, granted by defender and by Campbell and M'Intosh, sometime drapers in Dingwall, for £100, was not, at least to the extent of one-half of the contents, granted for the accommodation of the defender as well as of the said Campbell and M'Intosh:' Therefore repels the defences, and decerns the defender to make payment to the pursuer of the sum of £47, 10s., being the amount to which the conclusions of the summons have been restricted," &c.

The defender then proposed to refer the cause to the pursuer's oath.

The pursuer argued that the reference ought not to be sustained. It was contrary to the spirit, if not to the letter, of the Evidence Act, 1853.[1] The defender had cross-examined the pursuer as a witness, and yet had shrunk from examining either himself or his son.

The defender argued;—It was admitted that the case did not fall within the letter of the Evidence Act. Reference to oath was therefore not excluded, or intended to be excluded, and there was no reason why the reference should not be sustained.

At advising,—

LORD PRESIDENT.—This is a case of some importance. The question is, whether the defender is entitled, under existing circumstances, to make a reference of the whole cause to the pursuer's oath. The action was raised on a promissory-note in which the pursuer was payee and the defender was one of two joint promissors. The pursuer admitted that the promissors were not due him any money, but he alleged that the note was for their accommodation, and having been made to pay, he has brought his action against this defender. After evidence was led the Lord Ordinary found that it was not proved "that the promissory-note sued on, granted by the defender, and by Campbell and M'Intosh, sometime drapers in Dingwall, for £100, was not, at least to the extent of one-half of the contents, granted for the accommodation of the defender as well as of the said Campbell and M'Intosh." To that interlocutor we adhered. The judgment depended on the import and effect of the evidence led, because the question was truly one of fact, whether the note was granted, at least to the extent of one-half, for the accommodation of the defender.

The evidence consisted in the examination of the pursuer as a witness in his own behalf, and his cross-examination by the defender. Some documents were produced by both parties, but no witnesses were adduced by the defender, and on that evidence the proof was declared closed.

The statute 16 Vict. c. 20, allows the examination of the parties to a cause with certain exceptions. But this permission is accompanied by a condition which is expressed in the 5th section,—"The adducing of any party as a witness in any cause or proceeding by the adverse party shall not have the effect of a reference to the oath of the party so adduced: Provided always that it shall not be competent to any party who has called and examined the opposite

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of both obligants. (Q.) In what way? (A.) The promissory-note shews that. I did not rank on the estate of Campbell and M'Intosh for that promissory-note, because I had nothing to rank on, and, besides, J. and A. Gibb ranked for it. There was a balance of £54 due upon it after Messrs Gibb had drawn the dividends."

[1] 16 Vict. c. 20, sec. 5, quoted in the Lord President's opinion.

party as a witness thereafter to refer the case or any part of it to his oath, and that in all other respects the right of reference to oath shall remain as at present established by the law and practice of Scotland." No. 159. July 8, 1876. Macleay v. Campbell.

In the present case the pursuer was adduced as a witness for himself, and therefore it appears to me that the section is not directly applicable. It must be observed that two expressions are made use of in the section, the "adducing" of a witness by the adverse party, and again that it shall not be competent for any party who has "called and examined the opposite party to refer the cause to his oath." The provision is thus confined to a party called and examined or adduced as a witness for the opposite party. Now, the pursuer was adduced for himself and called and examined for himself. But that, of course, gives the defender an opportunity of examining him in cross, and examining him according to our present practice, which is recognised by statute, in chief also.

The question of fact, as I have said, was, whether the promissory-note was granted in whole or in part for the accommodation of the defender, and unquestionably in the course of his cross-examination the pursuer was examined on that question most distinctly and pointedly.

Assuming, then, that the case does not fall within the statute, the question remains, whether, in these circumstances, we ought to sustain the reference. It is not incompetent, as the statute does not apply, but the clause leaves the law, in other respects, precisely as it stood before, and so leaves this as a matter which is entirely under the control of the Court.

Now, when a party who has had an opportunity of examining his adversary on oath on the whole merits of the case proposes to examine him again on a reference to his oath, unless there is some special reason for such a course it can only be for vexatious purposes. If the object of the party is to subject him to a more severe examination it is illegitimate, because if he desired to test him further it was due to his own carelessness that he did not take his opportunity. Therefore, unless there are special circumstances to explain and justify the reference, I do not think it would be expedient or right to hold that a party is entitled to have his adversary twice put on oath to speak to the facts of the case. Here a full opportunity of examining the pursuer on the whole case was not only afforded to the defender, but taken advantage of by him, and I do not think he is now entitled to another. I am therefore for refusing to sustain the reference.

LORD DEAS.—It is a very narrow question whether this case falls under the words of the 5th section of the statute. It is difficult to construe the Act as applicable only to cases where the one party has been cited by the opposite party. A witness may be adduced by a party without having been cited by him.

I agree with your Lordship that this is, so far, a question of circumstances. To raise the objection, the party must not only have had the opportunity of examining his adversary, but must have used that opportunity, otherwise the rule would be applicable to every case in which a party adduced himself as a witness. That would certainly be going too far. But in this case the defender did use his opportunity. The questions put in cross-examination related precisely to the matter now in dispute. It is difficult, therefore, to say that the pursuer was not adduced, called, and examined as a witness for the defender.

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Supposing, however, the reference not to be incompetent, the state of the facts goes deep into the question whether it should be allowed.

Undoubtedly it is only in a limited sense that the privilege of referring to oath is matter for the discretion of the Court. As interpreted by the decisions, our discretion to refuse a reference is restricted to cases where to allow it would lead to gross abuse. But this case would come, I think, under that category. For it amounts to an attempt to evade the statute, by referring the cause, after putting to the party on his oath the precise questions of fact which are intended to be inquired into under the reference.

LORD MURE.—I take the same view of this case as your Lordship in the chair. The words of the Evidence Act do not reach the present case, though the principle applies. But I am willing to deal with the question as if there was no such clause. And it being a fixed rule that it is in the discretion of the Court to sustain or refuse a reference, I am of opinion that it would not be expedient to sustain the reference in the present case.

The defender is in this position: He had the opportunity, and he availed himself of it, of examining his opponent on the whole defence, and he puts distinct questions to him to that effect. Now, the reason why the law has allowed reference to the oath of the opposite party is fully explained by Lord Moncreiff in the case of Pattinson v. Robertson, Dec. 4, 1846, 9 D. 226:—"It has been a fixed rule of the law of Scotland for centuries that a party, pursuer or defender, even after all other methods of discussion or evidence have failed, may say to his adversary before the Court—Though I cannot produce other evidence to shew the truth, I appeal it to your oath—to your own conscience as a Christian man. And our law, though different from others, allows this, on the same principle that however strong a case a man may apparently have on documents or apparent evidence he ought not to be permitted to maintain it against conscience, and that if he cannot himself swear to the facts as averred by him, and which, if true, must be known to himself, or deny upon oath the material averments of his adversary, though not otherwise proved, he shall not be permitted to avail himself of the appearance of evidence on the one side, or the absence of it on the other, to take a judicial sentence contrary to the truth as revealed by his own conscience."

In this case the pursuer has deponed to everything contained in the cause, so that he is not in the situation contemplated by the law.

LORD ARDMILLAN was absent.

THE COURT pronounced the following interlocutor:—"Refuse to sustain the reference: Find the pursuer entitled to expenses," &c.

MACGREGOR & ROSS, S.S.C.—DANIEL TURNER, S.L.—Agents.

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Steele and Co. v. Dixon, &c.

ROBERT STEELE AND COMPANY, Pursuers.—*Burnet—Trayner.*
CHARLES E. DIXON AND ALFRED DIXON, Defenders.—*MacLean.*
THOMAS PERY POWELL, Defender.—*D.-F. Watson—J. P. B. Robertson.*
AMBROSE PARSONS, Defender.—*Black.*

Ship—Ships-husband—Powers of Managing Owners—Liability for Furnishings.—When a vessel is in a home port, and the owners easily accessible, the managing part-owner cannot, without specific authority, bind his co-owners for extensive structural alterations.

2D DIVISION. Ld. Curriehill. R.

THIS action was raised in September 1875 by Robert Steele and Company, shipbuilders in Greenock, against the registered owners of the iron steamship "Brazilian," lying at Greenock, and also against the firm of R. Byrne and Company, merchants and shipowners, London and Cardiff, for the purpose of recovering two sums of £5664 and £820, 1s. 2d., being the cost of certain repairs and furnishings executed by them in the summer of 1875 on the vessel on the employment of R. Byrne and Company, who owned 31-64ths thereof, and were the managing owners.

The first sum sued for was for work contracted for, and the second for additional work.

The pursuers averred that in entering into the contract R. Byrne and Company "acted for, and with the authority of, the owners of the said ship," and pleaded;—The sum first sued for being due to the pursuers under the contract libelled, and the sum second sued for being due to them under the employment libelled, they are entitled to decree therefor against the defenders as concluded for.

Messrs Byrne lodged no defences.

The other defenders, Messrs Charles and Alfred Dixon of Liverpool, Lieutenant Thomas Powell, and Mr Ambrose Parsons, solicitor, London, whose names at the date of the furnishings in question and also at the date of the action were upon the register as owners respectively of 21-64ths, 2-64ths, and 10-64ths of the ship, appeared, and stated defences to the effect that they had given no authority for the repairs and furnishings for which payment was claimed, and they maintained that the repairs and furnishings were not necessary, or such as a ships-husband or managing part-owner is entitled, when the vessel was in a home port, to order on the credit of his co-owners without their express authority.

Mr Parsons stated further that, although he was registered as the owner of ten shares, he merely held them in trust for one Pustau, to whom they had been mortgaged by R. C. Byrne (of R. Byrne and Company), in security of an advance.

A proof was allowed, from which the following facts appeared:—

In December 1872 Messrs C. E. and A. Dixon, who were then the registered owners of the whole vessel apparently in trust for persons of the name of Fernie, carrying on business in Liverpool as "The Merchants' Trading Company," entered into a contract with R. Byrne and Company by which the latter were to purchase two-thirds of the ship (the price of the entire ship being fixed at £19,000), and were to become the managers of the ship upon their usual terms as regards commission, &c. The other one-third was to be held by the Messrs Dixon, who were not to transfer the same without Messrs Byrne's consent. The contract contained a clause that in the event of Messrs Byrne deciding to re-engine the ship they were to find the money to do so, all profits on the one-third interest not held by Messrs Byrne to be retained by them until the amount advanced for the new engines should be paid to them. In implement of

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this contract 43-64th shares of the ship were formally transferred by Messrs Dixon to Richard Clarke Byrne.

Of the 43-64ths acquired by R. Byrne and Company two shares were afterwards purchased by Admiral Powell, who sold them in the early part of 1874 to his nephew, the defender, Lieutenant Thomas Pery Powell.

Ten more of the shares held by R. Byrne and Company were transferred in September 1874 to the defender Parsons, who, however, although *ex facie* absolute owner, merely held the shares as trustee for one Pustau, a German, who, not being a British subject, was incapable of being himself registered as owner, but who, it was arranged, should in this way have a security over the vessel for advances made by him to the Byrnes. A deed of declaration of trust and agreement between Parsons and R. C. Byrne, setting forth the position of Parsons in the matter, was executed *unico contextu* with a bill of sale of the ten shares to Parsons.

In December 1872, when the contract of sale was entered into under which R. Byrne and Company became managing owners of the vessel, she was lying in the Birkenhead dock. She had been classed in the Liverpool registry as for a period of eighteen years from the date of her launch in 1852, with a continuation of the class from year to year thereafter subject to an annual survey. This class was continued for only one year after the eighteen years expired, and it lapsed altogether in November 1872 in consequence of the annual survey not having been made.

Soon after they became managers Messrs Byrne having decided to put new engines into the vessel in terms of their agreement with the Dixons took her round to Greenock for this purpose. For the next two years the vessel lay in the Clyde, while the work of preparing her for the new engines went on very slowly. No anxiety seems to have been shewn by any of the owners to get her ready for sea until the autumn of 1874, when a proposal was made to employ the ship in the China trade, which, however, was not carried into effect. Afterwards Byrne and Company procured a survey of the vessel with a view to ascertaining the repairs which would be necessary to have the vessel restored to her place on the Liverpool register. These proved to be very considerable, and after some time they decided to have the vessel double plated and repaired in terms of a report which they obtained from Lloyds' surveyor of the district in January 1875, in order to obtain the class 95 A at Lloyds, the highest class which is given at Lloyds to vessels not originally built under special survey. The pursuers made an offer for the work on 19th February 1875, which was finally accepted by Messrs Byrne on 3d April 1875.

The pursuers made no inquiries as to the owners of the ship,* and proceeded to execute the work contracted for, with the exception of a few plates, which were not fitted on when the work was finally stopped on 30th August 1875. They also performed extra work ordered by Messrs Byrne, a part of which was the repairing of a hole in the ship's side, caused by a gale of wind knocking her against the pier before she got into the dock.

The first suggestion which Messrs Byrne appear to have made to the Dixons with regard to the expediency of having the vessel reclassed was in a letter dated 27th November 1874. The letter was forwarded by the Dixons to the Fernies, who wrote Messrs Dixon that they could not consent to the proposal. That reply was at once communicated by the

* Mr Robert Steele, managing partner of the pursuers' firm, stated in evidence,—"I never asked, for it is not our practice to inquire as to the credit of any person giving us employment. When employed to make any repairs we trust the ship and the owners for the expenses."

Dixons to Messrs Byrne. In this and subsequent letters the Fernies took up the position, apparently erroneous, that the Byrnes were responsible for allowing the ship's class to lapse, whereas the class had lapsed before the Byrnes had anything to do with her. Throughout the correspondence the Dixons acted simply as the medium of communication between the Byrnes and the Fernies, who never corresponded directly with one another. The correspondence proceeded on the footing that the Fernies and not the Dixons were the true owners of the shares nominally held by the latter.

The first intimation of the contract entered into by Messrs Byrne with the pursuers was apparently made in a letter by Messrs Byrne to the Dixons, dated 5th July 1875, by which time one-third of the contract work had been executed. A copy of the contract was enclosed. The letter was acknowledged by the Dixons, but they did not in their reply refer to the contract. A good deal of correspondence followed, in which the Fernies again and again repudiated liability. They complained strongly of the conduct of the Byrnes, and maintained, apparently, that the Byrnes were bound to do everything at their own expense necessary to have the vessel reclassed. Neither the Dixons nor the Fernies wrote to the pursuers countermanding the orders given by Messrs Byrne, nor, indeed, had they communication of any kind with the pursuers.

Mr Powell and Mr Parsons were not consulted as to the reclassing of the vessel nor the execution of repairs, and the former at least knew nothing about the matter until served with the summons in the present action.

The Lord Ordinary, on 15th February 1876, pronounced this interlocutor:—"Assoilzies the defenders, Charles E. Dixon, Alfred Dixon, Thomas Pery Powell, and Ambrose Parsons, from the whole conclusions of the action, and decerns: Finds the pursuers liable in expenses to the said defenders," &c.*

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* "NOTE.—(After a narrative of the facts, of which an abstract has been given)—There is no doubt as to the liability of R. Byrne and Company and the partners of that firm for these sums, because they gave the order for the work. The question now to be considered is, whether the other defenders,—viz. Messrs Dixon, Lieut. Powell, and Mr Parsons, as registered part-owners of the vessel,—are also liable therefor to the pursuers, as having expressly or by implication ordered or sanctioned the employment of the pursuers. Now, in the first place, it is quite certain that the pursuers had no communication on the subject of any of these operations with any of the owners of the vessel, except Messrs Byrne and Company. They apparently did not know or inquire who the other owners were, and they seem to have taken it for granted that the owners of such a vessel as the 'Brazilian' would not only be liable for the repairs, but were in a position to meet their liability." . . . (His Lordship referred to the correspondence, the import of which has been given in the preceding narrative).—"I think it must therefore be held that the pursuers have failed to prove that the defenders, C. E. Dixon, A. Dixon, Parsons, and Powell, or any of them, authorised Byrne and Company to employ the pursuers to do the work in question, or to have any such work executed at all.

"Indeed, in the case of Parsons, it is inconceivable that he should have given any such authority, as it is clearly proved that he had no beneficial interest in the vessel, and that he held the 10-64ths of the vessel merely as a trustee for Byrne, the real owners of the shares, in order to secure Pustau, Byrne's creditor, for the advances which he had made. And in the case of Powell it is proved that he never knew or heard anything of the matter at all.

"This being so, the next question is, whether these repairs and alterations were necessary operations, and such as Messrs Byrne and Company, in their character of ships-husbands or managing owners, were entitled to order on the

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The pursuers reclaimed.

Argued for them;—(1) The repairs and furnishings in question were

credit of their co-owners, the vessel being in a home port and not in the course of a voyage. I think this question must be answered in the negative. The law upon the point is, I think, nowhere better stated than in Parsons on Shipping, vol. i. p. 100—'In general, the part-owners are liable *in solido* for the repairs of a ship, or for necessaries actually supplied. This rests in part upon the general principle that one receiving and holding a benefit must pay for it, and in part upon the peculiar nature of this property, and the necessity there is for the public good as well as for the advantage of each owner, that wherever the ship may be, all who are interested in her should be regarded as authorising such expenditure for repairs or supplies as she may require. . . . . If the things furnished are in any reasonable conformity with the character of the ship, or the nature and purposes of the voyage, or if in fact they are such that any rational part-owner may be supposed to have desired them, it will be difficult for the absent part-owners to escape their liability. . . . It has been said that a part-owner of a vessel is not liable to another for repairs made at a home port without his consent. If made against his prohibition he would not be liable, but we should suppose his consent would generally be inferred if the repairs were reasonable and proper, and he made no objection. A considerable distinction exists in respect to all the powers of a part-owner, or master, or a ships-husband, between the exercise of them abroad and in a home port. A ship far from its home might perish for want of aid which was delayed till all the owners could be consulted; but, if at home, all who will have to pay have an unquestionable right to be consulted. It is not, however, quite certain whether the fact that the vessel is in a home port, which certainly limits these powers, goes so far as to destroy them; in other words, the question whether one part-owner can bind another in a home port without specific authority may be regarded as still open.' And the question was dealt with as open in the leading case in England of Mitcheson v. Oliver, 1855, 5 Ellis and B. 446.

"As regards the powers of a ships-husband, whether he be a part-owner or a stranger, to bind the owners for repairs and furnishings, the rule is that, being the general agent of all the owners, he binds his principals while acting within his authority. The powers and duties of the ships-husband are stated at some length by Mr Bell in his Comms., vol. i. (M'L's. edn.) pp. 552, 553, and they are more succinctly stated by Parsons, vol. i. p. 109, as follows:—'His duties are determined mainly by usage; they are in general to provide for the complete seaworthiness of the ship, to take care of her in port, to see that she has on board all necessary and proper papers, to make contracts for freight, and collect the freight and all returns . . . . . He cannot borrow money nor give up the lien for freight, nor insure, nor purchase a cargo for the owners without especial authority.'—(P. 110.) Questions of this kind have not arisen to any great extent in Scotland, but there are numerous decisions in England as to the powers of a ships-husband or managing owner, or a shipmaster, to bind the general body of owners *in solidum*. In the leading case of Mitcheson v. Oliver, already referred to, Lord Campbell had told the jury at the trial that 'the defendant would not be liable to the plaintiff's demand merely as owner of the ship, or by reason of his being registered as such owner; nor would he be liable merely by the orders being given to the plaintiff by the defendant's master of the ship.' And to that extent the direction was approved of by the Court of Exchequer Chamber when the case was brought under review; but the Court went beyond this ruling, and held that the defendant would not be liable unless it were proved that the master acted as the defendant's master of the ship, with his privity and consent, and the goods and work were supplied to and done upon the ship, not merely upon the credit of the owner by the *bona fide* order of the master given with the privity of the owner, but as in a contract with the owner on orders given by the master as for him. And in the later case of Whitwell v. Perrin, 1858, 4 C. B. (N. S.), p. 416, Byles, J., said, 'Since the case of Mitcheson v. Oliver, 5 Ellis and B., 419, the law is restored to what it

such as Messrs Byrne in their character of ships-husbands or managing owners were entitled to order on the credit of their co-owners. The

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formerly was, viz., that the mere fact of a man being owner, or part-owner, of a ship, or registered as owner, does not make him liable for work done or goods ordered for the ship. But as Jervis, C. J., put it in Brodie v. Howard, 17 C. B., 109, 117, the question is, with whom was the contract; was the party giving the orders the agent of the owners for that purpose? The mere fact of the goods being ordered by the captain or the ships-husband is no evidence to go to the jury, but here not only was the defendant beneficially interested, but he knew that Whitwell the elder was acting as ships-husband, and he received a share of the profits. That clearly was evidence to go to the jury that the ships-husband had authority to contract on behalf of the owners.' Now, I think that, upon the evidence in the present case, it is quite impossible to hold that Byrne and Company made the contract with the pursuers as for or on behalf of the present defenders, seeing that the latter had not only not authorised or sanctioned but had declined to sanction the repairs and alterations of the extent and character ordered by Byrne. And if I am right in this, there is an end of the case.

"But even if it should be held that notwithstanding the communications between Byrne and Company and the defenders, the former, as managing owners or ships-husbands, had power to bind the latter, the question remains, were the operations ordered of the nature of necessary repairs, and falling within the proper range of the ships-husband's duties and powers.

"In the case of Chappel v. Bray, 1860, 30 L. J., 24, it was decided that 'an express authority is necessary from a part-owner of a ship to the ships-husband to order work not necessary as repairs.' In that case the work ordered was the lengthening of a vessel, which was held to be unnecessary, and therefore not to fall within the powers of the ships-husband. On the other hand, in the case of Barker v. Highley, 1863, 15 C. B., N. S., p. 27, it was held that 'the ships-husband or managing owner is an agent appointed to do what is necessary to enable the ship to prosecute her voyage and earn freight.' In that case money was borrowed to release the ship from Admiralty process, by which it had been arrested to meet claims arising out of a collision. And it was held that as the vessel was prevented from prosecuting her voyage by the arrest, the advance of money by the ships-husband was necessary, and formed a debt by the whole body of owners.

"The result of all the cases seems to be that the 'necessity of the repairs and furnishings is a question for a jury,' and that the urgency of the repairs, the stoppage of the vessel in the midst of a voyage or on the eve of her departure by repairs being suddenly found necessary, and the facts that the vessel is in a home port, and that the owners can be easily communicated with, are all jury elements in considering the question of necessity. It appears to me that the evidence in the present case negatives the necessity of the repairs. In the first place, the repairs were not rendered necessary by any sudden emergency. The vessel had been lying in the Clyde for nearly two years, and the fact that she had been there undergoing repairs and being fitted up with new engines was known to the pursuers. The vessel had not been chartered for a voyage, because the arrangement with Pustau that the vessel was to sail for China within six weeks from 21st September 1874 had come to an end, and no new charter had been obtained. It must therefore have been plain to the pursuers that the repairs which they were employed to make, and which were recommended by Boolds in consequence of the general rottenness of the vessel, were not matters of urgency requiring such immediate attention as to prevent the authority of the owners being previously asked for. Indeed, the fact that a period of two months elapsed between the pursuers' original offer for the work and Byrne and Company's acceptance gave the pursuers ample opportunity, if they had chosen, to consult the register and communicate with the persons there appearing as owners before entering into the contract. In the second place, I think that the repairs and alterations were of a nature and extent so material and extraordinary, that

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repairs were necessary in order to get the vessel classed, in other words, to make her a freight-earning subject, for it was in evidence, and, indeed, was obvious, that an unclassed vessel could only be insured at rates practically prohibitory, and no merchant would put his goods on board a vessel where he could not get an insurance. If it were suggested that less thorough and expensive repairs would have been sufficient to obtain a lower class, the answer was that the great bulk of the expense was necessary for even the lowest class, and it was evidently an act of prudent management to incur the comparatively slight additional expense in order to secure a good class. In short, to use the language of Mr Parsons, quoted by the Lord Ordinary, the things furnished were such that any rational part-owner might be supposed to have desired them.[1] (2) The

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they cannot be regarded as necessarily falling under the power of a shipe-husband to order. Indeed, I think it is certain that the co-owners, had they been made aware of the circumstances before the contract was entered into, would have repudiated it, and at once have communicated with Messrs Steele to inform them of their repudiation, just as they did when they became aware of it for the first time in July 1875. It is said that without these repairs the vessel could not have been re-classed, and that it is difficult to insure an unclassed vessel. But where the operations required to secure this result were so extensive as in the present case, and so little urgent, the pursuers ought not, in common prudence, to have undertaken to execute them without ascertaining that the owners desired or sanctioned such extraordinary outlay. And, on the whole matter, I am of opinion that the defenders who have lodged defences are entitled to absolvitor, the pursuers being of course entitled to decree in absence against the defenders who have not lodged defences.

"It was specially pleaded in defence for Mr Parsons that, although he stands on the register as an *ex facie* absolute owner of ten shares of the vessel, yet, as he had no beneficial interest, and was merely a trustee, holding the shares in security for a creditor of Byrne, and for reconveyance to Byrne on the payment of that creditor's debt, and as he never was in possession of any part of the vessel or its profits, he is not liable. And the following passage from Parsons on Shipping (vol. i. 131) was cited in support of the defence:—'A mortgagee, who does not have the possession and control of the ship does not authorise a furnisher to consider him the owner; and if credit be given him, it does not bind him unless given with his consent. . . . . And even if a person takes a bill of sale of a vessel, absolute in its terms, and is registered as owner, and the person furnishing the supplies consulted the record of the Custom-House, and gave credit to him as owner, he is not liable for such if the bill of sale was intended as a collateral security, and he has never taken the vessel into his possession or control, or exercised any acts of ownership.' This, I assume, to be a correct statement of the law as administered in America, and perhaps the proposition is a direct corollary from the law as laid down by the English Courts in the cases of Mitcheson v. Oliver, and Whitwell v. Perrin. But in the view which I take of the present case generally, it is not necessary to say whether the doctrine is sound or not. There are sufficient materials disclosed in the evidence in this case to justify a verdict in favour of Parsons and his co-defenders.

"It is only necessary further to observe that I have not dealt with the pursuers' claim for the minor repairs, amounting to £820, as on a different footing from the repairs executed under the contract. These minor repairs were all more or less connected with the contract work, excepting those items which are for repairing damage done to the vessel while lying off the harbour before going into dock. But the whole of these repairs were executed along with and under the same employment as those under the contract, and they must, in my opinion, all be dealt with on the same footing as regards the liability of the defenders."

[1] Bell's Com. (M'L.'s ed.), vol, i. pp. 552, &c., 567, &c.; Story on Agency, sec. 35; Abbott (11th ed.), p. 79; Parsons on Shipping, vol. i. pp. 100, 101, also pp. 109, &c.; Green v. Briggs, 6 Hare's Ch. Cases (Sir J. Wigram's judg-

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repairs were acquiesced in by the defenders, Messrs Dixon. They were the registered owners. They were informed by Messrs Byrne's letter of 5th July, if not earlier, that the vessel was being put by the persons whom they had constituted managing owners into the hands of a ship-builder for repairs, by which they were to benefit. Knowing the law, as they must be held to have done, that the manager had power to bind them for necessary repairs, they were bound distinctly to repudiate any liability. (3) The pursuer was entitled in any view to recover from the defenders the items for repairing the hole made in the ship while lying in the harbour. It was unquestionably within the powers of the managing owners to have this damage repaired. (4) The pursuers had put value on the ship to the extent of about £6000, and they were entitled to recover against the defenders *in quantum lucrati.*

The pursuers did not press their case against Mr Parsons in the Inner-House.

The defenders, Messrs Dixon and Mr Powell, joined in supporting the Lord Ordinary's interlocutor, on the ground that such extensive repairs and reconstruction of the ship did not fall within Messrs Byrne's authority as managers; that as the ship was in a home port, and as there was no urgency, and the other part-owners were easily accessible, their express authority was necessary to bind them.[1] The Messrs Dixon also maintained that although appearing on the register as owners of 21-64ths, they had really no interest in the ship, being mere trustees for the Fernies.

At advising,—

LORD JUSTICE-CLERK.—The Lord Ordinary has accompanied his interlocutor with a long and satisfactory analysis of the evidence, and by a commentary on the authorities. Concurring as I do in the views of the Lord Ordinary, I shall content myself with expressing shortly the grounds on which my concurrence is mainly founded. (After stating the facts)—On the general law applicable to the present case, I am of opinion that when a vessel is in a home port a managing part-owner may bind the other part-owners for ordinary repairs; but that he is not entitled to bind them, without specific authority, for unusual and structural alterations, nor for work to fit the vessel for a new employment, on which the part-owners had not resolved. Something in such cases may depend on whether the other part-owners are easily accessible, and there will be a greater presumption in favour of the managing part-owner's authority should the others be beyond the reach of immediate communication. In the present case, as all the defenders were at hand, this element does not arise, and the first question is whether the contract with the pursuer, which was for structural and unusual alterations, was entered into by the direct authority of the defenders, or any of them.

As regards the Messrs Dixon, they maintain that they are entitled to absolvitor, on the ground that they not only never gave any authority to Byrne and Company to incur this account, but, on the contrary, repudiated responsibility from first to last, and that on the ground that although their names stood

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ment, p. 405; Webster v. Seekamp, 1821, 4 Barn. and Ald. 352; Preston v. Tamplin, May 23, 1857, 2 Hurlston and Norman, 363; Barker v. Highley, July 6, 1863, 32 L. J., C. P., 270, and 15 C.B. (N. S.) p. 27; Whitwell v. Perrin, May 7, 1858, 4 C. B. (N. S.) p. 412; Coulthurst v. Sweet, May 30, 1866, L. R. 1 C. P. 649; Hibbs v. Ross, June 13, 1866, L. R., 1 Q. B. 534.

[1] Authorities cited by Lord Ordinary; also French v. Backhouse, May 11, 1775, 5 Burr, 2728; Arthur v. Barton, 1840, 6 Meeson and Welsby, 138; Hamiltons v. Landale, May 12, 1860, 22 D. 1059, 32 Scot. Jur. 488.

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on the register they were mere names for Fernie and Company. Without going into the evidence, I am very clearly of opiuion that this defence is entirely consistent with the facts. Messrs Byrne never treated the Dixons as principals, and never considered them as such, but dealt with them solely as interposed persons between them and the real part-owners, namely, Fernie and Company. For some reason, which is not disclosed, Messrs Byrne made it a consideration of their purchase that Fernie and Company should not stand on the register as owners, but that the Messrs Dixon's name should be so entered, and that they should not re-transfer their apparent interest without the consent of Byrne and Company. There are some indications that at one time Messrs Dixon were the creditors of Fernie and Company, but they do not appear ever to have been mortgagees, and we have no evidence that at the date of the contract with the pursuers they were creditors of that firm. It has been long settled that the mere fact of a person being registered as owner does not of itself infer liability for furnishings by third parties on account of the ship. Even a mortgagee, not in possession, is not liable merely because his name appears on the register; and much less can a party be liable who merely lends his name for the benefit and to serve the purpose of another. Byrne and Company had no authority to bind Dixon and Company individually, and never supposed that they had.

How far Fernie and Company are liable to the shipbuilder is a question not raised in this action, and is one on which I desire for that reason to express no opinion. That they were part-owners through the Dixons, their trustees, seems to be the fact; although even that fact, in their absence, it would be unjust to assume. There may also be a question how far, although as between Byrne and Company and Messrs Fernie the latter insisted that they should not be responsible, they may not be responsible to the shipbuilder for work done on their property, of which they were cognisant, which they thought proper to be done, and permitted to be done, and of which they received or may receive the benefit. These are questions which cannot be raised and decided here, because the Messrs Fernie are not parties to this suit.

As regards Mr Powell, who held a very small stake in the vessel, I am of opinion that he is not responsible as part-owner for the important alterations on the vessel, which were the main subject of this contract. A minor question has been raised in regard to the amount of expense incurred in repairing certain injuries incurred in removing the vessel from the docks at Greenock. The Lord Ordinary has not allowed this item, looking at the account as one. I think it would be unfair to Mr Powell, in the absence of the other proprietors of one-third of the vessel, to treat this as an action for ordinary repairs. I propose to reserve this claim, to be made good, if the pursuers are so advised, in an action to which all the proper parties are called.

Lord Neaves, Lord Ormidale, and Lord Gifford concurred.

This interlocutor was pronounced:—"Adhere to the said interlocutor, but reserve to the pursuers the right to insist against the defender, Thomas Pery Powell, for payment of the sum of £271, 15s. 5d., being the amount of the two accounts, Nos. 13 and 14 of process, in any action they may be advised to raise against all the parties interested, and to them their defences thereto as accords, and decern: Find the pursuers liable in additional expenses," &c.

Mason & Smith, S.S.C.—Hamilton, Kinnear, & Beatson, W.S.—Mackenzie & Black, W.S.—Wilson & Dunlop, W.S.—Agents.

JOHN WHITE, Pursuer and Respondent.—*D.-F. Watson—R. V. Campbell.* No. 161.
RICHARD MUNRO AND OTHERS, Defenders and Appellants.—*Balfour—Mackintosh.*

July 11, 1876.
White v. Munro, &c.

Ship—Shipbroker—Commission.—Held that a shipbroker was not entitled to commission upon the sale of a ship, in respect that, though the seller had been introduced to the purchaser by the broker, the sale which ultimately took place was not in consequence of the broker's introduction.

M & Co. of London requiring a steamer for correspondents in China put themselves in communication with a shipbroker, who brought under their notice a steamer named the "E," which was for sale, and wrote to the owners mentioning that he had done so, and requesting that, in the event of a sale, they would reserve his commission. After some correspondence between the shipbroker and the owners it was arranged that the vessel should be inspected on behalf of M & Co. The inspector's report proved unfavourable, and the shipbroker communicated the result to the owners, saying that "his friends must decline her."

About three months after the date of this letter a Captain B arrived in England, commissioned by the persons in China, for whom M & Co. had been acting, to buy a steamer "through the medium and with the assistance of M & Co." Shortly after his arrival, B went to a friend D, who had considerable experience in the requirements of the China trade, and who happened also to be a friend of the owners of the "E," and was interesting himself in getting her sold. D recommended the "E" as well suited for the purpose, and after a meeting with one of the owners B agreed provisionally to purchase the vessel, subject to the approval of his China constituents and the result of an inspection of the vessel. Upon B writing to M & Co., reporting what he had done, they informed him that this was the same vessel which had been previously introduced to their notice by the shipbroker, and had been unfavourably reported on. B accordingly waited on the shipbroker, and had several interviews with him about the ship. B decided to proceed with an inspection which had been arranged, and the result was that M & Co. were induced by B and D to reconsider their determination, and to purchase the vessel for their correspondents in China. The shipbroker thereupon claimed commission from the sellers.

Held (*diss.* Lord Justice-Clerk) that the shipbroker was not entitled to commission, in respect that the sale which was ultimately effected was not in consequence of his introduction, or of anything done by him.

2D DIVISION. Sheriff of Lanarkshire. I.

THIS was an action raised in July 1874 in the Sheriff Court at Glasgow at the instance of John White, shipbroker, London, against Richard Munro, merchant, Glasgow, and the trustees of the late William Mories, also merchant in Glasgow, who were the owners respectively of 23 and 41 sixty-fourth shares of the steamer "Europe."

The conclusions of the summons were that the defenders should be decerned to pay to the pursuer "the sum of £450, being commission at the customary rate of 2½ per centum upon the purchase price of the steamship 'Europe,' which belonged to and was sold by the defenders to Messieurs Matheson and Company, merchants and shipowners in London, in or about the month of March 1874, at the price of £18,000 sterling, and which sale was negotiated through the pursuer in his capacity of shipbroker; or otherwise the said sum of £450, or such lesser sum as shall be fixed in the course of the process as a reasonable commission or remuneration to the pursuer for the services rendered by him in introducing the buyers, Messieurs Matheson and Company, to the defenders, in the month of August 1873, and recommending the said steamer to them as suitable for their purposes, and which introduction and recommendation, and the negotiations which supervened thereon during the months of August, September, and October 1873, conduced to the ultimate purchase of the

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said steamer by Messieurs Matheson and Company as aforesaid, with interest on the said sum of £450 sterling, or such sum as shall be found to be due to the pursuer."

The nature of the defence appears from the defenders' pleas in law:—(1) The defenders not having dealt with the pursuer on any footing in the negotiation and sale of the steamer, and the same not having been sold through his intervention as broker, they are not liable to him in any commission on the price, either by introducing a purchaser to them or otherwise. (2) The pursuer not having rendered any services to the defenders in connection with the sale of said steamer they are not liable to him in any remuneration whatever.

A proof was allowed, of which the result was as follows:—In August 1873 Messrs Matheson and Company of London were instructed by correspondents in China to purchase two steamers which were required at Shanghai. They put themselves in communication with the pursuer, who, among other vessels, brought under their notice the steamer "Europe," belonging to the defenders.

On 29th August 1873 the pursuer wrote Mories, Munro, and Company, merchants, Glasgow, who represented the owners of the "Europe,"—"Gentlemen,—Messrs Matheson and Company of this city are desirous of purchasing a spar-deck steamer. I have named 'Europe' to them as likely to suit; and as they have a representative at present in the neighbourhood of Glasgow he will probably call at your address, which I have handed to his firm. In the event of business, which I trust will result, please reserve my commission; and oblige yours, &c."

Upon this, Mories, Munro, and Company entered into correspondence with the pursuer at considerable length, giving all the particulars required by Matheson and Company, and an inspection of the "Europe," which then lay at Antwerp, was ultimately arranged and carried out by a Captain Crockett on behalf of Matheson and Company. Crockett's report was, however, unfavourable, and on the 7th October 1873 the pursuer wrote Mories, Munro, and Company—"The inspector has seen 'Europe,' and does not write a good report of her bottom, so my friends must decline her. I regret this, after all our negotiations, and his making the journey to Antwerp."

Throughout these negotiations Matheson and Company of London were referred to as the persons who proposed to buy the ship, although they were in fact acting for Jardine, Matheson, and Company of China, who, again, were acting for some native merchants there, trading under the name of the "China Merchants Steam Navigation Company."

On 7th October Jardine, Matheson, and Company telegraphed to Matheson and Company—"Until our letters come to hand suspend acting upon our last instructions relating to second new steamer." * In a subsequent letter, dated 13th November 1873, they informed Matheson and Company that a Captain Bolton was going to England, commissioned by the Chinese Company, "to have built, or to buy through your medium, and with your assistance, two boats for our native friends."

On 6th November 1873 Captain Bolton wrote from Shanghai to a friend, Mr Peter Denny,† Dumbarton—"I have just time before the mail closes to send you a line, saying I hope to be on my way home by the next French mail, leaving here a week hence, to see after the building

* It appeared that one of the two steamers required had already been procured from some other quarter.

† Designed in the proof as "shipbroker." It was stated by the counsel for the pursuer that this was a clerical error for "shipbuilder."

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of two steamers for the China Merchants Company, concerning which Mr Tongking Sing* has already written you. His instructions are to the effect of getting estimates from various builders, the same to be wired to him for decision. I shall come up to see you on my arrival."

Captain Bolton arrived in England in the beginning of January 1874, and soon after his arrival went down to Dumbarton to see Mr Denny.

Mr Denny happened to be an intimate friend of the senior partner of Mories, Munro, and Company, who had died shortly before, and in order to benefit his family he was interesting himself in the sale of the "Europe." After Captain Bolton had explained the kind of vessels he required for his constituents, Mr Denny, who had considerable experience in regard to the requirements of the China trade, informed him that a ship had been placed in his hands for sale, which he considered in every way well adapted for the purpose, and shewed him the particulars of the "Europe." Denny then made an appointment with Mr Munro, the surviving partner of Mories, Munro, and Company, and owner of 23 sixty-fourths of the "Europe," to meet Bolton at his office at Dumbarton. A meeting accordingly took place about the middle of January 1874, at which Munro, Bolton, and Denny were present. Denny stated that he would charge no commission, and suggested that the price should be £19,000. According to the evidence of Denny and Munro a minute of sale was then drawn up by Denny, narrating the price and other conditions upon which a sale would be concluded, which Munro signed, and Bolton took away. Bolton was not examined as a witness, the parties having been unable to discover where he was. No copy of the minute was taken.

On 13th January 1874 Bolton wrote to Matheson and Company—"To-day I have received the offer of a steamer, which I think would suit the C. M. S. N. Coy. very well indeed. At present she is in Constantinople, but will be home and available in four to five weeks. Herewith some of her particulars,—s.s. 'Europe.' . . . Mr Denny recommends her most highly, and desires me to say so. He also considers the price most moderate. . . . Will you kindly wire the requisite information concerning the steamer the 'Europe' to Messrs Jardine, Matheson, and Company, Shanghai, for the benefit of Mr Tongking Sing? Should the China people decide upon her purchase, my present arrangement with her owners is to the effect that before being taken over she is to be docked for inspection, cleaned, painted, and put in good order at the expense of her present owners. In fact, no final answer is to be given until she is docked. Any dispute to be left to Mr Denny."

Matheson and Company replied on 14th January—"We are in receipt of your letter of yesterday, and note what you say regarding the steamer 'Europe.' This vessel has already been inspected by Captain Crockett, who came to the conclusion that she was not suited for the trade of the Merchants Company's boats. . . . Before telegraphing, we think it well that you should be made aware of what Captain Crockett wrote to us about the steamer in October, and we enclose extracts from his letters for your consideration."

On 15th January Bolton wrote Matheson and Company—"Dear Sirs,—Your favour of the 13th, enclosing extracts from Captain Crockett's reports on the s.s. 'Europe,' I received to-day, for which my best thanks. I have written to Captain Crockett for further particulars; for it is difficult to reconcile his report on the steamer's bottom with the strong recommendation of Mr Denny's, who told me I could quote him as advising the

* Manager of the China Merchants Steam Navigation Company.

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purchase. He assured me he had no personal interest in the sale. . . . Thanks for not sending the telegram, and I would wish now to wait until I hear more particulars from Captain Crockett."

After receiving Matheson and Company's letter of the 14th January, Bolton told Denny what Matheson and Company had written. Mr Denny's evidence as to the conversation was as follows:—"I then said to Captain Bolton that I did not consider Captain Crockett an authority in such matters, and that as part of the condition of sale effected by me was that the ship was to be inspected on her arrival in dock, in Bristol, she being then on her way home from Constantinople, that I would send my manager, Mr Ramage, who, being a practical shipbuilder, would be able to give a reliable opinion on the matter. To this arrangement Captain Bolton assented."

A few days after this Bolton returned to London, and called upon Matheson and Company, who referred to the pursuer as having brought the "Europe" under their notice in the previous autumn. Bolton, accordingly, waited on the pursuer, and had several interviews with him. What passed is thus stated by the pursuer in his evidence:—"When he (Bolton) came back to London I heard that Mr Denny of Dumbarton had highly recommended the 'Europe' as likely to suit Matheson and Company's requirements. In fact, when Bolton returned to London he consulted me about that very purchase, and I understand that upon his report the ship was ultimately bought by Matheson and Company. . . . He told me he had been round the shipbuilding yards with the object of getting tenders for building, and to know what the builders' prices were. He said he had seen Mr Denny. He said he had made no business transaction with him at that time, that is to say, that he had concluded no transaction—no contract. He told me that Denny had mentioned the 'Europe,' and had spoken very favourably of it; that he had mentioned this to Messrs Matheson, and that they had said that she had previously been inspected by Crockett, who had not reported favourably. I told Captain Bolton that I thought the 'Europe' was a very suitable vessel for him, and that I understood the objections Captain Crockett made to her were slight, and might be remedied. Captain Bolton saw me several times before that, previous to the arrival of the 'Europe,' and he told me that he was going to inspect the 'Europe' as soon as she arrived home."

The "Europe" was inspected by Captain Bolton and Mr Ramage at Bristol about the beginning of March 1874, and the result was that a sale was concluded to Matheson and Company for £19,000, the sellers undertaking to execute some repairs specified by the inspectors. The manner in which the sale was brought about is thus stated by Mr James Macandrew, a partner of the firm of Matheson and Company, who was examined for the defenders on commission:—"In consequence of what passed between us and Captain Bolton on his return we sent a telegram to Jardine, Matheson, and Company, Shanghai. The telegram was to the effect that the steamer 'Europe' appeared suitable for their purpose, that she was strongly recommended by Mr Denny, and might be had for £19,000. We sent the said telegram as arranged with Captain Bolton, who, I have no doubt, saw its terms before being sent off. . . . Interrogated—Depones, The 'Europe' was on a voyage at this time. We recommended the purchase, subject to after inspection of the vessel. The vessel was afterwards inspected by Captain Bolton and an engineer at Bristol. Their report was satisfactory, and in consequence of their report some repairs were then made upon the vessel. I have no doubt Captain Bolton reported to us that the repairs had been satisfactorily completed, and in

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consequence we afterwards arranged for payment of the price, £19,000. The vessel, upon payment of the price, which was partly advanced by us, was transferred to my name as nominal owner, and along with the transfer we procured a paper from the Custom-House transferring her registry to the port of Hong Kong, where she was to be entered in the name of one of the partners of Jardine, Matheson, and Company as owners. The ship required to be entered in the name of some one other than the sellers, and we accordingly had the ship transferred for our own security, and with a view to the ultimate transfer of the vessel to the true purchasers. We acted in the transaction merely as agents, our firm not being shipowners. When we advance the purchase-money of a ship we are in the practice of having the vessel transferred to our name, in the first instance, for our security. Interrogated, depones, Neither my said firm nor any partner of it suggested or recommended the purchase of the 'Europe.' The vessel was brought under our notice by Captain Bolton. But for Mr Denny's recommendation the vessel would not have been purchased at all. The vessel was purchased by us for the China Merchants Steam Navigation Company. It had been arranged in China before the purchase was completed that the steamer should be taken by the China Coast Steam Navigation Company instead of the China Merchants Steam Navigation Company. . . . I had no communication with the pursuer in regard to the purchase of the 'Europe' in March. He had nothing to do with the purchase."

Upon learning that the steamer had been sold, the pursuer wrote to Mories, Munro, and Company claiming commission, which claim the agents of the owners declined to recognise.

The pursuer led evidence as to the custom of trade on the Clyde and elsewhere in regard to shipbrokers' commission, the result of which is stated in the Sheriff-substitute's note.

The Sheriff-substitute (F. W. Clark), on 16th October 1875, pronounced this interlocutor:—"Finds that on an introduction obtained from the pursuer, followed by negotiations in which the pursuer acted the part of middleman, the defenders ultimately sold the steamship 'Europe' for £18,000 sterling to Matheson and Company of London, and that the defenders, as sellers, are in consequence liable to the pursuer in a reasonable commission, in name of remuneration, or *quantum meruit*: Finds that the same may, in the present case, be fairly stated at two and a-half per cent., that being the amount claimed in the summons: Therefore, and for the reasons assigned in the subjoined note, decerns against the defenders for the sum of £450 sterling, with interest from the date of citation to this action: Finds the defenders liable to the pursuer in expenses," &c.*

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* "NOTE.— . . . . . The law in such cases, though perhaps at an early period somewhat ambiguous, may now, it is conceived, be stated as follows:—When a broker first introduces two principals to each other, and that introduction eventuates in a purchase and sale, he earns his commission. Nor does it matter whether he works out the business, or whether the principals complete it without his assistance. See as to this, Green v. Bartlett, May 30, 1863, 14 Scott's C. B. Reports, p. 681, 32 L. J. (N. S.) C. P. 261; Dalton v. Irvine, April 24, 1830, 4 Carrington and Payne's Reports, p. 289; Wilkison v. Martin, Feb. 16, 1837, 8 Carrington and Payne, p. 1; Cunard, &c. v. Van Oppen, 1859, 1 Foster and Finlason, p. 716; Gibson v. Crick, April 17, 1862, 31 L. J. Exch. p. 304.

"In the present case it is plain that the sellers and purchasers were originally brought together by the pursuer, and that for a time he acted as the sole middleman or mutual agent for the parties. That the negotiations for a time broke

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The Sheriff (Dickson) adhered.

The defenders appealed to the Court of Session.

Argued for the defenders;—It was not a correct statement of the facts to say that the vessel was ultimately sold to the same parties to whom the pursuer had introduced the defenders. The introduction was given to Matheson and Company of London, who were acting for Jardine, Matheson, and Company of China, or rather, certain native traders behind them, although Matheson and Company did not disclose their principals. Captain Bolton derived his powers directly from the same authority in China, and had never heard of the pursuer till he got Matheson and Company's letter of 14th January 1874. Matheson and Company acted simply as financial agents of the parties in China to whom the sale was effected. The pursuer was merely incidentally referred to as a person whose agency had failed. The negotiations which resulted in the sale were begun and carried through by Bolton and Denny. If Bolton had never come from China the pursuer would never have earned his commission. The case differed vitally from some of the English cases, in which the broker had been prevented from earning his commission by the parties to the sale taking the business out of his hands. No obstacle was thrown in the way of the pursuer earning his commission. He was *functus officio;* his intervention had failed; and he had himself intimated its failure to the defenders. So far from the pursuer having conduced to the sale, he and his actings were nothing more than a temporary impediment to the sale, which was ultimately removed. The case was a much less favourable case for the broker than the recent case of Moss v. Cunliffe and Dunlop,[1] for there, beyond question, the broker's introduction led, directly or indirectly, to the sale which was ultimately effected.

Argued for the pursuer;—By the custom of trade, established by the proof, and recognised by the English decisions, commission was due to a shipbroker who introduced a person who had a ship to sell to a buyer, provided that the introduction resulted in a sale, and it made no difference whether or not the broker gave his assistance in arranging the details of the transaction. The sale in the present case was concluded with precisely the same parties to whom the defenders were introduced by the pursuer, viz., Matheson and Company of London, and it was immaterial to the present issue whether Matheson and Company were acting as principals or as agents. Even if the pursuer had nothing to do with the re-opening of the transaction he could not be deprived of the commission which he had earned by his introduction. But in point of fact the parties did again

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down was no fault of his. At length the same vessel was bought and sold by the same parties through the intervention, no doubt, of a friend of one of them, who disclaims all claim for remuneration; yet even in this last negotiation the pursuer was also engaged, and probably contributed, in no small degree, to its success. To hold that, in such circumstances, he is not entitled to remuneration, would be to reverse alike the custom of trade and the rule of law. The case seems much stronger than many in which custom and rule have been given effect to; and, indeed, if any other view were to prevail it is difficult to see how brokers could claim remuneration at all, inasmuch as it is only when their introductions result in sales that they are allowed any remuneration. It may further be noticed that, in the present case, the pursuer did not let the matter rest on the mere law or trade custom, but specially stipulated with the defenders, at the very outset of the introduction, that if a sale resulted he should claim commission.

"About the amount there can be little doubt. From the evidence in process it would seem that 2½ per cent is the ordinary rate in the case of steamers."

[1] Moss v. Cunliffe and Dunlop, March 20, 1875, *ante*, vol. ii. p. 657.

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resort to him; he was reinstated in his position of broker. The position of matters was, in short, this:—A break occurred in the negotiations. The intending purchasers thought that the ship would not suit them. They were afterwards persuaded by Captain Bolton to think better of the matter, and they ultimately bought the vessel. The case was thus, in all essential particulars, the same as Mansell v. Clements.[1]

At advising,—

LORD NEAVES.—In this case, which is one of difficulty and subtlety, we are placed at a disadvantage in the way in which we have to deal with it. The foundation of the case is an alleged custom in favour of shipbrokers when introducing a purchaser of a ship to a seller. We have to take our data partly from English decisions, and partly from evidence of the custom in the Clyde. I am prepared to assume that such a custom exists, though not perhaps in the precise terms which the pursuer sets forth in his condescendence (Art. 8)—"By the custom of trade in the Clyde, as elsewhere, a shipbroker in the pursuer's position, negotiating the sale of a steamer, is entitled to commission at 2½ per cent upon the price payable by the seller; and by the same custom, where a broker's introduction and recommendation of a ship conduced, and, taken together with other circumstances, ultimately led to the purchase of the ship, the broker is entitled to fair remuneration as for services rendered."

The facts founded on by the pursuer are these:—He was acting for Matheson and Company of London, who desired to purchase a steamer for friends in China. He wrote the defenders that he had named the "Europe," belonging to them, to Matheson and Company, as likely to suit. After some correspondence the ship was examined on behalf of Matheson and Company, and the report on it was unfavourable. It is clear that a mere talk or negotiation about a sale does not give the broker a right to commission, unless a sale takes place. The question here is, whether the broker has a claim to commission on a sale, which was certainly not negotiated by him, but to which he says in his record his introduction and recommendation, "taken together with other circumstances, ultimately led." The other circumstances that occurred are these:—After bringing the parties together, *i.e.*, the defenders and Matheson and Company, and having had the ship examined by Captain Crockett, and an adverse report obtained, the pursuer, on 7th October 1873, writes the defenders—"The inspector has seen 'Europe,' and does not write a good report of her bottom, so my friends must decline her. I regret this, after all our negotiations and his making the journey to Antwerp." This letter imports that the transaction was broken off by the final declinature of the pursuer's friends, Matheson and Company. The letter is written by the pursuer, the broker, but acting as the channel of communication of Messrs Matheson. His friends, as he terms them, decline the ship, and he himself regrets it, no doubt sincerely. I doubt whether the broker's right to commission could survive this occurrence, unless in special circumstances leading to a reconsideration and withdrawal by Messrs Matheson of the rejection or declinature which had thus been intimated by the pursuer. He had

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[1] *Pursuer's Authorities.*—Cases cited in Sheriff-substitute's note; also Burnet v. Bouch, July 4, 1840, 9 Carr. and Payne, 620; Inchbald v. The Western Neilgherry Coffee, Tea, and Cinchona Co., Nov. 10, 1864, 34 L. J. (N. S.) C. P. 16; Mansell v. Clements, Jan. 31, 1874, L. R. 9 C. P. 139.

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done his best, but he had failed, and he himself intimates the termination of the negotiations without making any attempt or suggestion as to their renewal.

It is a part, no doubt, of the custom of trade alleged, that parties are not to take advantage of a broker's negotiations once opened by them, and, while these are still in dependence, employ another broker to carry through the sale, or to carry the sale through in person so as to oust the broker of the commission which he was in the course of earning. This is justly considered a breach of commercial morality and fairness. But I cannot find any authority for saying that after the broker himself willingly and deliberately intimates that "his friends" decline to purchase the ship, and closes his correspondence with expressions of regret, but without condemning or complaining of the course taken, the sellers are not entitled, without any breach of commercial good faith, to look out for another broker or another channel for selling the ship. That is what here took place. The sellers themselves resorted to Mr Peter Denny, who appears to be a shipbroker. At all events, if he is not, there is nothing to prevent his acting as a shipbroker, and doing so without payment. Denny arranges a sale upon different terms, and the vessel is sold, not, I think, to Messrs Matheson, but in reality to some traders in China, who have some connection with the Mathesons, but came forward themselves at this stage when the proceedings of the Mathesons were broken off.

Now, if there had been a competition between Denny and White, whether Denny was to get the commission on the sale effected by him, or whether White was entitled to commission upon a transaction which he declared himself unable to carry through, there cannot be a doubt that Denny would have been successful. If White were to come forward in a competition with Denny and say, "Matheson and Company, and Mories, Munro, and Company, are my clients; if at any time a sale of the ship is effected between the parties whom I brought together the commission is mine,"—I do not think that such a claim would, in the circumstances that occurred, be covered by the custom condescended on. In one way, no doubt, White conduced to the sale. He did so by retiring from the transaction, and allowing Denny to step in to carry out what he had failed to do. I cannot see what "other circumstances" there are for which White is entitled to take any credit. What Denny had to do was to counteract what White had done, or what was wrongly done under White's regime.

As an illustration: Suppose—by a rather violent supposition—that payment by results were the rule in medical practice,—which it is not likely to be in so thoroughly a liberal profession, I am called in as a medical man, and find that the disease declines to go away under my treatment. I say so, and retire from the case as incurable. Another doctor comes in, and employs a different system, and cures the patient. Could I, the first doctor, say The fee is mine. I was the cause of the ultimate cure. My going away was the cause of your coming, and therefore I was the *causa causans* of the resulting cure?

The custom must be treated as a reasonable one. I might look with more favour on the claim if I found authority for holding that a broker, who has failed and parted with the transaction as at an end in the manner that here occurred, is still entitled to commission on the ground that his intervention conduced to the ultimate sale through a new broker in circumstances like the present, where the ultimate sale is only effected by the report previously obtained through the

medium of the first broker being found bad and got out of the way. In the absence of any such precise or even cognate authority I think the claim cannot be supported.

Further, I doubt whether this was a sale to the same parties whom the pursuer introduced in 1873; at least, if it was, it was so in special circumstances. The true buyers were not Matheson and Company of London, but the men in China for whom they acted as agents. No doubt they furnished the sinews of war, and the vessel was accordingly registered in their name as a security for their advances. But Captain Bolton was ultimately sent out direct by the China Merchants Company with full powers; he did not go to Matheson and Company of London, but went direct to his friend Mr Denny at Dumbarton, who happened by accident to have been applied to by the defenders to get the "Europe," sold. True, after getting the letter of 14th January from Messrs Matheson, Captain Bolton calls upon Mr White. But Mr White was not the cause of the sale. The fact is, that Captain Bolton, being himself a man of skill, threw overboard Captain Crockett's report, and decided to buy the ship in opposition to it. I cannot think that Captain Bolton's constituents were in such circumstances indebted in any way to the pursuer.

Upon the whole, I see no reason why the pursuer, whose intervention was all against the sale, should now be paid a commission, because he retired and made it necessary or desirable to employ another man to come in and put matters right. I think, therefore, that the defenders should be assoilzied.

LORD ORMIDALE.—I do not suppose that any question of difficulty arises as to the pursuer's right to commission in point of law if he has made out his case in point of fact. Such cases are very rare in Scotland; but we had the whole subject fully under our consideration not long since in Moss v. Cunliffe and Dunlop.

I think the question in dispute is well raised in the first letter which the pursuer wrote to Messrs Mories, Munro, and Company. He there says that Messrs Matheson and Company of London are desirous of purchasing a spar-deck steamer, and that he has named the "Europe" to them as likely to suit; and concludes—"In the event of business, which I trust will result, please reserve my commission."

The custom applicable to such matters is that where a broker introduces a person who has a vessel to sell to one who is desirous to buy, and the introduction results in the purchase of the vessel, the broker is entitled to commission. The pursuer states the question fairly enough in the letter which I have referred to. When he speaks in that letter of the business which he trusts will result he can only mean business resulting from his introduction. That, again, raises the question of fact, whether the sale of the ship in question, the "Europe," resulted from the pursuer's introduction.

In dealing with this question, I look, at the outset, to the conclusions of the summons to see what view the pursuer himself took of the facts which he was prepared to prove—(reads the summons, quoted on page 1011).

The most favourable way for the pursuer of treating the summons as so framed is to take a combined view of his two grounds of action, although he libels alternatively. But let us see whether the pursuer has established his case on either conclusion of his summons, or on both of them. Combining what he

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says he did in the autumn of 1873 with what he says he did in the spring of 1874, can it be maintained on the proof that the purchase of the "Europe" ultimately took place in consequence of his introduction or services. If the pursuer has established that it did he may be entitled to prevail, but not otherwise. I am inclined to think, with my brother Lord Neaves, that he has failed to do so, and I shall shortly state my views of the evidence, which are in substantial accordance with those of his Lordship.

In the first place, looking alone to the negotiations which took place in the autumn of 1873 it is impossible to hold on the proof that anything resulted from them. On the contrary, the pursuer says himself, in his letter of 7th October 1873, that his friends must decline the "Europe," and that was the end of the negotiation in the autumn of 1873. If, therefore, the matter had remained there, no question, I should think, could have been raised. The only question is, whether the negotiations now referred to, and which had resulted in no business, were revived and resumed in the spring of 1874 in such a way as to give the pursuer a claim to commission which he would not otherwise have had. This is a somewhat difficult and certainly narrow question on the evidence; but, after careful consideration, I have come to the same conclusion regarding it as Lord Neaves. If negotiations had been resumed between Matheson and Company of London and the defenders, and a sale of the ship had ultimately taken place to Matheson and Company, the pursuer might perhaps have been entitled to commission, notwithstanding the interval of time which elapsed, and notwithstanding the breaking off in October of the autumn negotiations. But that is not the state of the facts. The pursuer's connection with the matter must, I think, be held to have terminated in October, and the subsequent negotiations in the spring of 1874 were by other parties altogether and entirely independent of him. Captain Bolton wrote from China on 6th November 1873 to his friend Mr Peter Denny at Dumbarton that he is coming to this country to "see after the building of two steamers for the China Merchants Company." He accordingly comes to this country, and in the beginning of 1874 goes down to Dumbarton. And it is very important to keep in view that Captain Bolton, who had plenary powers from his constituents in China, when he went to Dumbarton, knew nothing whatever of any previous negotiation in regard to the "Europe." He put himself in communication with Mr Denny; and by a singular coincidence, when Captain Bolton told Mr Denny the kind of ship he wanted, that gentleman stated that a ship—the "Europe"—had been placed in his hands for sale which he thought would suit. Negotiations accordingly proceeded between Bolton and Denny, who is designed as a shipbroker in the proof. A meeting also took place between Bolton, Denny, and the defender Munro, the latter acting for the other defenders, his partner Mr Mories being now dead, and we have the result in Bolton's letter of 13th January 1874, written in a tone and in terms which unequivocally indicate that previous to his meeting with Denny he had had no communication whatever either with Matheson and Company or the pursuer about the "Europe." I take it as a fact that neither Bolton nor Denny knew anything of the previous negotiations, and what is of equal importance is the fact that the defender Munro had no idea at that time that Bolton was negotiating for the purchase of a vessel for the same parties for whom Matheson and Company had been previously negotiating. I do not say that a binding and concluded contract of sale of the "Europe" was at this date entered into be-

tween the defender and Bolton through the medium of Denny, but these parties had certainly agreed to all the essentials of such a contract, subject to the approval of Bolton's constituents in China, and an inspection of the ship when she came into port. It was at this point of time, upon Matheson and Company getting Bolton's letter, that they found he was after the same vessel which had been previously reported upon unfavourably. They wrote Bolton to this effect. Their letter leaves Bolton in some doubt as to whether the ship would suit. However, it appears that he decided to proceed with the inspection of the vessel. In the meantime, while the vessel is on her way to a home port, he calls upon Mr White, the pursuer, in London. The only evidence as to what took place is given by the pursuer, Mr White, himself. If what took place between him and Bolton is a necessary part of the pursuer's case, I cannot think there is sufficient evidence of it. There is no corroboration of his evidence, for Bolton has not been examined as a witness at all. But what was it that took place according to the pursuer's own account? He says that Bolton spoke of Crockett's report, which was unfavourable, upon which "I told Captain Bolton that I thought the 'Europe' was a very suitable vessel for him, and that I understood the objections Captain Crockett made to her were slight, and might be remedied. Captain Bolton saw me several times before that previous to the arrival of the 'Europe,' and he told me that he was going to inspect the 'Europe' as soon as she arrived home." That was the nature and import of the communications which passed, so far as we can see, between Bolton and the pursuer. I am unable to hold them to be sufficient to shew that there was such a revival or resumption of the negotiations with the pursuer as to entitle him to the commission claimed by him. Bolton learned nothing from the pursuer beyond what he knew before, viz., that Crockett had reported on the ship, and that the report was unfavourable. I cannot therefore hold that White's introduction in 1873 led to the sale of the vessel, or that White had anything to do with the sale which ultimately took place in 1874, and in support of this view it is of importance to bear in mind that Mr James Macandrew, one of the partners of Matheson and Company, says distinctly in his evidence,—"I had no communication with the pursuer in regard to the purchase of the 'Europe' in March. He had nothing to do with that purchase."

I am far from saying that if there had been any evidence of an attempt or purpose by the parties, through and by whom the "Europe" was ultimately bought, to defraud or deprive the pursuer of his commission after he had fairly earned it, the case would have assumed a totally different aspect, and the pursuer might have prevailed. But clearly no such purpose was formed, and no such attempt made. Accordingly the pursuer did not represent his case on the proof in that light at all.

Nor does it make any difference that Mr Denny, through whom the sale was effected, has not claimed commission. To test the present dispute: Let it be supposed that Denny had been employed in the ordinary way by the defenders, on finding they could not sell the ship through the medium of the pursuer, and that the ship was sold through the medium and agency of Denny, as it unquestionably was, and that a competition had arisen between Denny and White as to which of them was entitled to commission,—in that case I cannot doubt but that Denny would be preferred.

For the reasons I have now stated it appears to me that the pursuer has failed

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to establish his claim, and that the interlocutor of the Sheriff should be recalled, and the defenders assoilzied.

LORD GIFFORD.—This is an action by a shipbroker in London against the owners and sellers of the steamship "Europe," to recover commission claimed by the pursuer on the price of the ship received by the defenders, the vendors.

The pursuer, Mr White, never was employed by the defenders, the owners of the ship, but it seems to be the custom that when a shipbroker is employed by a party who desires to purchase a ship, and where, under that employment, the shipbroker succeeds in finding a suitable vessel for his client, and where a purchase of it is concluded, the broker demands and receives his commission, not from his own client, the purchaser, but from the vendors of the ship to whom he has introduced the purchasers, this introduction or the shipbroker's agency having been the means of effecting the sale.

I cannot say that this custom, about which, however, there was no dispute at the bar, is one entirely to be approved and commended. I should think it would be much more healthy and wholesome in such trade that a broker should look for his remuneration to his own employer, and that his commission, at whatever rate it may be fixed, should be expressly charged as such, and not wrapped up and included, as seems to be the practice, in the price of the vessel. It is always best that everything should wear its own name, and that the truth of each transaction should distinctly appear. The custom in question practically leads to this, that the vendor simply adds to his minimum price the commission which he knows he will have to pay to the purchaser's broker, and possibly, if this is distinctly known and universally understood, it may not lead to any serious mischief, though I confess I could wish that the custom were otherwise.

In the present case, in Mr White's first letter to the owners of the "Europe," in which he informs them that Messrs Matheson and Company are desirous of purchasing a steamer, and that he has named the "Europe" as a likely ship, he concludes thus—"In the event of business, which I trust will result, please reserve my commission," that is, add to the nett price which you are willing to accept my commission, which we see otherwise was 2½ per cent.

So far there is no dispute between the parties, and if the "Europe" had been sold to the pursuer's clients, Messrs Matheson, in consequence of the pursuer's introduction, that is, in consequence of the pursuer having suggested the "Europe" to Messrs Matheson as a likely ship, it is not disputed that the defenders, the vendors of the "Europe," would have had to pay the pursuer his commission. And most justly so, for if the transaction had gone on in its expected course the vendors would have added to their own price, that is, to the nett price which they were to receive, 2½ per cent, for the very purpose of paying it over to the pursuer as the purchaser's broker.

But the real question in the present case is one of fact, Did the ultimate sale of the "Europe" by the defenders take place in consequence of the pursuer's introduction, that is, in consequence of the pursuer, as Messrs Matheson's broker, having introduced the defenders to them, or in consequence of the pursuer's having suggested the "Europe" as a ship likely to suit, or in consequence of anything whatever done by the pursuer as a shipbroker, or as an intermediary of any kind? To use the pursuer's own language in his very first letter, Did

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"business result" from the pursuer's brokerage, or from anything that the pursuer had done or might do, in which case only, as the pursuer himself says, the defenders are to reserve, that is, add on to their price the pursuer's commission. If the ultimate sale did not result from the pursuer's brokerage or agency, but was entirely and exclusively due to something else with which the pursuer had no concern whatever—if the pursuer's agency was absolutely terminated and at an end, it may be by the pursuer's own act, by his dissuading from the purchase and substituting some other vessel, if new negotiations had to be opened after a lapse of time and by another broker who took different views from the pursuer or gave different advice, and if the ultimate purchase resulted from a change of circumstances and a new intervention in no way attributable to the pursuer, if, in short, to use the words of Chief-Justice Erle, the pursuer is in no sense the *causa causans* of the sale, then whatever claim he may have against his own clients for abortive work done, it is difficult to see how he can have any claim upon the vendors who never employed him, who were not his clients, and who have taken nothing whatever—it may be only injury and prejudice—by his intervention.

Of course if there was anything like *mala fides* on the part of anybody, either vendor or purchaser, if there was any attempt to defeat or cut out the pursuer from a justly earned commission, if there were even grounds for suspecting collusion or the possibility that the parties were combining to throw over the pursuer, the case would be very different, but it was admitted on all hands that in the present case there was not the faintest colour for such an imputation—that all parties to the present suit have acted throughout in *optima fide* and with perfect honour and fairness, as indeed might be expected from their high standing and reputation, and whatever be the result of the pursuer's claim, whether he succeed or fail, it will not be on the ground of any unfairness or impropriety imputable to any of the parties.

Now, then, what resulted from the introduction effected by the pursuer, that is, from his introducing Messrs Matheson to the owners of the "Europe," and suggesting the "Europe" as likely to suit Messrs Mathesons' views? Particulars of the "Europe" were furnished by the pursuer, negotiations were opened, and some correspondence took place. A survey was resolved upon when the vessel should arrive at Antwerp, and apparently through the pursuer's arrangement a Captain Crockett was sent to Antwerp to survey and inspect the vessel. Captain Crockett reached Antwerp on 6th October 1873, and apparently made his inspection and report the same day. His report is No. 14/10 of process, 6th October 1873. The report gives various particulars, and apparently suggests various faults or defects of the "Europe," and he concludes in these words:—"Above all, judging from the state of her bottom, would have nothing to do with her." No doubt he adds "her boilers and engines are reported as very good," but these he had not inspected, or got inspected by any one, and I cannot help drawing the conclusion that he did not go on with such inspection because, in his opinion, the state of the vessel's bottom was conclusive against her. He "would have nothing to do with her." Captain Crockett's report was communicated to Messrs Matheson, and apparently through them to the pursuer, Mr White, and next day the pursuer writes to the defenders or their then authors (No. 8/2 of process),—"Dear Sirs—The inspector has seen 'Europe,' and does not write a good report of her bottom, so my friends must

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decline her. I regret this after all our negotiations and his making the journey to Antwerp."

Pausing here for a moment, I think nothing can be clearer that at this point the negotiation was, at least for the time, and I say no more at present, completely closed, and closed in perfect good faith. We have it under the pursuer's own hand—"my friends must decline" the vessel; and he gives the reason—the unfavourable report of the inspector. The matter is shut—the vessel won't suit—the Mathesons are to look elsewhere, and there, at least for the present, the matter closes. No doubt it might have been re-opened—the pursuer himself might have suggested that some farther inquiry should be made instead of acting at once on Captain Crockett's report, or the owners of the "Europe" might have remonstrated against Captain Crockett's report, or challenged its correctness, or tabled a counter report, or insisted that the ship's bottom was faultless, or in any other way continued, or even after a considerable interval resumed, the negotiations. If this had happened, or if anything approaching to this had happened, I am clear that the original introduction would still subsist, and if business ultimately resulted the pursuer's commission would be due.

Nothing whatever of this kind took place—the pursuer's own letter absolutely closed the negotiation. All parties acquiesced therein—nobody whispered that Captain Crockett might have been mistaken, and so far as Messrs Matheson were concerned the "Europe" passed out of their market. Their constituents in China might still require a vessel, but the "Europe" would not do—she had been tried and found wanting.

It was suggested that the "Europe" had been declined, not because she was unsuitable, but because the same day (7th October 1873) Messrs Matheson had got a telegram from China, dated 7th, which is read as instructions not to buy at all till further orders. We have not the letters referred to in the telegram, but I do not see any ground for the suggestion that this telegram was the true cause of the rejection of the "Europe." It certainly was not the assigned cause, which Mr White states quite expressly, and it is hardly suggested that Messrs Matheson would instruct their broker to give a reason different from the true one. It is not shewn that the private telegrams to Messrs Matheson were communicated to Mr White, at least at the time when he in the best of faith intimated the rejection of the "Europe," and its reason, to the defenders. In short, I hardly think the pursuer himself would deliberately suggest that the rejection was not a real and *bona fide* rejection, but only an ostensible and pretended one. One thing is clear—it was a perfectly clear and conclusive rejection so far as the defenders were concerned, and they acquiesced in it as such. They did not farther press, or press at all, the "Europe" on the attention of Messrs Matheson as proposed purchasers.

After this nothing whatever happened, so far as the "Europe" is concerned, till 13th January 1874, a period of upwards of three months. Of course the "Europe" was still in the market, and so far as those interested in her were concerned purchasers were being sought for, but the owners never thought of Messrs Matheson under the pursuer's introduction. Messrs Matheson had examined and finally rejected her, and her owners had never heard, and probably never thought, either of them or of the pursuer since that rejection. It is no doubt also true that the Chinese constituents of Messrs Matheson were still in want of steamers, and their wants had not yet been supplied, but of this the owners of the "Europe" knew nothing, and probably cared nothing, seeing that

the "Europe" would not do. The China company were looking after other sellers than the defenders, and the defenders must find other purchasers than Messrs Matheson, and so the matter stood for more than three months.

In the meantime, and in January 1874, the China company, instead of continuing to employ Messrs Matheson of London to find a ship by means of a broker (and the pursuer had been the broker whom Messrs Matheson of London had selected), send home from China their own agent, Captain Bolton, to buy or build steamers. The Shanghai letter, advising Captain Bolton's mission to Messrs Matheson (6th November 1873) bears:—"It will be of interest to you to know that Captain Bolton is at present here in communication with the manager of the Chinese company; and we think it likely that, in the course of a week or two, he will be authorised to proceed home with full powers to build or purchase, with your assistance, one or more boats, of such character as may be decided upon." * These were his powers, and he came to Messrs Matheson thus accredited. It is said Captain Bolton had no power to conclude a purchase, and that the expression "full powers" only meant that he was to inquire and assist Messrs Matheson, who after all were to be the only purchasers. I confess I can hardly read the expression "full powers to build or purchase" in so limited a sense, and I incline to think that the words "with your assistance" mean that Messrs Matheson, as the London correspondents of Messrs Jardine and Company of Shanghai, are to find the funds, while Captain Bolton, as the man of skill on whom Jardine and Company relied, is to choose, fix, and approve the vessel. But however this may be, Captain Bolton had certainly full powers by himself alone, and without the intervention of Messrs Matheson, to search for, discover, or find out suitable vessels, examine them, and ultimately approve them or select them as fit for his constituents' purposes, and accordingly he actually did so without the assistance or intervention of Messrs Matheson. No doubt he was in communication with Messrs Matheson, but it was not on their advice or instructions, but of his own accord, and acting for his Chinese constituents, that he came down to the Clyde in January to look for steamers, or, if he could not find them, to select builders to construct new ones.

Now, what resulted from Captain Bolton's search in the Clyde? It is not pretended that Captain Bolton was sent by the pursuer or had ever heard of him. It clearly appears from Captain Bolton's letters that before coming to the Clyde he had never heard of the "Europe," and I think it may be taken that he came down to the Clyde free and unfettered to choose a steamer wherever she might be found. In the course of his search Captain Bolton called, among others, upon Mr Denny, shipbroker, Dumbarton, not in virtue of any introduction from the pursuer or even the Messrs Matheson, but as appears from Captain Bolton's own letter of 6th November preceding, in consequence of instructions from Mr Tongking Sing of China, who, it appears, had also written to Mr Denny on the subject, and to whom, that is, to Tongking Sing, estimates were to be wired for decision. Captain Bolton's first meeting with Mr Denny was on 13th January 1874, when Mr Denny, in his capacity of shipbroker and as a skilled person acquainted with Clyde shipping, went into the matter and ascertained all Captain Bolton's requirements for second-hand ships. The result was that, after full communication and consultation, Mr Denny, the Dumbarton ship-

* This letter was followed by that of 13th November 1873, partially quoted in the narrative, p. 1012.

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broker, to use his own words, "stated to Captain Bolton that a ship had been placed in my hands for sale, which I considered in every way well adapted for the purpose. This ship I stated was the 'Europe,' belonging to Mories, Munro, and Company." Now, observe Denny was an independent shipbroker, who had never heard of the present pursuer in connection with the "Europe." Bolton was an accredited agent direct from China, with full powers to effect, or at least to negotiate, a purchase. In the ordinary course of business, and without the pursuer having anything whatever to do with it, Denny and Bolton came together. Denny is a shipbroker who has been directly employed by the owners of the "Europe" to try to sell their ship, and in ordinary circumstances if he sells her he will get his commission from his own clients, the present defenders. The seller of the ship always pays commission to the broker who effects or causes the sale. No doubt it is true that in the present case Denny happened to be a personal friend of the owners, and from considerations of friendship and a regard to the circumstances of the family of a deceased partner, who were owners of two-thirds, he had agreed to act gratuitously, that is, to waive his claim for commission against the vendors, in other words, to make them a present of his commission. But this does not in the least alter the case so far as regards the present pursuer. Denny in any question with the pursuer must be taken as an independent broker, earning and entitled to his commission, and it is very startling to be told, taking the facts even so far as I have now gone, that Denny will never be entitled to earn or to receive any commission even if he succeeds in selling the "Europe" to Captain Bolton acting for his Chinese constituents, because more than three months before the pursuer, Mr White, a broker 500 miles away, of whom he never heard, had named the "Europe" to Messrs Matheson, who, after a regular survey, had definitely and conclusively rejected her, of all which proceedings neither Captain Bolton nor Mr Denny knew anything whatever.

It is suggested that Mr Denny was not a broker, and had no power to sell without his constituents, the present defenders, and it is said that it does not appear when or how long before the 13th January the defenders had put the "Europe" "into Denny's hands for sale." But surely it cannot be doubted that Denny was acting purely and solely as a shipbroker, and as to his powers, why, Munro, the surviving partner of the defenders' firm, was specially brought to the consultations with Captain Bolton, and gave on the spot, if he had not done it before, full authority for the sale. If the present action had been at Denny's instance to get his commission from the defenders they could not for a moment have denied his authority. It can make no difference whatever that Denny, instead of charging commission in the ordinary way, is generously waiving it in favour of his personal friends. Nay, the circumstance tells the other way, for it is in evidence and undisputed in point of fact that the vendors in fixing the price had specially in view the fact that Denny was to charge no commission, and therefore that the price stipulated would not be subject to any deduction. In short, if Denny had charged commission the defenders, to use the pursuer's phrase, would have "reserved it," that is, they would have added it on, or as much of it as they could obtain, to the price demanded, or otherwise have declined to sell for a lesser sum.

The arrangement between Captain Bolton, Denny, and the defenders was of course conditional. The ship was at sea, and was to be inspected and surveyed on arrival. This was part of the bargain, and besides it had to be wired to

China for approval, but if everything was favourable the parties were agreed both as to price and subject, and this result, with all particulars, Captain Bolton announces to Messrs Matheson of London by his letter of that same evening (13th January 1874). It is only on receipt of this letter that an obstacle arises, for it is really an obstacle, and a very serious obstacle to the proposed sale. Messrs Matheson at once say to Captain Bolton—Why, this "Europe" that you have found out, and which you think so suitable and propose to buy, is the very vessel which we, acting on Captain Crockett's report, finally rejected more than three months ago. This will never do; we send you Captain Crockett's report. It is as if they had added—For any sake do not buy the "Europe." Of course this objection led to inquiries. Denny was consulted, and he said—I do not consider Captain Crockett an authority—I recommend a better survey from a more trustworthy person. Buy upon your own survey, and never mind Captain Crockett. And Denny succeeded in his view. He persuaded Captain Bolton and the Mathesons too to throw Captain Crockett's report overboard; to take a new and independent surveyor, and instead of following Captain Crockett's advice and have nothing to do with the "Europe," to buy her on the terms proposed at the meeting of 13th January, before Captain Crockett was heard of. And Mr Denny was successful in his efforts. He carried through the sale in spite of Captain Crockett, and notwithstanding the pursuer's declinature; for although it is perfectly true that the present pursuer was not to blame for Captain Crockett's unfavourable report, it is not the less true that he acted upon that report, and for himself and his constituents rejected the ship.

And now, when a new bargain is completed, with new and independent initiation, after new and independent negotiation through a new broker, and new surveyors, who have succeeded, it may be with difficulty, in overcoming the obstacles which the pursuer quite innocently, but not less really, was the means of interposing, when the pursuer's failure and resignation of the enterprise has been followed by a new inception and a successful completion of the enterprise by stronger hands and under better auspices, is it to be said that Denny, the successful negotiator, is to hand over his commission to the pursuer, of whom he never heard, and who did nothing but fail, and, however innocently or honourably, rear up an obstacle in Denny's way? I cannot help thinking this is the real question. Suppose the defenders had "reserved" and were ready to pay the commission, and that the pursuer and Denny were competing for it, the questions would be: By which of them was the sale brought about? Who was the efficient or real cause thereof? The answer to my mind is not doubtful. To Denny, and to Denny alone, of these competing brokers, is the sale due. To use the words of Chief-Justice Erle, Denny alone is the *causa causans* of the sale, and if I must give a name to the pursuer, it certainly would not be *causa causans*, but rather *impedimentum obstans*. If Denny chooses to hand over his commission as a present to his friends that is surely no reason for the pursuer claiming it, especially as the price has been fixed on the footing that Mr Denny would waive his commission. I am therefore for recalling the Sheriffs' judgments, and assoilzieing the defenders.

LORD JUSTICE-CLERK.—I differ from the judgment your Lordships propose, and I agree with the result arrived at by both the Sheriffs in the Court below. I attach more than usual weight to the views of these learned Judges in the present case, because it is one which depends entirely on mercantile custom and

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usages with which their position in a great commercial centre makes them necessarily familiar. I am also impressed by the evidence which has been led in regard to the understanding of merchants in this matter, which cannot be regarded as mere opinions by unskilled witnesses on matters of legal right, but is the indication and outcome of the custom on which alone the case depends, and which no man of sense in practical affairs would disregard. Still, I should not have thought it necessary to enter a formal dissent had I differed only on matters of fact or evidence. But I do not see my way to the result at which your Lordships have arrived without appearing to give my assent to some legal propositions which I think erroneous, and which may hereafter be misleading.

There lay at the root of much of the argument addressed to us, both in this case and in the former case of Moss v. Cunliffe and Dunlop,[1] a notion that a claim of this nature was not of a character legitimately professional, and that it ought to be judged of strictly, if not viewed with suspicion. There also seemed to prevail an idea that if such a claim could be put forward by a broker a similar demand could be made by any friend or acquaintance or stranger who might happen to give useful information on similar topics. But such views proceed on a want of familiarity with the kind of transaction in hand. The pursuer follows an occupation which has sprung up from the exigencies of our immense commercial concerns. He makes it his business to know, in the shipbuilding trade, which of the builders or merchants are desirous of finding customers or purchasers, and which are desirous of purchasing or giving orders. These, of course, are constantly varying, and it is found convenient, for those who are largely occupied, to have recourse to such middlemen, instead of looking out for themselves. The sole business of such brokers is to find a possible customer for the seller, and a possible seller for the merchant, just as a man who keeps a register for servants informs his customers who they are who wish to be engaged, and who the employers are who are anxious to engage. With the after negotiations and contract the broker has no concern, nor has he any responsibility in regard to them. If the principals come to one, and business ensues, he has his commission from the seller on the first transaction, if there be no special transaction in view, on the special transaction, if there be one in view. If nothing ensues, he has no claim. In all this there is nothing but an ordinary contract of employment for a particular service, resting, like a great many such contracts, on a well-defined usage, and limited and qualified by the custom on which it rests.

A great authority, Chief-Justice Erle, whom every jurist must respect, said in one of the cases in a claim of this kind,[2] that the broker's introduction must be the *causa causans* of the ultimate transaction. I agree that there must be the relation of antecedent and consequent between them, and that an incidental or indirect result will not be sufficient. But this remark has, I think, been misapplied. In accurate language an introduction of one person to another with a view to a contract never can be said to be the *causa causans* of the contract. Its causes lie elsewhere. It is enough in such a claim that the introduction produces negotiation, and that negotiation is followed by a concluded contract.

All this is not directly disputed; but the main consideration which, I think, has been rather lost sight of in the present case, and on which my dissent pro-

[1] March 20, 1875, *ante*, vol. ii. p. 657.
[2] Green v. Bartlett, May 30, 1863, 32 L. J. C. P. 261, 14 Scott's C. B. Rep. 681.

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ceeds, is, that the broker undertakes introduction only, not negotiation. When the principals, or those who act for them, are once brought together, the commission is earned if business ensues. The negotiation may undergo numberless vicissitudes, and may be terminated and resumed many times, as such negotiations frequently are, without in any degree affecting the claim of the broker, if the principals come to one at last. The intending purchaser may take all manner of opinions as to the merits of the vessel recommended to him, and the intending seller may inquire as to the price he should demand, or the solvency of the customer, or any other particulars. The seller may decline the transaction to-day, because the money offered is too little, but he may take it to-morrow. Captain Crockett may advise the purchaser one day that the vessel is unsuitable, and the purchaser may terminate the negotiation; but the next day Mr Denny may tell him that the vessel is a good one, and he may on that ground resume the negotiation. The purchaser may decline the bargain through Mr Matheson in October; he may resume it through Captain Bolton in January. All these things, and their causes, proximate or remote, do not affect the broker's claim in any way. His part was done when he informed the parties of their respective desires; and the only further question in which he is interested is, does the negotiation ultimately terminate in a purchase.

Now, how does the present case stand? Shortly stated, thus: Jardine, Matheson, and Company of Shanghai wanted a steamer for a Chinese constituent, and authorised their correspondents, Matheson and Company of London, to purchase one. Matheson and Company, in September 1873, applied to the pursuer, White, a London broker, and he informed the defenders, Munro and Company, that he knew a customer who might purchase their steamer "Europe," and the parties accordingly commenced a negotiation for a purchase. In January 1874 the negotiation terminated in a sale, and Jardine, Matheson, and Company purchased through Matheson and Company of London this same steamer "Europe" from Munro and Company for their Chinese constituent. The pursuer applied for his commission from the seller, and was refused, on the ground that although the negotiation had terminated in a sale, and both parties had received what they wanted, yet at one time the negotiation had been broken off, because Captain Crockett thought and reported unfavourably of the vessel, and that it was only afterwards resumed when it was found that Mr Denny of Dumbarton thought favourably of it. I am at a loss to see what relevancy there is in this statement. That the negotiation was commenced, broken off, resumed, and carried to a conclusion between the same parties is certain. The grounds which induced the parties to alter their minds can be of no consequence. The only thing of importance is the result.

In this view the episode of Captain Bolton's mission, and his communications with the defenders and Denny, are immaterial. Bolton was only, as Matheson was, the representative of the original party to the negotiation, Jardine, Matheson, and Company of Shanghai, and his part in the transaction only explains how it came that the negotiation which was broken off in October was resumed in January. It is said, perhaps truly, that when Bolton first met Munro and Denny at Dumbarton he knew nothing of the former proceedings in regard to this vessel. Munro certainly took care not to mention them, and what Bolton's own knowledge was we cannot tell, because he is not called, neither is his absence accounted for. But it seems of no moment if it be so, because the

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parties were precisely the same, the subject of negotiation the same, and the object of it the same; and when this was discovered Munro and Jardine's house stood in relation to each other, as regarded this transaction, just as they had done in October previously.

All this seems irrelevant to the main question, and I should have thought it so even if the pursuer had taken no part in any of the negotiations for the purchase, which, as I have said, did not enter into the service by which his commission was earned. In point of fact he did much more. He employed Crockett to report on the vessel, and communicated the result to the defender. But these things he did at Matheson's desire, on account of Jardine's house. It was no part of his action as broker, and can have no more effect on his claim than if Jardine had done them himself. It is not of much consequence to the case, but it is plain that on the 7th of October Matheson's mandate was recalled or suspended, and that was probably not without its influence in stopping the negotiation with Munro at that time. But when Matheson heard from Bolton that he was again on the track of the "Europe," he did what any sensible man would have done in the circumstances, and sent Bolton at once to White, the broker. The pursuer accordingly took the matter up where he had left it three months before. He had all the information regarding the former inquiry; he had over eight meetings on the subject with Bolton; and at last it was resolved to have the vessel into a graving dock, and have her thoroughly examined. The result of that inquiry was that on the 14th March 1874 Matheson of London wrote the final offer to purchase the vessel to Munro and Company. There was no bargain, nor was there the semblance of a bargain until then. Munro was as free to decline the offer as Matheson was to make it. Munro accepted it; and thus the negotiation terminated in a sale betwixt Munro of Greenock and Jardine's house of Shanghai, of the vessel in regard to which the introduction which commenced the negotiation had been given. I think the pursuer has well earned his commission, and that Munro had no more reason for refusing it in January 1875 than he would have had in October 1874.

THIS interlocutor was pronounced:—"Find in point of fact that the sale which was ultimately effected by the defenders and appellants of the steamship 'Europe' was not a consequence of the introduction by the pursuer and respondent or of anything done by him: Find that the pursuer's introduction and agency did not conduce to the ultimate sale, as libelled by the pursuer; and find in point of law that the pursuer is not entitled to charge commission against the defenders: Therefore sustain the appeal, recall the judgment appealed against, and assoilzie the defenders from the conclusions of the summons, and decern: Find the defenders entitled to expenses in both Courts," &c.

WEBSTER & WILL, S.S.C.—RONALD, RITCHIE, & ELLIS, W.S.—Agents.

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BARONESS GRAY, Pursuer.—*D.-F. Watson—Johnstone.*
SIR JOHN S. RICHARDSON, Bart., Defender.—*Balfour—J. P. B. Robertson.*
REV. ARCHIBALD FLEMING and MRS FLEMING, Defenders.—*Lee—Gloag—Asher.*

Property—Title to Lands and Fishings—Runrig and Rundale—Kavels.—Circumstances in which *held*—1st, That the title of two parties, each to one-half of an estate held in kavels by way of runrig or rundale, was not *pro indiviso* but separate and exclusive property, and continued to be so after the kavels were massed together and the whole divided into two continuous portions by decreet-arbitral; 2d, That the title to the salmon and other fishings *ex adverso* of what had been the respective kavels of the two proprietors was separate and exclusive, and not *pro indiviso* subsequent to the date of the decreet-arbitral, but opinions equally divided as to whether the title to the fishings had ever been otherwise than separate and exclusive.

In 1655 A stood vested under the Crown in the whole lands of Inchyra, situated on the north bank of the Tay, with the salmon and other fishings belonging thereto. In that year A disponed to the predecessor of the pursuer, B, "the just and equal sunny half" of these lands as then possessed by two parties named, "together with the just and equal half of the salmon-fishings of the said lands of Inchyra;" and to the predecessor of the defenders, C and D, A disponed the other half of the same lands, described as consisting of two quarters, and possessed by himself and another party named, "with the just and equal half of the salmon-fishings and other fishings of the said lands of Inchyra." The description of each half was continued in the same terms throughout the subsequent titles of the respective parties, and so appeared in their existing investitures.

The lands of Inchyra consisted of between 400 and 500 Scotch acres, parcelled out into upwards of 100 lots or portions called kavels, of different sizes, some 35 acres, some 10, but the greater part not exceeding 4 or 5 acres, and in this form a number of the kavels reached down to the banks of the river. In place of each of A's two disponees getting one continuous half of the estate the kavels were alloted, one to each alternately, in regular succession, by way of runrig or rundale, and continued to be so possessed till 1795, when, under a joint submission, a decreet-arbitral was obtained, massing all the kavels together and dividing the whole into two continuous halves, but without any change being made on the terms of the feudal titles.

The submission on which this decreet-arbitral proceeded, and likewise the decreet-arbitral itself, reserved "to both parties the right of salmon-fishings on the river Tay respectively belonging to them according to their present boundaries," which were not to be affected by any division of the lands, but the arbiters were empowered to put in march-stones to mark these boundaries, which they did.

These fishings were fourteen or fifteen in number. There had never been any *pro indiviso* possession either of the lands or fishings (although the peculiar position of one of the fishings had necessitated some peculiarity in its occupancy). Each proprietor had always exercised the exclusive right of fishing *ex adverso* of his own kavels, and continued to do so as formerly between the date of the decreet-arbitral of 1795 and the date of raising the action in 1874.

Held (unanimously, differing from the Lord Ordinary), that the title to the lands was not a *pro indiviso* title, but that each of the parties had all along a sole and separate title to one-half of the lands.

Held (also unanimously, and differing from the Lord Ordinary) that the proprietors of the different kavels had a separate and exclusive right to the fishings *ex adverso* of their respective kavels (and consequently that B was entitled to the fishing more immediately in dispute)—Lord Deas and Lord Mure being of opinion that the dispositions of 1655, construed by the possession which had followed on them, constituted, *ab origine*, a sole and exclusive title in each proprietor to the fishings *ex adverso* of his own kavels; and the Lord

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President and Lord Ardmillan being of opinion that the title to the fishings had been originally *pro indiviso*, but that it was to be presumed that the parties had agreed when the decreet-arbitral was pronounced to treat the title in future as separate and exclusive.

Runrig and Rundale—Property, division of.—Observations (*per* Lord Deas) explanatory of the law and practice of dividing an estate by way of runrig or rundale into two halves, called the sunny half and the shady half.

Salmon-Fishings—Crown grant.—A grant of salmon-fishings having been followed by possession so far as the fishings were available for the time, and the Crown having had no adverse possession, *held* that the Crown could not, *cum effectu*, make a grant to a different party of part of the fishings within the bounds of the original grant, although that part had not hitherto been fished, and had only now become available for being so.

1ST DIVISION. Ld. Mackenzie. B.

THIS case involved questions of great interest and importance to the law and practice of feudal conveyancing, as well as to the parties, but the material facts are so fully developed in the Lord Ordinary's note and the opinions of the Judges, particularly in the opinion delivered by Lord Deas, that a short introductory statement will suffice to make the questions discussed and decided intelligible.

In and prior to 1655 Sir Alexander Blair stood vested under the Crown in all and whole the lands of Inchyra, and the miln and miln lands thereof, with the salmon and other fishings of the said lands of Inchyra, houses, buildings, &c.

On 16th June 1655 Sir Alexander sold and disponed to William Blair (the predecessor of the pursuer, Lady Gray), "All and Haill the just and equal sunie half of all and haill the town and lands of Inchriff, now commonly called Inchyra, with houses, biggings," &c., "as the same is presentlie occupyed and possessed by Andro Lyell and Allan Peat, with the just and equall halff of the miln of the said lands of Inchyra, miln lands, multures, and sequels thereof, together with the just and equal halff of the salmond-fishinges and uthers fishinges of the saidis landes of Inchyra, and all and haill the passage upone the water of Tay called the ferry, with the ferry boates, privileges, and commodities thereof."

On 2d August, same year, Sir Alexander sold and disponed the other half of the lands of Inchyra to his brother, Andrew Blair, and his wife, and the heirs-male of their marriage (the predecessors of the defenders Mr and Mrs Fleming) under the following description, viz.—"All and haill that quarter or fourt part of the towne and lands of Inchyra, with the houses, biggings," &c., "last occupyet be James Blair and now by myself," and sicklike "all and haill the other quarter or fourt part of all and haill the saidis towne and lands of Inchyra, with houses, biggings, pendicles, and pertinents thereof, presently possessed by Gilbert Lyell, my tennent, with the just and equal half of the mylne of Inchyra, mylne lands, multures, and sequels of the samen used and wont, with the just and equal half of the salmond-fishings and other fishings of the saidis lands of Inchyra, and all and haill that malt barn, keill, and coubill, presentlie possessed by the said Gilbert Lyell, and all and haill these houses and yards of Inchyra, presently possessed by Francis Jack."

The description of each half remained the same in the existing investiture of each of the parties respectively as in their respective dispositions of 1655, and had been so throughout the progress of each from that date downwards—the half belonging to the Flemings being, however, in the interval erected into a barony called the barony of Inchyra, by charter in favour of their predecessor, Andrew Blair, dated 3d March 1662, and the half belonging to Lady Gray being incorporated into the barony of

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Kinfauns by charter in favour of her predecessor, Anne Blair, otherwise Carnegie, dated 28th February 1673. In consequence, apparently, of these erections the name of Inchyra came to be popularly appropriated to the Flemings' half of the lands, although remaining applicable to the whole as formerly on the face of the titles.

It appeared from a reported case between the then proprietors of the two halves of Inchyra, decided on 17th January 1782 (M. 14,151), that prior to that time the lands of Inchyra, which consisted of from 400 to 500 Scots acres, had been entirely parcelled out into lots or portions called kavels, varying in size from under 5 acres to 35 acres, and that each of the halves, in place of being continuous, was made up of an equal number of these kavels—a kavel belonging to the one party always alternating with a kavel belonging to the other party, after the fashion of runrig or rundale. The action, decided in 1782, bore accordingly to be founded on the statute 1695, c. 23, "anent lands lying runrig," the purpose of it being to have the whole kavels massed together and divided into two continuous portions. But the action failed in its object, the Court having held that the statute did not apply to fields or kavels of greater size than 4 acres.

It further appeared from other documents that long before the raising of that action the possession of the parties of their respective halves, in the form of kavels, had been the same as it was at the date of the action, and there seemed to be no room to doubt that it had also been so backwards to the date of the two dispositions granted by Sir Alexander Blair in favour of their respective predecessors in 1655.

Thus stood matters when, in 1794, a submission (following upon a previous contract) was entered into between the then proprietors of the two halves, the object of which (similar to that of the action on the statute 1695, c. 23) was to have the kavels massed together and the whole divided into two continuous portions, by a line running from the Tay to the north boundary of the lands, "reserving always" (as the submission bore) "to both parties the right of the salmon-fishings in the river Tay respectively belonging to them, according to their present boundaries, and which boundaries are not to be affected by any division that may be made in consequence hereof, but that the said arbiters, after such division, shall have power to put in march-stones in the ground belonging to either party to ascertain the boundaries of the salmon-fishings belonging to the parties respectively, which are not to be affected by the said division."

The arbiters accordingly pronounced a decreet-arbitral, dated the 2d and recorded in the Sheriff Court books of Perth 7th November 1795, dividing the whole lands into two portions, and allocating the miln, miln-lands, ferry-boat, and houses, all in manner authorised by the submission. The decreet-arbitral farther bore—"We reserve to the parties submitters the salmon-fishings on the river Tay respectively belonging to them according to their present boundaries, wherein we have infixed march-stones in the ground; and we also reserve to both parties access to their different fishings, and to draw and dry their nets, according to use and wont." The arbiters then found that certain of the fishings, which they specified, belonged to the one party, and certain others to the other party (being those *ex adverso* of the respective kavels which had belonged to each), and they described the march-stones which they had infixed to mark the boundaries of these fishings; and as regarded the fishing called the Hurle Carle (the nature and position of which was peculiar), they found it to be the joint property of the two parties. These findings were followed by this declaration—"And, in terms of the said submission we do hereby declare

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that the said fishings shall be enjoyed and possessed according to the rights, custom, and usages heretofore observed by the said parties, their authors and predecessors."

The fishings thus held to belong to the respective parties had been all along possessed by each of them respectively. It was not alleged that any of these fishings, except, it might be, the Hurle Carle, had at any time between 1655 and 1795 been possessed as *pro indiviso* property, nor were any of them (with the said exception) so possessed between 1795 and the date of the present action. The possession, so far as the right of fishing was exercised at all, had always been exclusive, each possessing the fishings *ex adverso* of his own kavels. But it had at different periods been contended, sometimes by the one party and sometimes by the other, according to the views they took of their interests for the time being, that this separate and exclusive possession was matter of implied arrangement for occupancy merely, terminable at the pleasure of either party; and this was the view now taken up at the bar by Mr and Mrs Fleming, although they at the same time maintained (Lady Gray said inconsistently) their exclusive right to the fishings they had themselves possessed, and particularly to the fishing called the Hen fishing, the bounds of which they alleged to have been extended for some distance eastward, upon the Pow Meadow frontage, by prescriptive possession. But upon this alleged extension of boundary by prescriptive possession the Judges were unanimous that the proof was insufficient, and it is unnecessary here to go into its details.

The immediate subject of the present action was the fishing situated *ex adverso* of the kavel called Meadowpows, or Powlands of Inchyra. That kavel had always been treated as the exclusive property of Lady Gray and her predecessors, and her present action of declarator was brought to vindicate her exclusive right to the fishing *ex adverso* thereof. Mr and Mrs Fleming claimed to be *pro indiviso* proprietors of that fishing along with Lady Gray, in so far as they had not prescribed an exclusive right to it in connection with their Hen fishing; and, as the fishings *ex adverso* of all the other kavels (excepting, perhaps, the Hurle Carle fishing), stood in this respect in precisely the same position, the dispute between Lady Gray and Mr and Mrs Fleming necessarily involved the twofold inquiry—1st, whether the kavels had been held by separate or by *pro indiviso* title; and 2d, whether the fishings *ex adverso* of these kavels were held by separate or by *pro indiviso* titles.

Having thus explained the general nature of the case as between Lady Gray on the one hand and Mr and Mrs Fleming on the other, a few additional sentences will be sufficient to explain the position of Sir John Richardson.

By means of a submission entered into in 1744 between the Lady Gray of that day and Sir John's predecessor, Mr Hay of Pitfour, and decreet-arbitral thereon, dated 8th and 11th April 1745, an excambion had been effected, by which Mr Hay acquired from Lady Gray the kavel called the Pow Meadow or Powlands of Inchyra, assumed to have belonged to her in property, and she acquired, on the other hand, certain portions of the lands of Cairnie belonging to Mr Hay, the remainder of which, along with the lands of Pitfour, now belonged to Sir John Richardson as in place of Mr Hay. No disposition was executed of the kavel called Meadowpows, but the ground has been ever since dealt with as part and pertinent of the lands of Cairnie or Pitfour under the decreet-arbitral. The submission and decreet-arbitral did not, however, bear to give to Mr Hay any right to the fishings *ex adverso* of the kavel called Meadowpows, but the ground merely.

The claim made by Sir John Richardson to the Meadowpows fishing,

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as proprietor of the Cairnie Island and the lands of Cairnie, was altogether of a special nature, as will be seen from the note of the Lord Ordinary. It had to some extent been made the subject of a previous litigation in this Court and in the House of Lords, but it raised no question of general interest.

Sir John, however, claimed the Meadowpows fishing, in virtue (*separatim*) of a crown-grant obtained by him in 1873, whereby, in consideration of £100 sterling paid to the Commissioners of Woods and Forests, these Commissioners, on behalf of Her Majesty, sold, alienated, and disponed to Sir John and his heirs and successors whomsoever, "All and Whole the right and interest of Her Majesty in the salmon-fishings or salmon-fishery in the river Tay *ex adverso* of certain lands now belonging to him," delineated on a plan annexed and signed as relative thereto,—the lands so delineated being the Meadowpows or Powlands, which Sir John had acquired by excambion under the foresaid decreet-arbitral,—"Declaring that these presents are granted under the express stipulation that the conveyance hereby made shall in no way prejudice the right of any person or persons, other than the said disponee, who may claim right to the salmon-fishing hereby disponed, provided such person or persons shall produce a valid and effectual title thereto completed anterior to the granting of these presents, with entry at the date hereof." The warrandice in the deed was from future facts and deeds only.

Although "the lowest or eastmost fishing," being that *ex adverso* of the Meadowpows, had been found by the decreet-arbitral of 1795 to belong to Lord Gray in right of his wife, Sir John Richardson had been no party to the submission on which that decreet-arbitral proceeded, and it did not appear and was not averred that either Lady Gray or any other party had, until quite recently before the present process was instituted, exercised the right of fishing *ex adverso* of the Meadowpows, except in so far as Mr and Mrs Fleming were alleged to have encroached upon it in connection with their Hen fishing. The kavel called the Meadowpows had the largest frontage of any to the river, extending, as it did, to some 260 yards or thereby, and the fishing was considered to have now, from various causes, become of considerable value. Sir John Richardson of course founded on this want of possession of the fishing on the part of Lady Gray as making way for the operation of his crown-grant; but, on the other hand, Lady Gray and her predecessors had exercised the right of fishing contained in their titles by fishing *ex adverso* of their other kavels, and the Crown had never had any adverse possession.

The Lord Ordinary (Mackenzie) on 5th January 1875 pronounced the following interlocutor:—"Finds that the pursuer is infeft in All and Whole the just and equal sunny half of All and Whole the town and lands of Inchriff, now commonly called Inchyra, and pertinents, with the just and equal half of the salmon-fishings of the said lands of Inchyra, all which lands, fishings, and others were created into one whole and free barony, called the barony of Kinfauns, conform to charter of resignation under the Great Seal in favour of Mrs Anne Blair, dated 28th February 1673: Finds that the defender, Mrs Isabella Rattray or Fleming, is infeft in All and Whole one equal half of All and Sundry the said town and lands of Inchyra and pertinents, with the just and equal half of the salmon-fishings and other fishings of the said lands of Inchyra, which lands, fishings, and others were united into one whole and free barony called the barony of Inchyra, conform to charter under the Great Seal in favour of Alexander Blair, dated 3d May 1662: Finds that the said salmon-fishings of the lands of Inchyra, in which the pursuer, and the defender Mrs Isabella Rattray or Fleming, are infeft, include the salmon-fishings in the Tay *ex adverso* of that portion of the estate of Pitfour and others now be-

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longing to the defender, Sir John Stewart Richardson, and formerly called the Meadowpows or Powlands of Inchyra, as far to the east of the march-ditch running northward from the river Tay, between that part of the lands of Inchyra now belonging to the defender, Mrs Isabella Rattray or Fleming, and the estate of Pitfour, as a line drawn to the centre of the river Tay, through the three stones situated on the said portion of the estate of Pitfour and others, formerly called Meadowpows or Powlands of Inchyra, and marked, the said three stones, A B C on the copy of the Ordnance Survey Plan, No. 79 of process: Assoilzies the defender, Mrs Isabella Rattray or Fleming, and the Reverend Archibald Fleming, her husband, from the conclusions of the summons as laid, and decerns, reserving right to the pursuer to institute, with reference to the said salmon-fishings of Inchyra, such other action or actions as she may be advised, and to the defender, Mrs Fleming, and her husband, their defences thereto as accords: Finds that the defender, Sir John Stewart Richardson, has not proved that he, his predecessors and authors, proprietors of the lands of Cairnie, and of the salmon and other fishings in the water of Tay belonging to the said lands, possessed the salmon-fishings *ex adverso* of that portion of ground now part of the estate of Pitfour, and formerly called the Meadowpows or Powlands of Inchyra, situated between the said march-ditch and the stones A B C above mentioned, for forty years prior to the institution of the present action, or for any consecutive period of forty years, whereby their title to the salmon-fishings attached to their lands and estate of Cairnie can be made applicable to the said salmon-fishings: Finds that the dispositions obtained by the defender, Sir John Stewart Richardson, from the Commissioners of Her Majesty's Woods, Forests, and Land Revenues, dated 28th July and 8th August 1873, do not confer upon him any right to the salmon-fishings in the Tay *ex adverso* of the portion of ground above mentioned, in respect that the pursuer, and the defender Mrs Isabella Rattray or Fleming, have a valid and effectual title thereto, completed anterior to the granting of the said dispositions: Finds and declares that the defender, Sir John Stewart Richardson, has no right of salmon-fishing in the river Tay *ex adverso* of the said portion of ground, and that he is not entitled to fish for salmon or fish of the salmon kind in any part of the said river *ex adverso* of the said portion of ground, and interdicts, prohibits, and discharges the defender, Sir John Stewart Richardson, from fishing for salmon or fish of the salmon kind in any manner of way *ex adverso* of the said portion of ground: Finds that the defender, Sir John Stewart Richardson, has right to the salmon-fishings in the Tay situated *ex adverso* of his property as far west or up the Tay as the line drawn to the centre of the river through the three stones A B C above mentioned, and decerns; and appoints the cause to be put to the motion-roll, with a view to the disposal of the question of expenses."*

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* "NOTE.—The question raised in the present action is as to the right to the salmon-fishings in the Tay *ex adverso* of that piece of ground now part of the estate of Pitfour, but formerly part of Inchyra, and called the Meadowpows or Powlands of Inchyra, which is situated immediately to the east of the march-ditch running northwards from the Tay, and separating the lands of Inchyra from the estate of Pitfour. The pursuer, who is proprietor of one-half of Inchyra and of one-half of the salmon-fishings thereof, claims the sole and exclusive right to the salmon-fishings in the Tay *ex adverso* of that piece of ground, or at all events *ex adverso* of the westmost portion of said piece of ground, extending 120 yards or thereby eastward of the said march-ditch; that is, as far down the river as the three stones marked A B C on the copy plan, No. 79 of process. On that

Lady Gray reclaimed, and the case was heard at great length on different days in October and November 1875, and many additional titles

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footing she has raised the present action of declarator and interdict against Mrs Fleming, proprietrix of the other half of Inchyra, and her husband, and also against Sir John Stewart Richardson, proprietor of the adjoining estate of Pitfour. The defenders, Mrs Fleming and her husband, also claim the sole and exclusive right to these salmon-fishings, as far down as the said three stones A B C, and Sir John Richardson claims the whole of these fishings in respect of his title to the lands of Cairnie and others, part of Pitfour, and of prescriptive possession following thereon, and in respect also of two dispositions obtained by him from the Commissioners of Her Majesty's Woods, Forests, and Lands Revenues in 1873.

"The Lord Ordinary is of opinion that the pursuer has failed to instruct any right to the salmon-fishings to the east of the three stones A B C.

"In regard to the salmon-fishings *ex adverso* of that part of the Meadowpows or Powlands between the march-ditch and the said three stones, it is necessary to notice the state of the title and the acts of the predecessors of the parties.

"Previous to the year 1744 the predecessors and authors of the pursuer, Lady Gray, and of Mrs Fleming, were each infeft under titles flowing from the Crown in one-half *pro indiviso* of the lands of Inchyra, and in one-half *pro indiviso* of the salmon-fishings of these lands. These lands were then possessed by them and their predecessors in runkavels, or by separate glebes. The eastmost kavel of Inchyra, being the Meadowpows or Powlands, was then possessed by Lady Gray, and the adjoining kavel on the west was possessed by Alexander Blair, proprietor of the other half of Inchyra. The lands of Cairnie, part of the estate of Pitfour, was situated immediately to the east of the Meadowpows or Powlands of Inchyra. Lady Gray was also proprietrix of certain lands called the Prior Lands, which formed no part of the *pro indiviso* lands of Inchyra, but were a separate estate. In the year 1744 Lady Gray and her husband, and Mr Hay of Pitfour, entered into a submission, which, on the narrative that there are several pieces of the lands of Cairnie lying among the Prior Lands and Powlands of Inchyra, and several pieces of the latter lands lying amongst the former, provided for the adjustment of the march between these lands by the excambion of portions of the interspersed pieces of ground. In 1745 the arbiters adjusted the march, by their decreet-arbitral, from the mill of Cairnie down to the Tay, and they gave off to Mr Hay of Pitfour the Meadowpows or Powlands then possessed by Lady Gray, and appointed march-stones with the capital letters I, on the west side of each stone, and P on the east side, to be set up in the march-baulk between the lands, that is, the kavel on the west belonging to Mr Alexander Blair of Inchyra and the Meadowpows or Powlands. The arbiters also, by their decreet-arbitral, adjudged the pieces of ground which previously belonged to Lady Gray, lying on the east and north sides of the march so fixed by them, to belong to Mr Hay, his heirs and successors, as part and pertinent of their lands of Cairnie in all time coming. No title was ever expede to the Meadowpows, and that piece of ground was thereafter held under the decreet-arbitral as a pertinent of the lands of Cairnie.

"The said submission did not include the Inchyra salmon-fishings situated *ex adverso* of the Meadowpows. Accordingly, the decreet-arbitral did not deal with these fishings in any way, and they remained the property of the *pro indiviso* proprietors of the lands of Inchyra and of the fishings thereof. The Meadowpows or Powlands had a frontage to the Tay, as is proved by the old estate plan of Pitfour, No. 81 of process, of about 260 yards.

"The salmon-fishings of Inchyra were possessed by each of the two *pro indiviso* proprietors opposite to the kavels respectively held by them until the year 1756, when Lady Gray and her husband Lord Gray, raised a summons of declarator in the Court of Session, concluding that they and the Misses Blair, the other proprietors *pro indiviso* of Inchyra, had no exclusive right to any particular fishings, and that these other proprietors should be ordained to desist from appropriating to themselves any particular fishings of the lands of Inchyra.

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and productions were from time to time desiderated by the Judges and obtained. Great research was made, but it was not found practicable to

"This process was submitted to the Lord President and to Lord Prestongrange as arbiters, with whom various written pleadings were lodged by the parties. In the first of these pleadings, being a memorial for the Misses Blair, in 1756, the various fishings are mentioned, from the lands of Ribney on the west to the lands of Pitfour on the east. In this memorial the Misses Blair state that to the east of a kavel of Lady Gray and her fishing opposite thereto, called the Lady's Glove, there 'lyes a kavel belonging to the respondents (Misses Blair), and opposite thereto there's a fishing called the Laying Hen, and next thereto lyes a kavel the eastmost part of the lands of Inchyra, adjoining to the lands and estate of Mr Hay of Pitfour, which sometime belonged to Lady Gray, and was the largest kavel on the river of any belonging to the lands of Inchyra, and was some years ago sold off and disponed by her to the deceased Mr Hay of Pitfour in excambion for the piece of land adjoining to the lands called the Prior Lands, belonging to the Lady Gray.'

"After thus stating the situation of the lands, the Misses Blair maintained, in defence to Lady Gray's process, 'that as the claimants have some years ago disponed the largest and broadest kavel of the whole lands to Hay of Pitfour, with the water adjoining thereto, the respondents therefore humbly think that by such alienation the claimants can't now demand any share of the respondent's fishings, because they have sold off a considerable part of their own, and so are not capable, on their part, of making ane equall division; and the respondents observe this the rather because a most commodious and convenient fishing, it's thought, might have been, and is now, actually made opposite to that kavel of land which was disponed by the claimants to Hay of Pitfour.' With reference to this defence, Lady Gray stated, in a memorial lodged for her in 1757, 'that she does acknowledge that she did excamb some part of her eastmost kavel of the lands of Inchyra with Mr Hay of Pitfour, and that this excambion was settled by a submission and decreet-arbitral, an extract whereof is herewith produced to the honourable arbiters, from which it will appear that the claimant gave to Pitfour no right of fishing opposite to that part of the lands given to him, and if there can be any fishing opposite to these lands the same does still belong to the heritors of Inchyra; and it is a certain fact that Mr Hay of Pitfour has not extended his fishing opposite to the lands of Inchyra farther than he was in right or in use to do before that excambion.'

"The arbiters issued a scroll decreet-arbitral in 1757, but there is no evidence that any decreet-arbitral was ever executed. Various pleadings were thereafter lodged by the parties in 1758, in one of which the Misses Blair claimed that the fishing called Hurl Carle should be possessed in common, and in another of which Lady Gray maintained that if the Misses Blair should still insist upon this fishing being common, she and Lord Gray must 'adhere to their first claim, viz., that the whole fishings be in common, and that each party draw their equall shares of the profites thereof, in terms of their rights and infeftments.' In a subsequent pleading the Misses Blair maintained that the Hurle Carle fishing should continue to be possessed as joint property, or in commonty, by the parties, 'in the same way and manner as they have been possesst since the said fishings were made out.' This the parties seem to have done down to the year 1794, when a submission was entered into between Lady Gray and Mr Anderson of Inchyra for the division of the lands of Inchyra, but not of the fishings.

"That submission of 1794 did not embrace the salmon-fishings of the lands, but expressly reserved the same to the parties respectively, according to the then existing boundaries; but power was given to the arbiters to define the fishing by putting in march-stones. This the arbiters accordingly did. By their decreet-arbitral, dated in 1795, they found 'that the lowest or eastmost fishings belongs to Lord Gray, and is altogether opposite to the lands of Pitfour, being bounded on the west by the old march-stone between the lands of Pitfour and Inchyra, which we ordered to be marked No. 1.;' that the several fishings

obtain any earlier deed or title than the crown-charter in favour of Sir Thomas Blair of July 1647, followed by the two deeds of 1655. It did between the stones No. 1 and No. 2, and the other stones therein specified and numbered, being seven in all, did all belong to Mr Anderson; that the several fishings between the stones No. 2 and No. 3, and the other stones therein specified, 'being also seven in number (besides the fishing opposite to the estate of Pitfour), do all belong to Lord Gray; and that the fishing between the stones Nos. 5 and 6, called Hurle Carle, is the joint property of Lord Gray and Mr Anderson.'

"In making the division of the lands of Inchyra contained in this decreet-arbitral of 1795 the Lord Ordinary thinks that the arbiters must have been fully aware that the Meadowpows was the eastmost kavel of the lands of Inchyra, and that they had been given in excambion by Lady Gray to Mr Hay of Pitfour, but that the salmon-fishing had not been excambed, and that they also must have taken that kavel into computation in effecting the division of the lands, because they dealt with the fishing *ex adverso* thereof as then forming part of the *pro indiviso* salmon-fishings of Inchyra. They found that the lowest or eastmost fishing belonging to Lady Gray was bounded on the west by the old march-stone between the lands of Pitfour and Inchyra, which they ordered to be marked No. 1. The boundary between the kavel belonging to Alexander Blair of Inchyra on the west, and the Meadowpows or Powlands of Inchyra given by the decreet-arbitral of 1745 to Mr Hay of Pitfour, is therein stated to be a baulk leading from the old march-ditch between the lands of Inchyra and Cairnie down to the Tay, and march-stones were thereby appointed to be set up at different places in that baulk. The old march-stone so ordered by them to be marked No. 1 must have been one of these march-stones appointed to be placed in the baulk by the decreet-arbitral of 1745. In or shortly before 1826 a ditch was cut in the line of this march-baulk, and it is proved that the march-stones which were then in the march-baulk were, after the ditch was cut, put into it, where they still remain, being five in number. On the third stone from the river there is an 'I' on the west side, and a 'P' on the east side of the stone; and on the stone nearest the river there is cut, according to the witnesses for the pursuer and for Sir John Richardson, the figure '1,' but, according to the witnesses for Mrs Fleming, the letter 'I.' There is no other mark on this stone. The pursuer's witnesses state that this stone is in its original state, while Mrs Fleming's witnesses say that a piece has split off the stone from the side opposite that on which the letter 'I' is cut. There are no marks on the other three stones in the march-ditch. The fact remains that this stone has only one figure or letter upon it. Whether the stone has split, and whether it is the figure '1' or the letter 'I' which is cut upon it, is mere matter of conjecture, and it is of no great importance, because the decreet-arbitral of 1795 proves beyond all doubt that the stone which the arbiters ordered to be marked No. 1 is the old march-stone between Inchyra and Pitfour, and that old march-stone must have been one of those placed in the above-mentioned baulk, in the line of which the present march-ditch was cut in or about 1826. Mrs Fleming maintains that the stone A on the Ordnance Survey plan, No. 79 of process, is the stone ordered to be marked No. 1 by the decreet-arbitral of 1795. But that is, it is thought, impossible, because the stone A is 86 yards to the east of the march-ditch.

"In and previous to 1826 there was situated in the Tay opposite the lands of Cairnie and the eastern part of the Meadowpows, an island called Cairnie Island, which formed part of the lands of Cairnie, and from which, or part of which, the proprietor of Pitfour was in use to fish for salmon. It is, the Lord Ordinary thinks, proved that the westmost or upper point of that island was situated opposite the old stone A, in the river bank, on the sides of which are cut the letters I and P. This stone could not be a land march, as it is situated on the Meadowpows river bank 86 or thereby yards to the east of the march-ditch between Inchyra and Pitfour, while the Meadowpows extended from that march-ditch 260 or thereby yards down the river. In 1826 Sir John Richardson con-

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not appear how he or his family had acquired the lands and fishings of Inchyra, how it had happened that one-half of the lands stood divided in nected Cairnie Island with the Meadowpows, and filled up the channel of the river between that island and the Meadowpows. And in or about 1831 two other stones were put in the new river bank in a line between the above-mentioned old stone A and the centre of the river. These two stones marked B and C on the copy of the Ordnance Survey plan, No. 79 of process, were placed, according to the evidence of Sir John Richardson, by Mr John Anderson, W.S., brother of the then proprietor of Inchyra, and his (Sir John's) commissioner, Sir John himself and his ground-officer being present, and also the Inchyra ground-officer, an old fisher of the name of Ireland, and some others. Sir John Richardson states that he heard that the stones were prepared by Lord Gray's mason.

"The above-mentioned Hen fishing was in and prior to 1838 finished at its lower or eastern extremity from a cairn. That fishing cairn was removed in 1838 by the Tay Commissioners, and a new cairn was erected nearer the land. That new cairn, called the commissioners' cairn, was used as the fishing cairn at the lower or eastern end of the Hen fishing until 1843, when it was removed, and a hauling place formed near the line of the three stones A B C on the river bank, which has been used from that date to the present time by the tacksmen of the Hen fishing.

"The Lord Ordinary thinks that he has now adverted to the chief matters which require to be attended to in disposing of the question between the parties as to the salmon-fishings between the march-ditch and the three stones A B C above-mentioned.

"1. In so far as the action is directed against Mrs Fleming and her husband, the Lord Ordinary is of opinion that the pursuer cannot obtain decree in terms of the conclusions of the summons. By these conclusions the pursuer asks for decree of declarator that she has the sole and exclusive right to the salmon-fishings in question, and that Mr and Mrs Fleming have no right thereto, and should be interdicted from fishing them. Mrs Fleming is infeft in the one-half *pro indiviso* of the Inchyra salmon-fishings, and the pursuer is infeft in the other half thereof. The pursuer, therefore, cannot obtain against Mrs Fleming and her husband the absolute and exclusive decree which she claims.

"The Lord Ordinary is satisfied that the Hen fishing terminated at the march-ditch separating the lands of Inchyra from Pitfour,—that is, from the Meadowpows or Powlands,—and that this fishing was situated *ex adverso* of the kavel on the west, which belonged in 1745 to Alexander Blair of Inchrya. That is clear from the decreet-arbitral of 1745, and from the memorial of 1756 for the Misses Blair of Inchyra, the predecessors of Mrs Fleming, and also from the decreet-arbitral of 1795. Even assuming that there had been no change since 1795 in the possession of the fishings by the *pro indiviso* proprietors, either by consent of these parties or *rebus et factis*, that old allocation or possession of the fishings would not, the Lord Ordinary thinks, warrant the absolute declarator of property in the fishings opposite the Meadowpows concluded for by the pursuer; although it might have warranted a decree of a limited and possessory nature, such a decree cannot, it is thought, be pronounced under the conclusions of the present summons. But even although that were competent, the pursuer could not obtain it, because it is proved that in 1844 a new allocation of the Inchyra fishing was made by the two *pro indiviso* proprietors. At that date Mrs Fleming's predecessor was in possession of the fishing to the east of the Hen fishing and of the march-ditch, and was fishing that fishing as far down as the stones A B C as part of the Hen. That extended piece of fishing only became available in 1843 by the removal of stones from the bed of the river which interfered with the hauling of the net; and from the time that it became available down to the date of the present action it has been fished as part of the Hen under that new division or allocation of the fishing made in 1844.

"The defenders, Mr and Mrs Fleming, maintained that they have proved prescriptive possession of the fishing between the Glove fishing and the stones A

his person into quarters, nor when or how the lands came first to be mapped out into kavels. No. 162.

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B C. A great amount of evidence has been led on this point. After carefully considering that evidence, the Lord Ordinary is of opinion that the account given with reference to this fishing by the pursuer's witnesses, George Gelletly, John Lennox, Andrew Swan, tacksman of the Hen from 1835 to 1843, and by Sir John Richardson's witnesses, Archibald Powrie, tacksman of the Hen fishing in 1843, and from that date to 1847, and James Davidson, also a tacksman of the Hen fishing, is entitled to much greater weight than the account given by the witnesses for Mr and Mrs Fleming. From the evidence of these witnesses the Lord Ordinary is satisfied that until 1838 the Hen fishing terminated at a fishing cairn situated nearly opposite the march-ditch which is the old eastern boundary of that fishing according to the memorial for the Misses Blair in 1756 above-mentioned; that this cairn was removed by the Tay Commissioners in 1838, and a new fishing cairn erected nearer high-water mark, and a short distance farther down the river than the march-ditch, and that this new cairn, called the Commissioners' cairn, was removed in 1843, at the expense of the Tay Commissioners, by Archibald Powrie, who ploughed and levelled the beach with levelling boxes, in which operation he took away thousands of tons of gravel; that he thus formed a new hauling place for the salmon nets on the river bank, a little above the line of the stones A B C; and that this new hauling place was used as the place for hauling the nets of the fishers fishing the Hen from 1843 down to the date of the present action. Mr and Mrs Fleming maintained that they have been in possession of the Hen fishing for forty years and upwards prior to the date of the action, and had acquired a prescriptive right thereto, and were entitled to have it found that they had the sole and exclusive right to that fishing. The Lord Ordinary is of opinion that they have not proved possession for forty years and upwards, and that it is proved that the Hen was not fished by them and their predecessors below the march ditch until 1838, and that the fishing was only extended down to the present hauling place in 1843. There is great discrepancy in the evidence on this point. But the Lord Ordinary considers that the evidence for the pursuer and for Sir John Richardson is entitled to much greater reliance than the evidence for Mr and Mrs Fleming. Farther, Mr and Mrs Fleming can never acquire, as in a question with the pursuer, an exclusive right to any part of the Inchyra fishings in the face of their own title, which gives them only a right to one-half of these fishings, while the pursuer is infeft in the other half thereof.

"Upon this question of prescription Mr and Mrs Fleming maintained that there was a strip of uncultivated ground or 'green' extending from the march-ditch down to the old stone A, and situated between the old river bank and the river, which belonged to and was pastured by their predecessors. But that ground or 'green' was part of the Meadowpows which was adjudged to Pitfour by the decreet-arbitral of 1745, his western boundary being therein defined as the baulk which 'leads down to the water Tay.' It appears from the evidence that the Inchyra cows pastured this piece of ground for a few years prior to 1826, when it was of little value, but in doing so they trespassed upon Sir John Richardson's property, and all such trespass ceased in 1826, when the new embankment was formed and the march-ditch deepened.

"2. As regards the defender, Sir John Richardson, the Lord Ordinary is of opinion that he has completely failed to prove prescriptive possession of the salmon-fishings, on his title to the lands of Cairnie, above the western extremity of Cairnie Island, which, as is proved, extended up the river only as far as the line of the stones A B C. His title to the lands of Cairnie gave him only a right to the salmon-fishings of these lands, and the western boundary of these fishings was the western end of Cairnie Island. The decreet-arbitral of 1745 gave him no right to the salmon-fishings of the Meadowpows. These fishings then belonged, and still belong, to the proprietors of the estate of Inchyra. The old march-stone A, which has I and P cut upon it, was not a land march-stone. It has been in its present place beyond the memory of man. It is proved by the

No. 162. At the advising, on 11th January 1876, the following opinions were delivered:—

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witness James Davidson to have been there sixty-one years ago. The faggot dyke, which was erected in 1807 with a view to the filling up of the channel between Cairnie Island and the north river bank of the Meadowpows, ran between this stone and the western extremity of Cairnie Island. The Lord Ordinary is of opinion that this old stone must have been a fishing march-stone, put in to indicate the eastern end of the Inchyra fishing, probably in or about 1795, when the other march-stones were placed in the march-baulk. The view that this old stone was a fishing march-stone is supported by the fact that more than two-thirds of the Meadowpows are situated to the east of it, and by the placing in 1831 of the stones B and C in the new embankment connecting and incorporating Cairnie Island with the north river bank. There is also a great deal of evidence in the proof to the effect that when these two stones B and C were put in the new river bank they were inserted in connection with the old stone A, for the purpose of defining the march between the Inchyra and Cairnie fishings, a very necessary act, seeing that Cairnie Island had been recently incorporated with the river bank, and its western end obliterated. It is also proved that the old stone A went by the name of the old Hen march-stone, and was so called by aged witnesses long since dead. Sir John Richardson, his ground-officer, the gardener of Mr Anderson of Inchyra, who was the predecessor of Mrs Fleming, an old fisher called Ireland, and some others, were present when the two new stones B and C were fixed. Robert Young, who fished the Glove fishing in 1834 and 1835, depones that the two stones were called the march-stones of the Hen betwixt Sir John and Inchyra, and that Ireland (who sometimes fished with him) told him that he 'howkit' the holes and put the two new stones into them, and that they were put in 'for the march betwixt Sir John and Inchyra.'

"Sir John Richardson maintained, on the authority of the opinions expressed in the case of Lord Wemyss v. The Town of Perth, 31st May 1867, 39 Scottish Jurist, p. 429, with reference to Balhepburn Island, that his Cairnie fishings were not limited by the western extremity of Cairnie Island, and that as proprietor of that island he was entitled to fish as far up the river from its western extremity as his nets could reach. But that case is not, the Lord Ordinary thinks, in point. Sir John has a title to the lands of Cairnie, and to the salmon-fishing belonging to these lands. In the Balhepburn case the title gave the town of Perth the sole and exclusive right to the salmon-fishings in the Tay pertaining to Balhepburn Island, lying either round about the 'said island, and upon every part of the same, or wherever the same lyes, or may or shall lye, any manner of way,' and the town was in possession of that right. Sir John Richardson has not proved that he ever possessed any right to fish as he now claims from the western end of Cairnie Island. From 1843 Mr and Mrs Fleming and their predecessors have been in possession of the salmon-fishings opposite the Meadowpows as far down as the stones A B C, that is, as far down the river as the western extremity of Cairnie Island where Sir John's Dadhead fishing begins, and when his Dadhead fishers attempted to come upon the water above these three stones, on two or three occasions since 1843, the tow-rope of their nets was cut and they were turned off. That possession, and these acts of Mrs Fleming and her predecessors are, the Lord Ordinary thinks, available to the pursuer, seeing that they are *pro indiviso* proprietors, and that such possession was obtained and held under an arrangement between them for the allocation of the fishings.

"It was also maintained by Sir John Richardson that the pursuer had failed to instruct that the Meadowpows were a part of the lands of Inchyra to which a grant of salmon-fishings is attached, and that the Meadowpows are not a part of the Prior Lands belonging exclusively to the pursuer, the titles to which do not confer a right of salmon-fishing. The Lord Ordinary is of opinion that the Meadowpows were a part of the lands of Inchyra, and not a part of the Prior Lands. The Meadowpows are situated at the eastern end of Inchyra, and are a continuation of these lands along the Tay, whereas the Prior Lands are at a distance from the Tay, and are separated from the Meadowpows by other parts of

LORD DEAS.—The summons in this case concludes that it should be found and declared that the pursuer, Lady Gray, "has the sole and exclusive right to the salmon-fishings in the river Tay *ex adverso* of that piece of ground formerly called the Meadowpows or Powlands of Inchyra, and which formerly belonged to the pursuer's predecessors, and which now belongs to the defender, Sir John

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Inchyra and by the lands of Cairnie. This is proved by the old Inchyra estate plan of 1769, No. 80 of process, and by the table of contents therein, and also by the old estate plan of Pitfour, No. 81 of process. Sir John Richardson, when examined as a witness, also proves this, and so do other witnesses. There is also another old estate plan of the lands of Inchyra, No. 141 of process, which shews that the Prior Lands are situated at a considerable distance from the Meadowpows. It is no doubt the case that the submission of 1744 was between Lady Gray and Mr Hay of Pitfour, and that Mr Blair, the other *pro indiviso* proprietor of Inchyra, was not a party to it, but that arose, the Lord Ordinary thinks, from the mistaken notion that each *pro indiviso* proprietor was entitled to deal with any kavel possessed by him as if it were his absolute property. Accordingly, the decreet-arbitral of 1745, in defining the western march of the Meadowpows, described it as a 'march-baulk betwixt the lands belonging to Alexander Blair of Inchyra on the west, and that piece of ground commonly called the Meadowpows or Powlands' which belonged to Lady Gray, and was given off by that decreet to Pitfour. Now, the land belonging to Alexander Blair on the west was simply the kavel of the *pro indiviso* lands of Inchyra situated immediately to the west of the Meadowpows, which was the eastern kavel thereof, possessed by Lady Gray.

"The pleadings of the proprietors of Inchyra in the submission of 1756 also clearly prove this. The memorial of 1756 for the Misses Blair states that the kavel adjoining the Meadowpows on the west belongs to them, 'and next thereto lyes a kavel, the eastmost part of the lands of Inchyra adjoining to the lands and estate of Hay of Pitfour, which sometime belonged to Lady Gray,' and was some years ago given by her in excambion to Hay of Pitfour. The memorial for Lady Gray in 1757, in answer to that for the Misses Blair, acknowledges 'that she did excamb some part of her eastmost kavel of the lands of Inchyra with Mr Hay of Pitfour,' as settled by the decreet-arbitral, but that she gave to Pitfour no right of fishing opposite to that part of the lands given to him, and that the fishing belongs to the heritors of Inchyra. In the decreet-arbitral of 1795 the lowest or eastmost fishing of Inchyra, situated to the east of the Inchyra and Pitfour march, is dealt with as belonging to Lord Gray.

"Sir John Richardson maintains that these memorials and the decreet-arbitral of 1795 are not competent evidence against him on the question whether the Meadowpows are a part of Inchyra or of the Prior Lands. The Lord Ordinary is of a different opinion. These memorials contain statements of fact of very old date, made by parties with reference to fishings belonging to them. Sir John Richardson's predecessors acquired in 1745 a piece of land then also their property, but he did not acquire any right to the salmon-fishing *ex adverso* thereof, and never had any right thereto. The submission of 1794 and decreet-arbitral of 1795 had reference, besides the division of the remainder of the lands of Inchyra, to the possession of these salmon-fishings and the insertion of march-stones for the purpose of defining the boundaries of the salmon-fishings belonging to the proprietors respectively. The stone A, which has the letter I cut on the east side and the letter P cut on the west side thereof, is not without significance in connection with the decreet-arbitral of 1795, placed as it is in the land then acquired by Sir John opposite the upper end of Cairnie Island, and at a distance of eighty-six yards from the march-ditch, and of 174 yards from the eastern end of the Meadowpows. But even if it were held that these pleadings and the decreet-arbitral of 1795 cannot be founded on as evidence against Sir John Richardson on this question as to the identity of the lands, it is sufficiently established by the parole proof that the Meadowpows are not a part of the Prior Lands, but are a part of the lands of Inchyra."

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Stewart Richardson," or otherwise to the salmon-fishings *ex adverso* of the westmost portion of that piece of ground to the extent of 120 yards. The summons contains a farther conclusion that it should be found and declared that neither Sir John nor Mr and Mrs Fleming, who are the only other parties called as defenders, have any right of salmon-fishing *ex adverso* of the said piece of ground, or at all events *ex adverso* of said westmost portion thereof, and that they should be interdicted from interfering with the pursuer's possession and enjoyment thereof accordingly.

It will contribute to clearness to consider, in the first instance, the question as between Lady Gray on the one hand, and Mr and Mrs Fleming on the other. The dispute with Sir John Stewart Richardson is of quite a different nature, and I shall deal with it afterwards.

The Lord Ordinary has assoilzied the defenders, Mr and Mrs Fleming, "from the conclusions of the action as laid, reserving right to the pursuer to institute, with reference to the said salmon-fishings of Inchyra, such other action or actions as she may be advised."

The single ground assigned by the Lord Ordinary for this decision is that one-half *pro indiviso* of the whole fishings of Inchyra, including the fishing in dispute, belongs to Mr and Mrs Fleming, and the other half *pro indiviso* to Lady Gray. If this be so I cannot doubt that his Lordship's decision falls to be affirmed. But after very full and careful investigation into the titles I am humbly of opinion that such is not the state of the titles here, either as regards the fishing *ex adverso* of that part of the estate of Inchyra called the Meadowpows, which is directly in controversy, or as regards the other fourteen or fifteen valuable fishings belonging to the two parties respectively along the river boundary, the property of which, it is quite clear, must be governed by the same rule which is applicable to the Meadowpow fishing.

The Lord Ordinary holds that, anterior to the submissions and decrees-arbitral to be immediately noticed, there was no distinction between the right and title of the parties to the lands of Inchyra and their right and title to the fishings, that is to say, that both lands and fishings equally belonged to them *pro indiviso*. He says in his note,—"Previous to the year 1744 the predecessors and authors of the pursuer, Lady Gray, and of Mrs Fleming, were each infeft, under titles flowing from the Crown, in one-half *pro indiviso* of the lands of Inchyra, and in one-half *pro indiviso* of the salmon-fishings of these lands." Following out this view to its legitimate conclusion the Lord Ordinary accounts for the fact that Lady Gray did not obtain the consent of Mr and Mrs Fleming's predecessor to the transference of the Meadowpows to Sir John Richardson's predecessor under the submission of 1744, by observing that this "arose," the Lord Ordinary thinks, "from the mistaken notion that each *pro indiviso* proprietor was entitled to deal with any kavel possessed by him as if it were his absolute property."

If the Lord Ordinary were right in supposing that the title of the parties to the Inchyra estate, consisting as it did of a great number of interjected portions called kavels, of which the Meadowpows was one, was a *pro indiviso* title, it would follow, of course, that the predecessor of Lady Gray could not possibly transfer the property of the Meadowpows to the predecessor of Sir John Richardson without the concurrence of the predecessor of Mr and Mrs Fleming. That the Lord Ordinary should have proceeded on the assumption that the title was a *pro indiviso* title is not perhaps surprising when it is considered that the

parties themselves had, at different periods of their former litigations, maintained varying and inconsistent views on this subject, influenced, no doubt, by their supposed interests for the time being, and that it has only been after the case came into the Inner-House that an approximation has been made to a full recovery and placing before the Court of important titles and documents, which were not before the Lord Ordinary in this case, nor before the Court and the House of Lords in the action instituted by Sir John Richardson against Mr and Mrs Fleming, decided in this Court on 16th July 1868, and in the House of Lords on 28th July 1871, 43 Scot. Jur. 448.

From the titles latterly produced we find that in and prior to 1655 Sir Alexander Blair of Balthayock stood vested, under the Crown, as proprietor of the whole lands of Inchyra, with the salmon and other fishings pertaining thereto. By charter and disposition dated 16th June of that year Sir Alexander, in consideration of a price paid, sold and disponed to William Blair of Tarsappie, the predecessor of Lady Gray, "all and haill the just and equal sunie half of all and haill the town and lands of Inchyra, with houses, biggings," pendicles, and pertinents, &c., "as the same is presentlie occupyed and possessed by Andro Lyell and Allan Peat, with the just and equal halff of the miln of the said lands of Inchyra, miln lands, multures, and sequels thereof, together with the just and equal halff of the salmond-fishinges and uthers fishinges of the saidis landes of Inchyra, and all and haill the passage upone the water of Tay called the ferry, with the ferry boates, privileges, and commodities thereof."

Having thus disposed of the one-half of the estate of Inchyra, Sir Alexander Blair shortly thereafter sold and disponed the other half to his brother Andrew Blair and his wife, for a price paid, apparently out of the wife's funds. The disposition is dated 2d August 1655, and conveys to the purchasers and the heirs-male of their marriage, &c., "all and haill that quarter or fourt part of the towne and landis of Inchyra, with houses, biggings," &c., "and pertinents thereof, last occupyet be James Blair, and now by myself," and sicklike, "all and haill the other quarter or fourt pairt of all and haill the saidis towne and landis of Inchyra, with houses, biggings, pendicles, and pertinents thereof, presentlie possest be Gilbert Lyell, my tennent, with the just and equal half of the mylne of Inchyra, mylne lands, multures, and sequels of the samen, used and wont, with the just and equal half of the salmond-fishings and other fishings of the saidis landis of Inchyra, and all and haill that malt barn, kill, and coubill, presentlie possessit by the said Gilbert Lyel, and all and haill these houses and yards of Inchyra, presentlie possessit by Francis Jack."

These two deeds were respectively followed by infeftment, and the same description of the subjects has been substantially continued in the feudal titles of the respective parties down to the present time. The first mentioned deed forms the commencement of Lady Gray's separate progress, and the second mentioned deed the commencement of that of the Flemings.

Reading these two deeds together we find that the one-half, which now belongs to Lady Gray, is described as the sunny half (synonymous, it is understood, with the eastern half), and is said to be then occupied and possessed by Andrew Lyell and Allan Peat; and the other half, which now belongs to Mr and Mrs Fleming, is stated to consist of two quarters, the one of which had been last occupied by James Blair, and was then occupied by Sir Alexander himself, while the other quarter is stated to be then possessed by Gilbert Lyell, Sir Alexander's tenant, and the houses and yards belonging thereto to be then

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possessed by Francis Jack. It seems impossible therefore, *prima facie* at least, to resist the conclusion that what Sir Alexander Blair conveyed to each of his original disponees and their successors was not a *pro indiviso* but a separate half of the town and lands of Inchyra, each disponee becoming the exclusive proprietor of the half conveyed to him.

But this point is somewhat complicated by the fact that within less than a century after the date of the two conveyances thus granted by Sir Alexander Blair we find evidence under the hands of the predecessors of both of the parties whose rights I am now considering (and indeed the fact is not disputed), that long before that time (how long does not appear) the whole estate of Inchyra (extending to between 400 and 500 Scots acres) had been parcelled out into lots or kavels, upwards, I think, of one hundred in number, of various sizes, but the two next each other being generally nearly of a size, and that Lady Gray's predecessors, and the predecessors of the Flemings, had been respectively and immemorially in the enjoyment of each alternate kavel, in regular succession, and that this continued down to the date of the decreet-arbitral of 1795, to be immediately adverted to. The counsel on both sides have referred to the plan, No. 141 of process, as sufficiently accurate for reference on this subject, with the explanation that the Meadowpows, which formed the eastmost kavel, is not shewn on that plan, having been previously transferred to Sir John Richardson.

The way in which this ancient parcelling out of the lands has complicated the question of title has been by giving rise to an idea, which seems to have impressed the mind of the Lord Ordinary, that the parcelling out had been intended for occupancy only, and not as marking out the separate property of the parties. To remove this idea as regards the lands is vital to the question of title to the fishings, to which, by natural transition, the Lord Ordinary applies the same rule when he says "that old allocation or possession of the fishings would not, the Lord Ordinary thinks, warrant the absolute declarator of property in the fishings opposite the Meadowpows, although it might have warranted a decree of a limited and possessory nature," which is not concluded for.

I have therefore been anxious to obtain what light I could upon the nature and effect of dividing an estate by kavels, or, in other words, of parcelling it out between two or more proprietors in the form of runrig or rundale. The practice has been long abandoned, and the means of information in regard to it, although they may be considered sufficient, are certainly not more than sufficient for the present purpose. It was frequently resorted to in early times when an estate had to be divided among heirs-portioners or adjudgers, so that each got a share of the different kinds of soil and climate which the locality afforded, although at other times one continuous portion was allotted to each, as is invariably done in modern times since planting and improvement introduced a preference for a compact estate. The most common mode of proceeding, whether by heirs-portioners or adjudgers, was by obtaining a brieve of division from Chancery, directed to the Sheriff or other Judge Ordinary, who summoned a jury, at whose sight kavels, as they were called, were cast for the different lots, which, after an equalising valuation, were apportioned accordingly.

Lord Stair, who published his work in 1693, gives a form of the brieve, which is retained in our familiar style books at the present day. There is no difference either in the form of the brieve or in the effect of the procedure, whether the divi-

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sion is to be by alternate kavels or in any other way. The object and effect was, and is, to divide not merely the possession, but the right of property, and so the matter is treated of by all the authorities. Balfour, in his Practicks (p. 440-1), gives a full account of the procedure under the brieve of division, the object of which, he says, is "to ken ilk ane of thame to thair awin parties" of the lands. "And efter the inquest has partit and dividit the saidis landis, the Clerk of the Court sould put the samin in form of ane rolment and decrete of the said inquest, and cause the samin to be seillet with the seilles of the persounis of inquest, togidder with the Schiref's seill; and thairefter the said Schiref sould cause the saidis persounis to cast cavellis upon the saidis partis," after which the parties are to be entered "ilk ane to thair awin part, conform to the cavil obtenit be thame, and to be bruikit and joisit be thame in all time cuming, conform to the decrete and deliverance of the said inquest, and the meithis and marchis expremit thairin." He afterwards says, in substance, that although the division may be reduced, if not fairly and equally done, yet "gif ather of the parties gevis infeftment to his sone, or any uther persoun, of any part of the landis fallin to him be the said divisioun, he ratifies and apprevis the samin, and thairfoir on na wayis may impugn the said divisioun, nor call for reduction thairof."

Bankton says (i. 8, 38),—"The division among co-heirs, co-adjudgers, or other conjunct proprietors, *pro indiviso*, proceeds on a brieve out of Chancery, directed to the Sheriff of the bounds, subject to the review of the Lords of Session, though the sentence is founded on a verdict. In the division among heirs-portioners, the mansion-house, yards, and garden or orchards, not in use to be set for rent, will be allotted to the eldest; and she is likewise preferred to the custody of the writings." This is obviously treating the division as a division of property, and not of occupancy merely. I may observe, however, that what the learned author says about review by the Court of Session must be taken as qualified by the judgment in Cathcart v. Rocheid, Feb. 22, 1772, M. 7663.

Mr Bell, in his Commentaries (vol. i. p. 64, 5th ed.), in like manner treats the brieve of division as applicable to the property of the subjects; and in a note he observes—"For the case of heirs-portioners the very old form of a brieve of division still subsists. It is directed to the Sheriff—a jury is named under his authority to measure and lay off the shares, and by lot they are appropriated to those interested. The matter is commonly arranged extrajudicially by referees." In his Principles (sec. 1081, 3d ed.) he details the procedure, and says—"5. The verdict settles the shares, and lots being cast, the division is fixed by decree of the Court. 6. Extract and possession complete the separate rights of the parties in their shares of what was formerly common." Mr Bell describes the remedy by brieve as competent to all joint proprietors, and in sec. 1083 he mentions that among heirs-portioners "peerage or superiority go as *præcipuum* to the eldest," and that this preference is extended to a mansion-house.

But it is from Dallas, our oldest and most authoritative formalist, that we get the most direct and valuable information, because he gives us the style of a decreet of division in which the mode adopted is division into two halves by runrig, which is just the mode in which we find the lands of Inchyra to have been here divided.

It would appear to have been the practice to issue a decreet to the party to whom fell the sunny half of the lands, and a separate decreet to the party to whom fell the shady half. Accordingly, the style given by Dallas is the style of the decreet issued to the party to whom had fallen the shadowy half.

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After narrating the brieve, the swearing of the inquest, and other preliminary proceedings, the style bears, "which persons of inquest, after long consultation and advisement, divided the forenamed lands into halves betwixt the said portioners by runrig, as it shall happen them by cavel, conform to the points of the brieve as they lie in length and breadth, after which declaration and deliverance in plain Court the Judge caused cast cavels, and to the said J. fell the shadow half; to the which verdict the said Judge instantly interposed his authority, and kenned and entered the said J. B., compearing for the said J. in her name, and himself for his interest, which division of the forenamed lands, made in manner foresaid, the said Judge decerned and ordained to be observed and kept by both the said parties, and the said lands to be bruiked and joysed by them, their heirs and successors, conform to the said division. In witness of the which I have caused my Clerk of Court subscribe these present letters testimonials with his hand at S., the day of years."

A note is added—"This brieve is not retoured, for the Judge puts all immediately in execution, and the parties in possession conform."

It will be specially noted that in the style thus given by Dallas the inquest are said to have "divided the forenamed lands into two halves betwixt the said portioners by runrig," and at the same time the half which fell to one of the parties (consisting obviously of kavels alternating with those which fell to the other party), is called the shadowy half. We have thus the authority of that eminent conveyancer for holding that where the just and equal half of certain lands was conveyed to one party, and the other just and equal half to another party, such conveyances were quite apt and habile as titles to cover the case of each half, consisting of alternate kavels, lying runrig or rundale, although that could only be seen on going to the ground. And this, again (I may as well here observe by anticipation), suggests that similar conveyances of the just and equal halves of the fishings of the same lands would be equally apt and habile, in the language of those days, to convey to each of the parties the alternate fishings *ex adverso* of their respective kavels, although this peculiar position and alternation of the fishings, in like manner with the peculiar position and alternation of the lands, could only become known by going to the locality and ascertaining how these fishings were marked out and possessed. It follows that infeftment in "all and haill the just and equal sunie half of all and haill the toune and lands of Inchyra, together with the just and equal half of the salmon-fishings of the said lands of Inchyra," was then, and consequently still is, in point of expression, an apt and habile feudal title to the exclusive property of all and each of the kavels which constituted that half, and to the exclusive property of all and each of the fishings connected with that half, if such appears to have been really the meaning intended to be expressed—of which afterwards.

The parties, I understand, have made every effort in order to discover at what period the lands of Inchyra were parcelled out into kavels, but without success. All the probabilities are against this having taken place subsequent to the deeds of alienation of 1655, and as no writings connected with it have been found within that period, I conclude that it must have occurred anterior to the date of these deeds, either by voluntary deed of agreement, now lost, or under a brieve or action at the instance of adjudging creditors or heirs-portioners. The fact that the whole estate in the person of Sir Alexander Blair was made up of a half and two separate fourths points strongly to the conclusion that there had been a judicial division by kavels in or before his time, and that the estate

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stood in that form when he transferred it to his respective disponees in 1655. We have no titles shewing how he acquired either the sunny half or the two-fourths, constituting the other half; but the presumption, *post tantum temporis*, is that the division by kavels was made in a manner lawful and usual at the time, and if so, the result would be the same whatever the precise form of procedure may have been.

It is not very easy now to see the consistency of calling one half of a divided estate the sunny half and the other the shady half, where both halves were intermingled with each other in alternate kavels, as the halves of the estate of Inchyra undoubtedly were. Mr Johnstone suggested an explanation, which I think probably correct, viz., that the party to whom fell the sunny or eastern half was entitled to the kavel nearest the morning sun; the party to whom fell the shady half to the next kavel, and so on alternately, so that a kavel of the first party was always to the east of a kavel of the second party, so long as the whole were not exhausted. Beginning with the Meadowpows, and leaving out of view what were then the commonty lands farther inland, this would pretty well accord, in a rough and round way, with what we find to have been the distribution of the kavels of Inchyra. Be this as it may, however, it is certain, as we see from Dallas, that in those days it was quite well known which half was the sunny and which the shady half, although the whole consisted of kavels lying runrig or rundale, and that is enough for the present purpose.

After the passing of the Act 1695, c. 23, "anent lands lying runrig," questions arose whether the Act was meant to be applicable to the lands of two proprietors which lay intermixed, in alternate fields (more accurately called rundale), or had in view only lands which lay in alternate ridges (crooked for the convenience of ploughing), such as were within my own memory, and perhaps may be still to be seen within burghal territory to which the Act does not apply. At first the Court were inclined to put what was called a liberal construction on the Act, and held it to extend to fields of considerable size. But when it afterwards came to be clearly perceived that what the Act authorised was really not division of common property but excambion of separate property, the Judges generally came to think that it could not have been intended to compel an excambion except where the lands to be excambed were of comparatively limited extent; and, after varying decisions, it was latterly decided in a suit at the instance of Lady Gray against Mrs Blair and others, applicable to the very lands or kavels we are now dealing with, that action on the statute could not be sustained as to fields containing more than four acres (17th January 1782, M. 14,151). Looking to the number of fields shewn on the plans produced of smaller extent than four acres, that judgment would apparently have warranted a decerniture as concluded for with reference to these smaller fields, but an appeal entered against the judgment was withdrawn, and no farther procedure in the action is understood to have taken place. If that decision was a sound one Bankton (i. 8, 9) had put too limited a construction on the Act when he confined it to cases "where one heritor has one ridge or rig and another the second, and so on, interchangeably, over the whole parcel of land; and this takes place between two or more proprietors; and, from the nature of the thing, can only be of arable lands." Erskine had anticipated more accurately what the Court ultimately found when he said (iii. 3, 59),—"The division competent to landholders by the last quoted Act, 1695, is not in practice confined to runrig lands in a strict sense of the word, but

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is, by liberal interpretation, extended to cases where the properties of the several heritors are broken off, not by single ridges, but perhaps by roods or acres."

The whole estate of Inchyra, both infield and outfield, stood in 1782 parcelled out into kavels, some of them large and some of them small, and thus afforded an example at once of rundale and of runrig strictly so called. The word "runrig" appears to have been the generic word, but the nature of the power conferred by the Act 1695, which enabled one of two neighbours to compel an excambion of property without the other's consent, coupled with the declared policy of that Act in connection with previous statutes, led ultimately to a somewhat strict construction being put on the word "runrig" as used in the Act. But the general principles applicable to runrig and rundale had always been the same; and when the Lady Gray and the Blairs of 1782 joined issue upon whether the Act 1695 was applicable to their Inchyra kavels or not, they necessarily did so upon the footing that the kavels of each were the separate and exclusive property of each. The report of the case accordingly narrates that "their respective properties lay blended together in a great number of fields of different sizes. Some of these fields consisted of 35 acres, some of them of 10, but by far the greatest part did not exceed 5 acres." The judgment obviously proceeded upon the footing that the kavels were the separate and exclusive property of the parties respectively, and the Court accordingly applied to the case the principle affirmed in the previous case of Buchanan v. Clark (M. 14,143, bottom), "that the Act 1695, which in the cases to which it applies obliges a man to part with his property without his consent, being in some measure an encroachment on it, ought not to be extended."

Long before the date of the judgment of 1782, viz., in 1745, the same Lady Gray, who afterwards became pursuer in that action, had asserted and exercised her separate and exclusive right of property in the kavel called Meadowpows, in the strongest of all ways, viz., by transferring it for other land, equivalent in value, to the proprietor of Pitfour, through the medium of a submission and decree-arbitral, which were both publicly recorded in July of the same year. The land so transferred has been openly possessed and enjoyed ever since as part and portion of the Pitfour estate, and neither Mr and Mrs Fleming, nor any of their predecessors, have ever either objected to or judicially challenged that transaction. No difference has been or can be suggested between the nature of what was Lady Gray's right of property in that kavel, and her right of property in the other Inchyra kavels, alternating with those of the Flemings.

An objection to this transaction, on the ground that it was *ultra vires* of Lady Gray, would indeed have been altogether inconsistent with the relative position which the parties had all along assumed towards each other, as proprietors of their respective kavels, and which they were, at that very time, acting upon under a submission entered into in September 1743, and which issued in a decreet-arbitral in October 1747, recorded, along with the submission, in October 1748.

There was an uncultivated muir called the Muir of Inchyra, and there were certain greens along the margin of the Tay (which is there a public navigable river) of the nature of sea greens, that is, greens over which the tide occasionally flows, and which, as Mr Erskine explains (ii. 6, 17), have been sometimes thought to be *inter regalia*, but which he himself, agreeing with Bankton (vol. i. p. 83, sec. 4), considered to be ruled by the case of Bruce, Nov. 25, 1714, M. 9342, in which it was found "that the sea greens might belong to the neighbouring heritors, as part and pertinent, without special right," and decree was

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pronounced assoilzieing from a declarator to the contrary, "in so far as the defenders' exclusive possession of property by pasturage, or casting feal and divot, was proved."

The submission of 1743 bore to be between Lady Gray, heritable proprietor of the half lands of Inchyra, with consent of her husband on the one part, and Alexander Blair, with consent of his daughters, the heirs-apparent of their deceased brother Dr John Blair, who, it is stated, "was heritable proprietor of the other half lands of Inchyra," on the other part.

It is clear enough (particularly from what followed) that this meant that each was heritable proprietor of the respective kavels which were then and had immemorially been possessed by each. There was not a suggestion of *pro indiviso* property in any of these kavels. On the contrary, the Muir of Inchyra and other rights held in common, and which were singled out as the objects of dispute in the submission, were carefully distinguished throughout from the property lands, which could only have been the kavels. The subject-matter of the submission was stated to be the "several rights, claims, and pretensions" of the parties "to the muir commonly called the Muir of Inchyra, and to the whole other commonties of the saids whole lands of Inchyra, and likewise anent any illegal or unwarrantable encroachment, made or pretended to be made, by either of the parties submitters upon the property or commonty of the saids lands, or any part thereof, with full power to the arbiters before named to divide the said common muir and other commonties belonging to the said lands, and to allocate and assign such parts or portions thereof to either party as they shall think fit, and to decide and determine what either of the saids parties submitters shall do, pay, or perform to one another, for any cause or occasion preceding the date hereof."

The decreet-arbitral which followed bears—"We find that each of the saids parties submitters have an equal right of commonty in the said Muir of Inchyra, and on that other piece of ground besouth the miln, and on the heall greens, from east to west, lying betwixt the laboured lands of Inchyra and the river of Tay." Following up this finding the arbiters allocated a specific portion on the north side of the Muir of Inchyra, then marked out by march-stones, to belong to Lady Gray "in full property," and a specific portion, likewise marked by march-stones, on the south side of the muir, "to be the sole and full property" of the Blairs.

In like manner the arbiters appointed "the eastmost part of the high grounds of the miln inch, lying besouth the miln of Inchyra, and adjacent to the said Alexander Blair his part of the miln inch, long since divided, as ascertained by march-stones now fixt, to be the property of the said Alexander Blair and his said daughters and their heirs, and the westmost part of the said high grounds of the foresaid miln inch, as already meithed out and divided from the other part by march-stones sett, to be the property" of the Blairs. A similar appointment was made as to the east and west parts of the low ground of the miln inch, "long since divided," excepting in both cases what was marched off for repairing the dam-dyke, the use of the miller, and access along the miln lead, "and declare the same to continue in common."

Lastly, the arbiters appointed "the greens that ly from east to west betwixt the laboured lands of Inchyra and the river of Tay, and possesst in common by both heritors of Inchyra, to belong in property to each of the said heritors and their heirs as aforesaid, opposite to their laboured grounds respectively, so that

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their property shall extend to the river opposite to the lands that are laboured by them in the same manner that the laboured grounds belong to them respectively, with this qualification, that notwithstanding of the exclusive property upon the foresaid greens determined as above, each heritor and his tenants shall have a right of loaning upon one anothers' property of the foresaid greens, in so far as is or shall be necessary for carrying manure to their respective lands and possessions, and that either from the river or from their several steadings or dwellings."

If the principal estate belonging to the parties had been held *pro indiviso* I need hardly say that the portions of commonty or common property allocated to each, in respect of their pertinential rights, would have been declared or appointed to be *pro indiviso* also. In place of this the portions allocated to each are so allocated "in full property," and what had been previously divided (probably by march-stones only) is declared to be property also. Each party who was designed in the submission as proprietor of the half lands of Inchyra is described in the decreet-arbitral as the heritor of the particular lands (that is, the particular kavels) to which the newly divided portions of what had been common were added and attached. All this is utterly inconsistent with the supposition of a *pro indiviso* title to the whole estate of Inchyra, either in the form of kavels or in any other form.

That portion of the decreet-arbitral which relates to the stripe of greens along the shore is specially valuable and explicit, because it expressly recognises the right of exclusive property of each of the parties in the kavels respectively possessed by each, and totally extinguishes the somewhat startling idea that the enjoyment of centuries, during which leases had been let for terms of years, farm steadings and houses had been built, and large sums expended on fencing, planting, and other improvements, had been under some possessory arrangement merely. The respective portions of the greens opposite the laboured lands of each are declared thenceforth to be the exclusive property of each, "in the same manner that the laboured lands belong to them respectively." It neither has been nor can be alleged that the laboured lands of each thus referred to were other than the kavels stretching down to the shore, which the parties had respectively cultivated and improved for time beyond memory or written record, just as they had improved the kavels farther inland by the expenditure of money in ameliorating the soil, planting trees, building houses, in the manner already mentioned, and upon one of which kavels the mansion-house, kept up and occupied by the Blairs, stood and still stands, or recently did so.

The contract of 21st August and 18th September 1784, and the submission dated 18th March and 4th April 1794, with the decreet-arbitral therein, dated 2d and registered 7th November 1795, likewise bear ample evidence, under the hands of all parties interested, that the different kavels were the exclusive property of the respective parties by whom they had been immemorially possessed. Thus, for instance, the contract binds Lady Gray, after the expiry of the present tacks of her ladyship's part of Inchyra," to grant to Mrs Isobel Blair (wife of the Rev. Thomas Beat) "a valid and formal tack of the two yeards belonging to the said Lady Gray, lying nearest to the mansion-house of Inchyra, the one whereof is presently in the possession of the said Mrs Isobel Blair and Thomas Beat—meaning obviously as tenants of her ladyship—"and the other lying immediately behind, the onstead of houses belonging to the said Mrs Beat, which were lately possessed by James Richardson, her tenant."

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And the deed of submission, with a view to the excambion and division thereby authorised of the runrig and rundale lands, as well as of the commonty lands of Inchyra, empowers the arbiters to "appoint a land measurer to measure the lands, distinguishing the parts thereof belonging to the said parties respectively, and to make a plan or plans thereof," and to adjudge the miln, the ferry, and the customs, and timber growing on the lands, to belong to the person to whom the lands on which the same are situated shall be adjudged, "and to fix and determine the value thereof to be given to the other party in land or money, as the said arbiters shall think proper;" and in case any of the then existing houses or steadings and growing timber on the ground of the one party should be adjudged to the other, the arbiters were empowered to decern the one party to pay the value of these houses or steadings and growing timber to the other party.

It was thus mutually acknowledged and declared in probative deeds, duly subscribed by both parties, that the lands possessed by each (personally or by their tenants) were, and had all along been, the separate and exclusive property of each. A plan and measurement, shewing what was thus acknowledged to belong to each, was prepared by Mr Ireland, land-surveyor, by order of the arbiters, as we find from the decree-arbitral, and it is not disputed that what was so shewn embraced and substantially consisted of the kavels regularly alternating with each other, and that these were valued and dealt with by the arbiters as the separate and exclusive property of the respective parties accordingly. If the lands had been held *pro indiviso*, they could, of course, have been divided at any time, at the suit of either party, at common law. It was just because they were not held *pro indiviso* that the action which failed in 1782 had been brought on the Act anent runrig. And it was, in like manner, just because they were not held *pro indiviso* that the contract of September 1794 and the submission of November 1795 were necessary and were entered into. What thus required to be done, although called a division, was truly an excambion, which the common law had no power to compel. That the excambion was of a very substantial description is seen from the fact that the arbiters struck a line of division through the centre of the estate from south to north, whereby all that had belonged to each party on the one side of the line became the property of the other.

If the lands of Inchyra had been held *pro indiviso*, as the Lord Ordinary holds, or rather assumes them to have been, it would have been very difficult to make out that the fishings were not *pro indiviso* also. Hence the care (perhaps greater than necessary) with which I have investigated into the title and history of the lands, before entering specially upon the question as to the fishings, which I shall now proceed more directly to consider,—still, however, only as between Lady Gray and the Flemings,—reserving a few further observations, applicable to the title both of the lands and the fishings, which it will save repetition to make once for all when I come to consider the question with Sir John Richardson.

I refrain from quoting again the dispositive clause of the deed of June 1655, describing the subjects conveyed by Sir Alexander Blair to William Blair (Lady Gray's predecessor), because it is easy to refer back to it. It conveys the sunny half of the town and lands of Inchyra, which I shall now assume not to have been a *pro indiviso* conveyance; next it conveys the half of the miln, with its adjuncts; then "the just and equal half of the salmon-fishings and uthers fish-

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ings of the saidis landis of Inchyra;" next the ferry, with its boats and privileges, and the boatman's house; and lastly, the teind sheaves or parsonage teinds "of the saidis halff of the landis of Inchyra, and the personage teinds of that rig of land in the said toune of Inchyra pertaining to David Lord Balvaird."

Now, here it will be observed that the words *pro indiviso* do not occur throughout the dispositive clause. It is true that the conveyance of one-half of the miln and its adjuncts, which immediately precedes the conveyance of the half of the fishings, imports in law a *pro indiviso* conveyance, but this arises solely from the subject conveyed being indivisible in its nature. That does not seem to afford a very cogent reason for construing the conveyance of one-half of the fishings (which are not indivisible) as *pro indiviso* also. The conveyance of the ferry, which immediately follows, with the ferry-boats, privileges, and commodities thereof, and the boatman's house, is clearly not a *pro indiviso* conveyance, for no interest whatever in these subjects is given to Andrew Blair, the disponee of the other half of the lands, by the deed of 2d August immediately following. They are, accordingly, not in his crown-charter of 3d March 1662, but they are in the crown-charter in favour of the heir of William, of 28th February 1673. It was in consequence, no doubt, of this state of the titles that the decreet-arbitral of 1795 found and declared that the right of ferry was to continue with and belong to Lady Gray. It is equally clear that the conveyance of the teinds "of the saidis halff lands of Inchyra," and the teinds of Lord Balvaird's rig, in the town of Inchyra, is not *pro indiviso*, but exclusive.

In like manner, in the deed just mentioned in favour of Andrew Blair, if we lay out of view the fishings themselves, we find no *pro indiviso* conveyance of anything except the one-half of the miln and its adjuncts, the conveyance of which falls to be construed as *pro indiviso*, simply for the reason I have just assigned in analysing the deed in favour of William.

If each of these deeds of 1655, after conveying a just and equal half of the lands of Inchyra, had simply said "with the salmon and other fishings of the said half of the said lands," this, no doubt, would have been a clearer form of expression. But it seems to me to be by no means a very strained construction to hold the words actually used as meaning the same thing,—that is to say, to hold that by the just and equal half of the fishings of Inchyra was meant the half of the fishings connected with the just and equal half thereby conveyed of the lands of Inchyra. But let it be assumed that *ex facie* of the deed, while as yet nothing had followed upon it, the reasons would considerably preponderate for construing it otherwise: Still, there can be no better evidence of the meaning of an old deed, which it is at all possible to read in two ways, than the construction which, so far as we can discover, the parties interested themselves put upon it at the time and ever since. In the present case the evidence thus afforded is peculiarly strong, because there are here two deeds similarly expressed in favour of two different parties, each of whom has immemorially construed them, *rebus ipsis et factis*, in the same way. There are, I think, some fourteen or fifteen valuable fishings *ex adverso* of the different kavels which stretch down to the river. With the exception of some promiscuous fishing at what is called the Hurle Carle, the position of which is admittedly peculiar, none of the fishings have ever been possessed as *pro indiviso* fishings. The parties have respectively had exclusive possession of the fishings *ex adverso* of their respective kavels. They have immemorially let these fishings to tenants, laid out money in improving them, and treated them in every way as

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their separate and exclusive property. The defenders, Mr and Mrs Fleming, retain possession, upon that footing, of what they still call their own fishings. They say in the record (Stat. 3) that the defender, Mrs Fleming, and her predecessors, "have, from time immemorial, or at least for more than forty years, exercised without interruption on the part of the pursuer or any one else the right of salmon-fishing in the river Tay, and that within the limits and bounds marked and pointed out by march-stones placed in the embankment of or near the river, along the whole of the said fishings."

More particularly, they say (Stat. 4) that the defender, Mrs Fleming, and her predecessors, have possessed their fishing called the Hen fishing for time immemorial. And, after mentioning a stone which they say marks the northern boundary of that fishing, they add—"The stone is a very old stone, and indicates the ancient boundary of the said fishing at the time when the greens adjoining the separate kavels of Inchyra still existed;" that is to say, as I understand it, when the greens were not yet divided, and the divided portions thrown into the adjoining kavels, which they were by the decree-arbitral of 1747. In their 6th statement Mr and Mrs Fleming farther say—"The said fishing, known as the Hen, or the Laying Hen, has existed and has belonged to the defenders and their predecessors for more than a century." And in their 7th statement they quote from a different decreet-arbitral, which they allege to have been pronounced in 1757, in a submission between their predecessors and the predecessors of Lady Gray, by which they say it was found "that the parties submitters, as heritors of the two half lands of Inchyra and salmon-fishings thereto belonging, have each a distinct and divided right and possession of the said salmon-fishings belonging to the parties, and lying opposite to the greens adjoining to the different kavels or gliebs of the said lands, and that they and their heirs and successors may continue to possess the said fishings, or any other fishings to be made out by them belonging to the said lands, and to sett, use, and dispose thereon, in a separate and divided manner, in all time coming, as they have done in times past." I quote this only as being adopted by Mr and Mrs Fleming as part of their statements; for we have only an alleged scroll of this submission, and the supposed decreet-arbitral upon it, of 1757, probably never was pronounced.

All this, whatever else may be contended for, is very conclusive of the fact that the defenders, Mr and Mrs Fleming, do not dispute that there has been separate and exclusive possession by the parties respectively of the fishings *ex adverso* of their own kavels, although they do not admit that the frontage of each kavel is now the precise limit of each fishing, but, on the contrary, contend that the Hen fishing has been extended, by possession, upon the Meadowpows, which is a separate question arising upon the proof led upon that point.

Thus, then, apart altogether from the submission of 1794, and decree-arbitral of 1795, we have the conveyance of the fishings by the deeds of 16th June and 2d August 1655 sufficiently construed as having imported a separate and exclusive and not a *pro indiviso* conveyance of one-half of the fishings to each of the disponees under these deeds respectively.

That submission and decreet-arbitral are, however, most important documents in this case, and would go far, of themselves, to settle the present dispute, which necessarily involves, not the property of the Meadowpows fishing only, but of the whole fishings which the parties have respectively hitherto enjoyed as the separate and exclusive property of each.

I have already adverted to this deed of submission as regards the lands, and I

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now proceed to quote the clause which follows as to the fishings. Reading it in the third person, as it would, of course, be in the deed of submission, it runs thus,—"Reserving always, to both parties, the right of the salmon-fishings on the river Tay respectively belonging to them, according to their present boundaries, and which boundaries are not to be affected by any division that shall be made in consequence hereof; but that the said arbiters, after such division, shall have power to put in march-stones in the ground belonging to either party, to ascertain the boundaries of the salmon-fishings belonging to the parties respectively, which are not to be affected by the said division."

Now, what does this import? Obviously, that, although the kavels were thenceforth to be obliterated, and the lands divided into two portions in place of very many portions, this was not to affect the fishings, which were expressly admitted to be then "belonging to them respectively," according to the existing boundaries, and which boundaries were not to be affected by any division of the lands. The property of each fishing, separately possessed, was thus recognised as separate and exclusive in the person of the party who so possessed it. The boundaries are spoken of as existing boundaries, known to both parties, with less or more precision, although they had not yet been marked out by march-stones; and then follows a power—equally important with the narrative on which it proceeds,—"that the said arbiters shall have power to put in march-stones in the ground belonging to either party to ascertain the boundaries of the salmon-fishings belonging to the parties respectively." Here, then, we have an admission, in one breath, of the exclusive nature of the property of the kavels, and, in the next, of the exclusive nature of the property of the fishings. By empowering the arbiters to put in march-stones to ascertain the boundaries was obviously meant that the arbiters were first to ascertain with precision what the boundaries were, and then to put in march-stones to mark them for the future.

Both functions the arbiters accordingly performed. The seventh finding of the decreet-arbitral is so important that I shall make no excuse for quoting it at length. It is in these terms:—"We reserve to the parties submitters the salmon-fishings on the river Tay repectively belonging to them according to their present boundaries, wherein we have infixed march-stones in the ground; and we also reserve to both parties access to their different fishings, and to draw and dry their nets according to use and wont. We find that the lowest or east-most fishing belongs to Lord Gray, and is altogether opposite to the lands of Pitfour, being bounded to the west by the old march-stone between the lands of Pitfour and Inchyra, which we ordered to be marked number one. That the several fishings between the stones number one and number two, numbers three and four, numbers seven and eight, numbers nine and ten, numbers eleven and twelve, numbers thirteen and fourteen, and numbers fifteen and sixteen, being seven in number, do all belong to the said John Anderson. The stone number sixteen stands in the march between the lands of Inchyra and Ribney. That the several fishings between the stones numbers two and three, numbers four and five, numbers six and seven, numbers eight and nine, numbers ten and eleven, numbers twelve and thirteen, numbers fourteen and fifteen, being also seven in number (besides the fishing opposite to the estate of Pitfour) do all belong to Lord Gray, and that the fishing between the stones numbers five and six, called Hurle Carle, is the joint property of Lord Gray and Mr Anderson; and in terms of the said submission we do hereby declare that the said fishings respectively belonging to each of the said parties shall not be hurt or affected by

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the division now made of the lands; but that the said fishings shall be enjoyed and possessed according to the rights, custom, and usages heretofore observed by the said parties, their authors and predecessors."

Now, there can be no doubt at all that this seventh finding was within the powers conferred upon the arbiters. The submission sets forth, in substance, that the respective fishings were the property of the respective parties who had hitherto possessed and enjoyed them, according to certain boundaries, in the same way as they had possessed and enjoyed the runrig and rundale lands,—that is to say, the respective kavels. It stipulates that there should be no division, that is to say, no excambion of the fishings as there was to be of the lands, but that, although these fishings would be no longer *ex adverso* of the kavels belonging to the respective parties, they should continue to be possessed and enjoyed as they had previously been by the parties to whom they respectively belonged. We have thus, in the form of a probative deed, at once the admission and the evidence of the parties themselves, who had the best means of knowledge, of what had been the state of things in time past, as well as a mutual stipulation that, so far as regarded the fishings, the same should continue in time to come.

In fulfilment of the duty devolved upon them by the submission the arbiters did ascertain what had been, and consequently what were the boundaries of the different fishings belonging to the respective parties, and caused march-stones to be set that there might be no mistake about them in future. Following the very language of the submission they reserved these fishings to the respective parties according to these boundaries, and, by an enumeration, without which their duty would have been imperfectly performed, they specified the position of the fishings belonging to each party and the numbers of the march-stones which marked the boundaries of each. In particular, they found "that the lowest or eastmost fishing" (that is, the fishing opposite the Meadowpows) "belongs to Lord Gray, and is altogether opposite to the lands of Pitfour, being bounded to the west by the old march-stone between the lands of Pitfour and Inchyra, which we ordered to be marked number one." Eighty years or thereby elapsed between the date of that decreet-arbitral and the date of raising the present action. We see from the detailed powers and privileges anxiously conferred on the heritable keeper of the water of Tay by the ancient charters in process, that, even in the seventeenth century the salmon-fishings were considered important, but, at same time, it is undoubted that the value of these fishings has only been gradually developed, and that some of the fishings connected with the lands of Inchyra, of which that *ex adverso* of the Meadowpows is an instance, have only come to be considered valuable in comparatively recent times. But, in so far as there has been fishing at all *ex adverso* of the lands of Inchyra, the right has been exercised since the date of the decreet-arbitral, in accordance with the rights of parties, as therein set forth, and in a manner inconsistent with the supposition that the fishings *ex adverso* of the different kavels were or are held under a *pro indiviso* title. The presumption in fact and in law *retro* to the date of the two deeds of 1655, being a period of 140 years prior to the date of the decreet-arbitral, is that the possession during that period was equally inconsistent with the supposition of the fishing being held under a *pro indiviso* title, as it has been during the additional eighty years which have elapsed since the date of that decreet.

I should consequently come to the conclusion that the fishings were not and

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are not held under a *pro indiviso* title, although I had nothing to go upon but the terms of the two deeds of alienation of 1655, and the fact that from that time to this,—a period of 220 years,—the possession has been inconsistent with the supposition of such *pro indiviso* title.

An ambiguous title may no doubt be construed by possession as a *pro indiviso* title, but apart from such possession there is no presumption in favour of a *pro indiviso* title. The law, on the contrary, is hostile to *pro indiviso* titles, and favourable to their conversion into separate and exclusive titles. Here the fishings are all connected with the lands. They are included in the same titles, and although the words used in the titles had been less open to construction than they are, I could not have construed them in one way where the parties themselves, *rebus ipsis et factis*, had for between two and three centuries construed them in a different way. And I should come to this conclusion although the submissions, with the decreets-arbitral which followed on then in 1747 and 1795, were to be altogether laid aside, or had never existed.

As to the contention of Mr and Mrs Fleming that the negligence of Lady Gray has enabled them to extend the eastern boundary of their Hen fishing, so as to embrace a portion of the space *ex adverso* of the Meadowpows down to the stones A B C, it is obvious that before this claim can be entertained it must be held or assumed that the title to the fishings (including the Hen fishing) is not a *pro indiviso* title. The question of title to be solved necessarily comes to be whether the whole fishings of Inchyra are held *pro indiviso?* The two parties (Lady Gray and the Flemings) have between them the whole of these fishings. The words in the deeds of 1655, which fall to be construed, comprehend the whole. If these words are held, notwithstanding of the usage, to import a *pro indiviso* title to the fishing *ex adverso* of what, down to 1795, was the kavel called Meadowpows, they necessarily import that the title to the fishings *ex adverso* of the other kavels, including the defenders' title to the Hen fishing, is *pro indiviso* also. Now, it is superfluous to say that one *pro indiviso* proprietor cannot, in virtue of his *pro indiviso* title, prescribe against another *pro indiviso* proprietor a separate and exclusive right to a portion of the *pro indiviso* property, which is really what Mr and Mrs Fleming, in this branch of their case, are seeking to do. To call this a question of bar or of personal bar would be a misapplication of words. It is a question of title to an heritable subject and nothing else. If the Lord Ordinary were right in holding that the title to the fishings is *pro indiviso* his conclusion would be irresistible that "Mr and Mrs Fleming can never acquire, as in a question with the pursuer, an exclusive right to any part of the Inchyra fishings in the face of their own title." Accordingly, if I thought with his Lordship that the title to these fishings is a *pro indiviso* title, I should be of opinion that the plea of the Flemings that they had acquired a portion of the fishings *ex adverso* of the Meadowpows, by prescriptive possession, fell to be rejected without entering upon their proof of possession, in respect of the claim being in that view inconsistent with the nature of their own title.

Holding, however, as I do, that each of the two parties has an exclusive title to their separate fishings, I recognise the competency and relevancy of Mr and Mrs Fleming's contention that, by prescriptive possession, they have added the fishing or a portion of the fishing *ex adverso* of the Meadowpows to their Hen fishing. But then I am of opinion that they have failed to prove that possession. To have the effect contended for the proof of possession would require, by our law, to be clear and unequivocal for the complete period of forty years. I think

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it is not proved to have been so. I agree upon this point, not only with the result arrived at by the Lord Ordinary, but with his detailed observations upon the proof made in his note, and having had so much to say otherwise I shall add nothing on this particular subject to what has been well said already.

To come now to the case of Sir John Richardson, I take first his claim in virtue of his crown-grant of 1873 to the fishing *ex adverso* of the Meadowpows, because many of the observations I have already made upon the case between the Flemings and Lady Gray have necessarily an intimate bearing upon that claim. I certainly am of opinion that one *pro indiviso* proprietor cannot sue a declaratory action as to the common subject without the concurrence of the other or others; and if the title to the Inchyra fishings were held to be a *pro indiviso* title I think Sir John Richardson would be entitled to have the present action, so far as directed against him, at once dismissed. It has been held that a *pro indiviso* proprietor may defend his possession against a mere intruder; but it is fixed law that he cannot by himself pursue an action of declarator, which this is, with reference to the title of the common subject. It is true Sir John might take very little by that degree of success. I think he would substantially take nothing. Because, if the title to the respective fishings were not separate and exclusive in each of the two parties (Lady Gray and the Flemings), it would be *pro indiviso* in these parties jointly, and that would, equally with the other view, exclude the claim of Sir John under his recent crown-grant, because the Crown cannot give out a second time the fishings given out previously, whether in exclusive property or *pro indiviso*.

But I am of opinion that Lady Gray and the Flemings have each a perfectly good title to the separate and exclusive property of their respective fishings in a question with Sir John and with all the world, and this independently altogether of the submissions and decreets-arbitral to which Sir John was no party, and consequently that Sir John's ground for the total dismissal of Lady Gray's action entirely fails.

Sir John could not well plead ignorance of the terms of Lady Gray's title to the lands and the fishings, even if others could do so, for the progress which constituted that title was and is the identical progress under which he acquired the property of the Meadowpows. But nobody can plead ignorance of the terms of the titles of others which appear, as they do here, on the face of the public record of sasines. As little can anybody plead ignorance of the position and nature of the subjects, the mode in which they have been publicly possessed, and other patent facts which go to explain the title, and which are open to the observation or inquiry of all. For instance, when lands are described, with whatever obscurity, as within certain boundaries, the purchaser or other singular successor must find out the boundaries for himself. If the lands are described simply as being possessed, or as having been formerly possessed, by parties named, he must find out what was then or had formerly been so possessed. If neither boundaries nor possessors are mentioned he must still take the burden of finding out what the lands consist of, and how far the terms of the titles have been affected or explained by what has followed upon them. A familiar and instructive instance of this occurs in the case of a barony, the title to which frequently specifies nothing as to the lands beyond describing them as the lands and barony of A, with the addition of the parish or county within which they are situated. The law thus applicable to lands is, of course, equally applicable to fishings and other heritable subjects; and if the fishings are described, as in this

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case, as the fishings of certain lands, the inquiry of the purchaser, or other stranger, claiming a right to or interest in the fishings, must be extended to all the particulars relative to the lands which have a bearing upon the right and title to the fishings. Here we have the actual case of a barony to deal with. For by the crown-charter of 3d March 1662, in favour of Andrew Blair, the predecessor of the Flemings, the two quarters which made up one-half of the town and lands of Inchyra together with the half of the fishings, &c., were erected into a barony called the barony of Inchyra. The Lord Ordinary finds that the sunny half of the lands of Inchyra, together with the half of the fishings now belonging to Lady Gray, was incorporated into the barony of Kinfauns by the crown-charter of resignation in favour of Mrs Anne Blair, and her husband Alexander Carnegie, dated 28th February 1673, and this was not, I think, disputed by either party at the hearing, although, owing to blanks in the print of the titles, I have not been able quite satisfactorily to verify the fact for myself, and it is not of moment in this part of the discussion, except as farther illustrating the reasonableness, or rather the necessity, of that principle of our law of conveyancing which will not allow Sir John Richardson or any other stranger to found upon the terms of the titles of Lady Gray and the Flemings without having reference at the same time to the separate and exclusive possession which has publicly followed upon them, and by which they have been immemorially construed and explained.

I therefore require nothing but the terms of the titles and the possession which has followed upon them to exclude Sir John Richardson from claiming the fishings *ex adverso* of the Meadowpows, in virtue of his crown-grant of 1873, as well as from insisting that, so far as directed against him, Lady Gray's present action should be dismissed. It is not in the least necessary, in order to arrive at these results, that Lady Gray should have possessed the particular fishing *ex adverso* of the Meadowpows. The fishings, of which she has had separate and exclusive possession (some six or seven in number), are part and portion of the same crown-grant with the fishing *ex adverso* of the Meadowpows, for it is quite clear that the Meadowpows was part of the lands of Inchyra proper, and not, as Sir John alleges, part of the Prior Lands, which lay apart from all the kavels. The crown-grant of the Inchyra fishings has, therefore, been immemorially possessed upon, and is possessed upon at this hour, both by Lady Gray and by Mr and Mrs Fleming. The Crown has had no possession adverse to that of the original grantees, and in these circumstances the Crown could not, *cum effectu*, grant to Sir John in 1873 any one or more of the fishings which had been given out to others centuries before.

As regards Sir John Richardson's claim to the Meadowpows fishing, in his capacity of proprietor of the lands of Cairnie, I think it only necessary to say that I agree with the Lord Ordinary, both in the finding on the subject embodied in his interlocutor and in the observations made in his note.

I farther agree with the Lord Ordinary that Sir John Richardson has the property of the fishings *ex adverso* of his Cairnie property as far west as the line drawn through the three stones A B C, because, to that extent, his Cairnie Island, prior to the embankment, came directly between the Meadowpows and the main channel of the river, and he has not lost any of his frontage by the embankment. I think, further, that it follows from this that Sir John is entitled to be assoilzied from the alternative conclusion of Lady Gray's summons which embraces the space to which his right thus extends.

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On this addition being made, and the absolvitor of the Flemings from the action as laid being recalled, I see no objections to the findings in the Lord Ordinary's interlocutor so far as they go. But whether we adopt these findings *simpliciter* or not, there must, if my opinion be well founded, be an important alteration in the substance of the operative judgment itself, by decerning in favour of the pursuer Lady Gray, and against the defenders, in terms of the last alternative conclusion of the libel.

LORD ARDMILLAN.—The pursuer, Lady Gray of Kinfauns, alleges, and has produced titles to instruct, that she is proprietrix of one-half of the lands of Inchyra, and she claims the exclusive right of salmon-fishing *ex adverso* of the piece of ground formerly part of Inchyra and now of Pitfour to which the action relates. It is to be observed that the right of salmon-fishing was not conveyed with the lands to Hay of Pitfour, the predecessor of the defender Sir John Richardson. If Sir John has any right to the salmon-fishing opposite to that piece of ground it is not in respect of that conveyance. It is on another title that he claims them.

The other half of the lands of Inchyra appears to have formerly belonged to the Blairs, of the family of Balthayock, and now belongs to the defenders Mrs Fleming and her husband.

It is important to consider the right which, on the titles before us, these two parties, the pursuer and the defenders Fleming, have respectively instructed to the lands of Inchyra. The statements on the record and the pleadings at the bar have not been quite consistent on this point. But, without dwelling at present on that consideration, I am of opinion that the right of Lady Gray, and the right of Mrs Fleming and her husband, under their titles to the lands, are both rights of separate estate, and not rights *pro indiviso*.

On this point I cannot agree with the Lord Ordinary. On careful consideration of the titles I am humbly of opinion that the rights of both parties respectively to the two halves of the lands of Inchyra are separate rights to separate halves, and are not held *pro indiviso*.

The pursuer, Lady Gray, has alleged and produced a title to "the just and equal sunny half of all and whole the town and lands of Inchriff, now commonly called Inchyra, with houses, biggings, &c., as the same were occupied and possessed by Andrew Lyell and Allan Peat."

The defenders, Mr and Mrs Fleming, have alleged and produced a title to "All and haill that quarter or fourth part of the town and lands of Inchyra, with houses, biggings, &c., last occupied by James Blair, and now by myself," that is, Sir Alexander Blair of Balthayock, and a second title to the other quarter. We have here in both titles a description of the lands as occupied and possessed by certain individuals named. This of itself indicates a separate estate, and not a *pro indiviso* estate. But further, and yet more specially, the description of the pursuer's just and equal half as "the sunny half" is conclusive in my opinion of the separate and divided character of the right. If the whole lands were held *pro indiviso* there could be no sunny half to one of the parties, for the sun would shine equally and the shadows fall equally on the estate of both parties. The description of the half disponed to the pursuer's author is necessarily the description of the divided subject—a subject to be ascertained and known by the physical or natural distinction that it is the side on which the sun shines, perhaps supposed to be the lightest and warmest, like

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the sunny side of a peach. In the Latin charter founded on by the pursuer the description is *solarem dimidietatem*, and I think that "sunny half" is clearly the correct translation. In one description of another subject in the titles the words are *tam solarem quam umbralem dimidietatem*. This contrast of *solaris* with *umbralis*, taken along with the obvious derivation of the word, supports the translation "sunny half;" and besides, there is classic authority for the expression *arcus solaris*, meaning the rainbow or the sunny bow. Taking this view of the expression, I have no doubt that we have here a description of some importance; the half conveyed is distinguished by a special natural or physical peculiarity. It appears to me clear that, taking into view the fact that special occupancy or possession is set forth, and that the one half is described as the sunny half and the other is not, the rights to these lands are separate and not *pro indiviso*. Nor does the fact that the lands appear to have been possessed in alternate lots or kavels affect my opinion that they are held on separate and not on *pro indiviso* rights. I look upon the division into lots or kavels as an adjustment for convenience of parties—regulating the mode of possession—but affording no conclusive proof and raising no presumption in favour of a *pro indiviso* right, but rather the contrary. In the face of these titles, which are not dubious, I could not give effect to the fact of possession by alternate kavels as altering or qualifying the separate rights to the respective halves as they stand on the titles. The pursuer states, as I think erroneously, on the record, and the pleadings were opened accordingly, that the lands of Inchyra were before 1795 held *pro indiviso*. I am of opinion that on the titles the lands were not and are not held *pro indiviso*.

I understand Lord Deas to be of opinion that the allocation and possession by kavels was prior to the charters here founded on. That may be so, but, whether it be so or not, I am of opinion that on the words of these charters the rights are separate. I agree with Lord Deas in holding that the right of each party to the lands is, and has been since the charters, separate and not *pro indiviso*.

But passing from the titles to the land, and coming to the title to the fishings, I have felt the question, whether the right to the fishings was on the old titles separate or *pro indiviso*, to be attended with more difficulty. Take Lady Gray's title. Immediately following the conveyance of the just and sunny half of the lands is the conveyance of the "just and equal half of the mylne of Inchyra, mylne lands, multures, and sequels of the same." This is the conveyance of a *pro indiviso* right, for the mylne could not be divided so as to be conveyed in two halves as two separate subjects. There is no dispute about this. But observe the effect of it on the construction of the remainder of the titles. The course or flow of the conveyance in separate parts has thus stopped at the point where the mill is introduced into the title. The description by physical peculiarity is no longer present; the ascertainment of the subject conveyed in halves by specification of the separate occupancy of each of these halves is no longer present. These peculiarities, appropriate in the description of a separate estate, but inappropriate in the description of a *pro indiviso* right, have been dropped at that point. The words "just and equal half" standing alone without the aid of any reference to any natural feature or boundary or specified possession, or some equivalent, might mean or appear to mean "just and equal half *pro indiviso*, such a half as is conveyed as regards the mill.

The next subject conveyed is "the just and equal half of the salmon-fishings and other fishings of the said lands of Inchyra." What do these words mean,

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reading them as they stand in the context? In the first place, the words are not the salmon-fishings of the just and equal half of the lands as above described. That could easily have been stated if intended, and that would have been the conveyance of a separate right—a right to salmon-fishings *ex adverso* of the lands. But the words are, the just and equal half of the salmon-fishings of the lands. There is no part of the salmon-fishings of the lands of Inchyra of which the just and equal half is not conveyed. Every portion of this fishing is divided into just and equal halves. No part is exempt from division. If so, the right to each half so conveyed is the right to a *pro indiviso* half. But still further, the peculiar features by which in the previous clause the several parts were distinguished are dropped in the description of the fishings. I do not know whether the fishing opposite the sunny half is better or worse than the fishing opposite the shady half of Inchyra. Nor do I know whether the fishing opposite the land possessed by Andrew Lyell and Allan Peat is better or worse than the fishing opposite the land possessed by James Blair. But this I do know, that of all the fishing, whether opposite the sunny half or the shady half of the lands, and whether opposite Lyell's possession or Blair's possession, the just and equal half is by this title conveyed. No boundaries of the fishings are specified, nor is any possession referred to, nor any occupant mentioned. Therefore the peculiar marks by which divided property may be distinguished and preserved from confusion are set forth in the description of lands and are withheld in the description of the fishings; and the words selected for describing and conveying the fishings are those which have been used appropriately for conveying the just and equal half of the mill *pro indiviso*, and are not those which have been used appropriately for conveying the separate, just, and equal half of the lands. It is quite true that the mill is a subject which may be viewed as naturally indivisible, and which could not be conveyed in separate parts, and therefore the use of the words of conveyance *pro indiviso*, as applicable to the mill, cannot afford much aid in construing the words of conveyance of the fishings. Nor do I rest my opinion chiefly on that circumstance. I rather view the conveyance of the mill as stopping the current of the style used in the previous part of the deed, and so making manifest the change. It is on resuming its flow after the conveyance of the mill that we perceive in the title this peculiarity, that the words of description which prevented the conveyance of the land from being construed as conferring a *pro indiviso* right have been omitted. If in Lady Gray's title the sunny half had not been mentioned, and if the occupancy or possession by persons named had not been stated, the words of the title to the lands might have been otherwise construed, and might have imported a conveyance of a just and equal *pro indiviso* half of the lands. It is because of the peculiarity of the description that this construction cannot be adopted. But the style is changed in regard to the fishings. The peculiar words which gave a character of separate distinctiveness to the description of the halves of the land are omitted in the description of the fishings, and I think that the import and effect of the conveyance of the fishings, and of the pursuer's title built on that conveyance, is therefore different.

The terms of the defender Mrs Fleming's title to the other half of the lands of Inchyra are so similar as regards description that it seems scarcely necessary for me to advert to them particularly. These defenders have a title to two quarters making the other half of Inchyra. Their half is not indeed called the sunny half. That pleasant description is confined to the pursuer's half. But

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the absence of the word by which the pursuer's half is so attractively described is of itself an indication of a natural distinction between the two, and a natural feature in both, the one being the sunny half and the other the half that is not the sunny half. The occupancy of the lands of the defenders is stated to be by James Blair, but a *pro indiviso* right cannot be well described by stating the occupancy of a part. Then the just and equal half of the mill is conveyed in the same terms as in the pursuer's title, terms expressive of a *pro indiviso* half, and then the just and equal half of the fishings of Inchyra is conveyed—not the salmon-fishings of half the lands—but the just and equal half of the salmon-fishings of the whole lands—the equal division attaching to every part of the salmon-fishings opposite every portion of the lands on the river. It may, however, be noticed here that the lands appear to have been again sub-divided, so that while one-half is conveyed to the pursuer, two separate quarters, making between them the other half, were acquired by the defenders. The fishings, on the other hand, are conveyed to the pursuer and to the defenders as in each case "the just and equal half." I think that at the time when the submission and award were adopted as a means of adjustment and division there does not appear to have been any sub-division of the halves of the fishings. Each title sustains throughout, until the arbitration procedure commenced, a right to a just and equal half of the whole fishings of the whole lands.

These observations tend to confirm my view that in the title of both the parties the just and equal half of the fishings was conveyed to Lady Gray and to Mrs Fleming respectively as a *pro indiviso* right. It was so originally on the construction of the title, and it remained so until in some manner divided.

But a division was possible, and indeed probable. I think, indeed, that our law, though it acknowledges, yet does not favour, the permanent maintenance of *pro indiviso* rights. I can scarcely doubt that the proprietors of the two halves of the fishings of Inchyra on *pro indiviso* right could legally and effectually obtain, either judicially by process of division, or by arbitration and award, or by mutual arrangement and contract, if sufficiently instructed, the division and adjustment of their *pro indiviso* rights for their mutual satisfaction and convenience. Indeed I think that facilities for division are afforded by law, and that evidence of such adjustment and division of joint rights of fishing of which the permanent maintenance must be inconvenient, should be carefully and even favourably considered by the Court.

The result of my consideration of the evidence adduced to instruct the adjustment and division of the fishings is, that they have been divided, and that the *pro indiviso* rights of fishing have now ceased, and been succeeded and superseded by separate and exclusive rights.

Now, we have here important procedure in submissions between the respective authors of the pursuer and the defenders Fleming. I do not think that the pleadings by one or other of the parties to these arbitrations, or the adjusted admissions of both these parties in combination, or even the award or decree issued by the arbiters, can be held as directly affecting the rights of Sir John Richardson, the other defender. In regard to him the whole of these proceedings were *res inter alios acta*,—what either party said in these proceedings while in contest with each other cannot be evidence against Sir John. Nor can what both parties agreed to accept as a fact in their contest be held as a proof of the fact in a question with him. The concurrence of both is no more binding on him than the act of either. There is a view, to which I shall afterwards advert, on

which the issue of the arbitration, if it be found to be a division of the rights of fishing, may indirectly affect the interest of Sir John. But in the meantime I think we must deal with the proceedings in the submission as affecting the rights of Lady Gray on the one hand and Mr and Mrs Fleming on the other hand.

I do not dwell on the earlier submissions, because we have no authentic and probative award before us. I proceed at once to the submission in 1794 between William Lord Gray on the one part, proprietor of half of the lands of Inchyra, and John Anderson, W.S., as proprietor of the other half, and representing the interest now in the defender, Mrs Fleming. That was a submission to Mr Proctor of Glamis and Mr Hunter of Glencarse. It is true that the division of the fishings *ex adverso* of the lands of Inchyra was not committed to the decision of the arbiters by the deed of submission. There was a reservation in the following terms:—"Reserving always to both parties the right of the salmon-fishings in the river Tay respectively belonging to them according to their present boundaries, and which boundaries are not to be affected by any division that may be made in consequence thereof, but that the said arbiters after such division shall have power to put in march-stones in the ground belonging to either party to ascertain the boundaries of the salmon-fishings belonging to the parties respectively, which are not to be affected by the said division." Even under this submission with the reservation in it, it is plain that the arbiters were expected, and indeed desired, to put in march-stones to ascertain the boundaries of the salmon-fishings, a proceeding scarcely necessary or even intelligible if the fishings of both parties were held on *pro indiviso* right, and were to continue undivided. There can be no boundaries defining the mutual rights of *pro indiviso* proprietors, as each possesses the half of all. But further, I think that the parties to this submission of 1794 could enlarge the apparent scope of the submission by bringing within it still more clearly and more effectually, for the practical purpose of division, the question of boundary of the fishings and the proceeding of setting up march-stones to denote the boundaries. Accordingly, it appears that the parties did bring the subject specially under the notice of the arbiters. The authors of Mr and Mrs Fleming alleged throughout the pleadings in this submission, not a joint right to all the fishings, but a separate and exclusive right to certain fishings, and, in particular, to an important and valuable fishing known as the "Hen" fishing. This assertion of exclusive and separate right is quite inconsistent with the plea urged at the bar in favour of a *pro indiviso* right. The pleading, as I have already noticed, has not been consistent on this point. The defenders Fleming have not in this record alleged a *pro indiviso* right, and their pleas in law as well as their statements of fact are at variance with such an argument. Besides, they concurred in seeking specification and division by the setting down of march-stones to denote the boundaries of the fishings, and that was done.

Then we have the extract registered decree-arbitral, dated 2d and recorded 7th November 1795, in which the arbiters state, that while reserving to the parties submitters the salmon-fishing respectively belonging to them "according to their present boundaries, wherein we have fixed march-stones in the ground," proceed to give a series of distinct findings in regard to the fishings of both parties respectively, as indicated by the march-stones infixed by them for the purpose. I think, as Lord Deas does, that the arbiters had power to pronounce this award, and have effectually pronounced it. Now, this decision was recognised and accepted and acted on by both parties, and I agree entirely with Lord

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Deas on the importance of this arbitration and award. I think it was a division effectually carried out by award and the fixing of marches. I have really no doubt that whatever possession has taken place since 1795 has been, not on the footing of *pro indiviso* rights of fishing, but on the footing of separate rights to separate halves of the fishings of Inchyra, as ascertained and divided by the march-stones set down by the arbiters for the purpose of such division. The defenders Fleming possessing the "Hen" fishing and other fishings as separate rights under this proceeding, whereby the boundaries were ascertained, cannot possibly plead that the rights of the proprietors of the two halves are *pro indiviso*. To them at least the award which they craved, and which they accepted, and in accordance with which they have possessed, in so far as they have possessed at all, must be conclusive.

The lands of Meadowpows had been given by Lady Gray in excambion to Mr Hay of Pitfour, but the salmon-fishing *ex adverso* of Meadowpows was not included in the excambion. It remained a portion, and the eastmost portion, of the fishings of Lady Gray, though the land had been conveyed and had ceased to be a portion of her estate. It is just the fishing opposite that piece of ground which forms the subject of the present action. In my view the fishing opposite this piece of ground not having been conveyed with the land to Hay of Pitfour, remained the property of Lady Gray, who, as proprietor of the land and the fishing, had disponed the land, but retained the fishing.

In regard to the march-stones, I think that the old stone with an "I" on the one side and a "P" on the other must be held as one of the march-stones placed by directions of the arbiters, and that it is a fishing boundary, the "I" standing for Inchyra on the west side of the stone, and the "P" standing for Pitfour on the east side of the stone. The letters A B C indicate the remaining line of the boundary, which is according to the contention of Lady Gray.

An attempt was made by the defenders Fleming to prove possession further down the river beyond and contrary to this boundary. I concur with the Lord Ordinary in thinking that this attempt has not been successful, and that the preponderance of evidence back for more than forty years, and as near as it can be brought to the award of 1795, is in favour of the pursuer. I think, as the Lord Ordinary does, that the testimony of the witnesses for the pursuer is the most distinct and reliable, though I do not doubt the honesty of the witnesses on either side.

Accordingly, viewing this case as between the pursuer, and the defenders Fleming, I am of opinion that the interlocutor of the Lord Ordinary should be recalled, and that the pursuer is entitled to decree of declarator, conform to the second or alternative conclusion of the summons.

In regard to the case against Sir John Richardson, I am of opinion (1) that Sir John has instructed right to the salmon-fishings in the Tay situated *ex adverso* of his property as far west or up the river as a line drawn through the points indicated by the three stones A B C to the centre of the river. To that extent he is entitled to absolvitor. Beyond this and to the west of this I do not think that Sir John can on the merits and on the proof resist the alternative conclusions of this action at the instance of Lady Gray. On the effect of the usage and understanding of the fishers on the Tay in regard to the sweep of the net from the western point of Sir John's Cairnie property I express no opinion, except that we have no sufficient proof of such usage, but that, I think, usage, when ascertained, should be respected.

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His title to the lands of Cairnie, with the salmon-fishings belonging thereto, is not sufficient of itself to sustain his defence against the conclusions of the pursuer's action, and I am not able to perceive that he has instructed such possession of fishings above the line A B C as can, with reference to his Cairnie title, support his claim. The pursuer's right appears to me to be clear on the titles, and not to have been parted with, and Sir John's opposing right is not supported by sufficient proof of possession contrary to hers.

A recent title from the Crown has been obtained by Sir John in 1873, but that title from the Crown is granted under the declaration and express stipulation that the conveyance should in no way prejudice the rights of any person who may claim right to the salmon-fishing, provided such person shall produce a valid and effectual title thereto complete anterior to the grant. If Lady Gray's title be, as I think it is, valid and effectual, it cannot be prejudiced by this recent grant from the Crown.

I do not think that in the result of my opinion I differ from Lord Deas, for I also hold that the lands have never been held *pro indiviso* since the charters of 1662, and that the fishings are not now held *pro indiviso*, and have not been so held since the decree, and the acceptance of the decree of 1795.

It is right that I should advert to a point of form in reference to the conclusion against Sir John Richardson.

The action is laid on the footing of the right of the pursuer to the fishing being separate and exclusive.

On the titles produced, read without reference to the arbitration, the right to the fishing is *pro indiviso*, though the right to the land is separate and exclusive. The arbitration proceedings and award are equivalent to an adjustment and division and ascertainment of boundaries, and such is their effect in this action as in a question with the defenders Fleming. It is settled that one *pro indiviso* proprietor cannot pursue alone an action of declarator with reference to the common property. A defender is entitled to protection against such an action. Here the pursuer has called as a defender the other *pro indiviso* proprietor, who has appeared and defended. The pursuer has, in my view, instructed a division of the property, so that her right is now separate and exclusive. It is not therefore against the pursuer as a *pro indiviso* proprietor, but against the pursuer as a separate and exclusive proprietor, that the defender Sir John Richardson is now called on to defend his claim to the salmon-fishing. The effect of calling the Flemings as defenders, and the effect of the decision against the defenders Fleming, is to put an end to the plea otherwise competent to Sir John, that one of two *pro indiviso* proprietors could not alone sue such an action as this. In my view this point, which is technical, could now have no other effect than to delay proceedings and protract litigation; and therefore I disregard it. I think the plea might otherwise have been competent to Sir John. But I think that, in respect of the decree against the defenders Fleming, the pursuer's right is now separate and not *pro indiviso*, and the plea may be fairly set aside as inapplicable.

The result is that, in my opinion, the pursuer is entitled to decree of declarator as concluded for to the extent I have already explained, except in so far as regards Sir John Richardson's right to salmon-fishings *ex adverso* of his lands as far west as a line through the points indicated by the stones A B C.

LORD MURE.—I concur in the result which your Lordships have arrived at.

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I shall content myself with stating as shortly as I can the grounds on which I have arrived at that conclusion. I cannot concur with the Lord Ordinary that the title of these parties is a *pro indiviso* title. It is plainly not a *pro indiviso* title to the lands in the ordinary sense of that word. For it is not a *pro indiviso* conveyance *per expressum*, nor is it a conveyance of an equal half of the whole subject; but it is a conveyance of one-half as possessed by particular parties, thereby shewing that at the date of these titles, in 1655, the conveyance to each of the parties was of a separate and distinct portion of the whole. The title to the fishings, looking to the express words of the deeds, is somewhat different. It is more like the usual phraseology of a conveyance *pro indiviso;* and if called upon to construe it at the time it was granted I should have had difficulty in holding that it was not a *pro indiviso* title to the fishings. But the language is peculiar, and as it occurs in a part of the deed where there are conveyances of various subjects other than the fishings or the lands, and is so worded as in some respects to be ambiguous, it may, I think, admit of being cleared up by the possession and the actings of the parties under it. For I have no doubt that in construing a title of this description we are entitled to take into consideration the possession and the actings of the parties following upon it. That I apprehend to be a well-known rule of law in disposing of questions of this sort. It was so laid down by Lord Wynford in the case of Macdonald against Heriot's Hospital, in the House of Lords, in which he said:—"Old writings might be expounded by contemporaneous usage, and there can be no means of getting at the meaning of old instruments so satisfactorily as that of seeing how the parties acted under them at the time they were made, and have since continued to act." Lord Brougham expresses a similar opinion with reference to the construction of Acts of Parliament in the case of the Magistrates of Dunbar, 1 Shaw and M'Lean, 134; and with reference to the rules adopted in England there is the opinion of Lord St Leonards in the case of the Attorney-General v. Drummond, 1 Drury and Warren, p. 368, in which his Lordship says:—"One of the most settled rules of law for the construction of ambiguities in ancient documents is that you must resort to contemporaneous usage to ascertain the meaning of a deed. Tell me what you have done under such a deed, and I will tell you what it means." Now, applying these rules to the circumstances of the present case, I think it quite clear, upon the evidence afforded by the various documents that have been founded upon on both sides, to which Lord Deas has referred, that these fishings have never been possessed *pro indiviso;* and with the exception of what is called the Hurle Carle fishing, which in all the proceedings seems to have been dealt with differently from the rest, there is, in so far as we can see, no evidence of any other portion of the fishing ever having been possessed *pro indiviso.* In the submission relative to them which took place in 1756, and to which the scroll of the decree-arbitral applies, they are spoken of as separate and divided rights; and I find it stated, in answer for Mr and Mrs Fleming to the third article of the condescendence for the pursuer that "the proprietors of the two half lands of Inchyra, and salmon-fishings thereto belonging, had each of them a distinct and divided right and possession of the salmon-fishings belonging to them, and that this was found by a decree-arbitral pronounced in 1757 in a submission between the parties to Lord President Craigie and Lord Prestongrange." Now, these words "distinct and divided right and possession of the salmon-fishings belonging to them," are the very words of the decree-arbitral, and from that date down to 1795, when the second submission was entered into,

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the same distinct and divided right and possession appears to have been continued. The arbiters under the decree-arbitral of 1795 were not to settle the rights of parties as respects the fishings, but they were to fix the boundaries of the fishings as at that date; and, in my opinion, it is impossible to read the terms of that decree-arbitral without coming to the conclusion that the portion of the river Tay here in dispute was assumed, and expressly declared at that time, to belong to and to have for long belonged to Lord Gray. It is described as the eastmost fishing, that is, to the east of the Hen fishing, now belonging to Mrs Fleming, and as belonging to Lord Gray, "and altogether opposite the lands of Pitfour, being bounded to the west by the old march-stone between the lands of Pitfour and Inchyra, which we ordered to be marked numbered one." And when we now find a march-stone at the march between the estates of Inchyra and Pitfour, at about the very place where the arbiters appointed it to be placed, I think we may assume that that is the march-stone which they put there, and that the stone a hundred yards down the river, which is founded on by the defenders in this case as that march-stone, cannot be held to be the march-stone of the Hen fishing as fixed by the decree-arbitral of 1795. I agree with the Lord Ordinary in his observations on this point, and, looking to the terms of the decree-arbitral, I think that we are bound to hold that the march-stone at the boundary of the estate is the march-stone which is the boundary of the original Hen fishing. Now, that being the case, I can see no grounds on which the defenders can successfully maintain that Lady Gray is not the owner of the fishings in the portion of the river Tay in question which are opposite the Meadowpows, and which her title, as explained by these proceedings, gives her an express right to, because her grant is an express grant of salmon-fishing, and the portion of the fishing that belongs to her has been assumed as fixed by that decree-arbitral in 1795 in a question with the predecessors of the defenders. It is said by Mrs Fleming, as I understand, that she has acquired by prescription a right to extend the boundary of her fishing called the Laying Hen, and that she has established a prescriptive right down to the line A B C, which is in question here. Now, I cannot help looking on that decree-arbitral of 1795 as a document which is so worded as to make it very difficult to hold that a party who founds on it as explaining where her share of the fishings in the river were, can be allowed to found upon it to that extent, and yet not to be bound by it in other respects. That decree-arbitral is the proof of who the party is to whom the Hon fishing belongs. It was founded upon by Mrs Fleming as shewing the nature of her right in the action between her and Sir John Richardson, decided in 1871; and it was referred to by the Judges in that case as shewing that Mrs Fleming was in the position of having a separate right to certain portions of the fishings in the river, and she founds upon it to the same effect in this action. Now, if it is necessary for her to found on that deed, and I think it is, in order to shew what her portion of this divided fishing is, it is very difficult to say that she can be entitled to maintain that she can go beyond the boundary fixed by that deed as the boundary of her fishing. It comes very much within the principle of the rules applicable to prescription in the case of a bounding charter, and it is in that view an attempt to prescribe against her own title. Even in such a case as this, where it is not on the deed itself that the question is raised, but on that deed coupled with a decree-arbitral acted on by the parties, I should not, as at present advised, be prepared to hold that one of these parties could in the face of such a title acquire by prescription any extension of boundary in a question

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with the party holding the coterminous property. But without proceeding on that strict ground, I concur with the Lord Ordinary, and also with Lord Deas and Lord Ardmillan, that there is no such evidence of exclusive possession by Mrs Fleming of the portion of the water to the east of the march boundary fixed in 1795 as can enable her to maintain that she had acquired by prescription a right to go beyond that line. If that be so, then Lady Gray's title, as explained by what has followed upon it, gives her an express grant of the salmon-fishings of the portion of the river Tay opposite the Meadowpows; and that being so, I think the Lord Ordinary's interlocutor ought to be recalled as regards the question between Lady Gray and Mrs Fleming; and that Lady Gray is entitled to prevail on that part of the case—not to the full extent that she claims in the first conclusion of her summons, but to the extent which the Lord Ordinary points at in his interlocutor under the alternative conclusion. The summons concludes for 120 yards, but there is some evidence to the effect that in the old action the question in dispute was 86 yards. But to the extent of one or other of these lines she is entitled to have decree.

The case of Sir John Richardson as laid on record is, that the action is unfounded, in respect that the defender, in virtue of his titles to the lands of Cairnie, and the salmon-fishings and others aforesaid, and, *separatim*, in respect of his possession under the said titles, has the sole and exclusive right to the salmon-fishings at that place. Now, I think Sir John Richardson is entitled to the exclusive right of the salmon-fishings *ex adverso* of the portion of the river where the island of Cairnie was. As I understand, the line which the Lord Ordinary refers to, the line A B C, it is somewhat to the westward of the westmost point of Cairnie Island at low water, and in that way, by the line now given to Lady Gray, Sir John Richardson gets right to fish as far up the river as he would have fished if the island of Cairnie had not been joined to the mainland as it is now. Looking to the plan; it appears to me that the line now fixed with Lady Gray is about the same line as that of the original Cairnie fishing, and to the east of that line I think he is entitled to exclusive possession, subject, it may be, to the custom of the Tay as to the sweep of the net beyond that line. I do not know whether the conclusions of this action point to leaving that open; but that is a matter of detail to be considered in dealing with the terms of the decree. In the recent case of Hay v. The Town of Perth this Division of the Court[1] qualified a line fixed by them, making it subject to the custom of the Tay, and it is for your Lordships' consideration whether for safety's sake some such words should not be inserted in the decree disposing of this case. But I think Sir John Richardson's right to any other portion of the fishing claimed under his first plea in law in respect of possession was disposed of in the former action. It is the very plea maintained in the question raised between him and Mrs Fleming in this Court and in the House of Lords. But since the date of that decision a new title has been got from the Crown, with an express grant. And the case now raised by Sir John, as I understand it, is that under this deed he has acquired an express grant from the Crown. But this express grant is qualified by the important words to be found in the print, by which he only gets the right if there is no one else who can shew that they hold a prior grant to the salmon-fishings at that particular place. Now, in the view I take of the case, Lady Gray has that prior right, because it has been now held, as between Lady Gray and Mrs Fleming, that Lady Gray has right to the sal-

[1] Dec. 20, 1861, 24 D. 230, H.L. May 12, 1863, 1 Macph. 41, 35 Scot. Jur. 463.

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mon-fishings at that particular portion of the lands of Meadowpows which are immediately to the east of the Hen fishing, and that she holds them under an express grant of salmon-fishing. This was disputed on the part of Sir John Richardson, on the ground that the Meadowpows was a part, not of the estate of Inchyra, to which the express grant of salmon-fishings applied, but of another estate called Prior Lands, belonging to the Gray family, which had no right of fishing; and it was contended that there never was any right of fishing belonging to the Gray family opposite the lands of Meadowpows—Meadowpows being part of Prior Lands. But after having carefully considered the argument adduced in support of this plea, and examined the whole of the titles, and looked at the different plans, the conclusion I come to is the same as that arrived at by the Lord Ordinary and your Lordships, viz., that there is nothing in these deeds, or in the situation of the lands, that can be held to lead to the inference that this water was not held under the Inchyra title but under the title of Prior Lands. I think that in this respect Sir John Richardson has failed, and that the pursuer is entitled to prevail in a question with him, excepting as to that part of the river which is immediately *ex adverso* of what was known as the Cairnie Island, before that island was joined to the north bank of the river.

LORD PRESIDENT.—I understand your Lordships are all of opinion that Lady Gray, the pursuer of the action, is entitled to a decree of declarator to the effect that she has the sole and exclusive right to the salmon-fishing in the Tay *ex adverso* of the westmost portion of the Meadowpows, being that portion which lay to the westward of the westmost point of Cairnie Island before it was embanked and added to the land opposite it; and also that she is entitled to judgment in terms of the other auxiliary conclusion of the summons to a corresponding extent. In the proposed judgment I concur; but as I have experienced considerable difficulty in reaching this result, and as my opinion is perhaps founded upon slightly different grounds from those at least of some of your Lordships, I think I should hardly be discharging my duty if I did not endeavour to express briefly what the precise grounds of my opinion are. I may say, at the outset, that as regards the pretensions of Sir John Richardson to the fishings *ex adverso* of the portion of Meadowpows which I have endeavoured to describe, I think these are not well founded. I think he has not shewn by words or otherwise that these fishings are within his Cairnie title, and I think that his recent grant from the Crown affords him no title to these fishings, because a valid and effectual grant of the same fishings had been long ago made along with the lands of Inchyra, whatever may be the nature of the title under which these fishings are held by proprietors of Inchyra. But, then, the question raised—at least, the chief question raised—by the interlocutor of the Lord Ordinary, comes to be a question of title. His Lordship holds that the title which Lady Gray has to the fishings *ex adverso* of the portion of Meadowpows which I have already specified is a *pro indiviso* title merely, and therefore that she is not entitled to prevail in a conclusion of declarator of the sole and exclusive right either against the other *pro indiviso* proprietor, Mrs Fleming, or against her neighbour to the east, Sir John Richardson. The history of this estate of Inchyra is somewhat peculiar, but it is not necessary to go back, and, indeed, we have not the means of going back, further than the year 1647, at which time we find that it was held under a crown-charter in favour of Sir Thomas Blair of Balthayock along with a variety of other lands therein contained. The description of Inchyra in that charter is as follows:—"Totas et integras terras de Inchirref cum molendino earundem

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terris molendinariis multuris et sequelis solit et consuet cum piscariis salmonum et aliis piscariis dict terrarum de Inchirreff domibus edificiis," &c. And the *quæquidem* to these lands is thus—"Quæquidem terre de Inchirreff cum pertinen earundem supra mentionat perprius ad Gilbertum comitem de Errol hereditarie pertinuerunt." Now, it is quite clear that Sir Thomas Blair possessed the entire estate of Inchyra and the entire salmon-fishings of the estate of Inchyra, by which must be meant, in the absence of any evidence shewing the contrary, the entire salmon-fishings in the water of Tay opposite to the lands of Inchyra. It also appears that the estate with its fishings had been held as an undivided estate at an earlier period by the Earl of Erroll, and therefore it does not appear to me that there is any reason to suppose that the division of this estate into kavels, as we find it afterwards possessed, had occurred prior to the date of this charter of 1647. There is no evidence to shew that the estate ever had been divided in any way prior to 1647, in which year it is possessed as a single and undivided estate by Sir Thomas Blair. But then there is no doubt that it was divided by Sir Alexander Blair, who appears, I think, to have been Sir Thomas' son, in the year 1655. There are two deeds in that year, the one of which was in favour of William Blair of Tarsappie, and is dated 16th June 1655, by which Sir Alexander Blair conveys to him all and haill the just and equal sunny half of all and haill the town and lands of Inchyra, with houses, biggings, yards, orchards, tenements, &c., as the same is presently occupied and possessed by Andrew Lyell and Allan Peat, with the just and equal half of the mill of Inchyra, mill lands, multures, and sequels of the same used and wont, with the just and equal half of the salmon-fishings and other fishings of the said lands of Inchyra, and all and haill the passage upon the water of Tay with the ferry and the ferry-boat, &c., and all and whole the teind sheaves and parsonage teinds of the said haill lands of Inchyra and the parsonage teinds of a certain rigg of land in addition. Now, I do not entertain any doubt that what was conveyed by this disposition was one-half of the lands of Inchyra, known as the sunny half of these lands, and the limits of which were ascertained on this disposition by the occupation of the lands at that time—at the time of granting the disposition—by two persons called Lyell and Peat. Whether these lands were the eastmost half of the lands of Inchyra, which the term sunny would rather lead one to suppose, or whether the lands had been possessed by Lyell and Peat and by certain other persons mentioned in the conveyance of the other half, in that form in which we see they were possessed afterwards, it is impossible exactly to ascertain, but there is nothing in either of the two conveyances of the year 1655 to preclude the supposition that while the title to the estate of Inchyra was an undivided title in the person of Sir Thomas Blair and his son Sir Alexander, the possession by the tenant might have been a possession by kavels; and if that were so, then the effect of this disposition in favour of William Blair of Tarsappie would be to give him the alternate kavels possessed by Andrew Lyell and Allan Peat. The other disposition of the same date, or nearly of the same date—for it is upon the 2d of August of the same year—gives to Andrew Blair of Inchyra all and haill that quarter or fourth part of the town and lands of Inchyra, with houses, biggings, yards, &c., last occupied by James Blair and now by myself, lying within the sheriffdom of Perth, and all and sundry the teind sheaves, &c., and also all and haill the other quarter or fourth part of all and haill the said town and lands of Inchyra, with houses, biggings, yards, orchards, &c., with the just and equal half of the mill of Inchyra, and with the just and equal half of the salmon and other fishings in the said lands of Inchyra. There is no particular

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evidence at a subsequent date of any division of the estate into kavels, and I think it is not an unreasonable supposition, but probably the most reasonable supposition that can be made in the circumstances, that the division of the estate as regards title into alternate kavels originated in a possession of that kind by tenants under the proprietor of the whole undivided estate. But whether that be so or not, I am very clearly of opinion that this estate was not given out by Sir Alexander Blair in equal undivided halves, but was given out in distinct and separate halves, and has been possessed and held ever since that time as divided halves of the estate of Inchyra. But then, as regards the fishings, they stand in a very different position. It must be observed that the sunny half of Inchyra, as possessed by certain persons named, is a half of Inchyra, which may or may not be precisely the one just and equal half; and it seems to me that when you have the words "just and equal half" of a subject, and without any other description whatever, it is almost impossible to resist the conclusion that what is intended to be conveyed is a *pro indiviso* half. If there is nothing to discriminate between one half of an estate and the other half of an estate, as existing *in rerum natura*, either by boundary or possession or in some other manner, how are you to ascertain which of the two halves is intended to be conveyed? and if in the conveyance you have no other words than these, "I give, grant, and dispone one just and equal half" of such and such a subject, I think it is very difficult indeed to interpret it in any other way than as a conveyance of half of the subject *pro indiviso*. Now, how stood the fishings? In the first of the two dispositions they are given out in these words,—"The just and equal half of the salmon-fishings and other fishings of said lands of Inchyra." If it was intended to give the fishings of the sunny half of Inchyra, most assuredly these words would have been used, or if it was intended to give one-half of the fishings as distinguished from another half of the fishings by local situation or by possession, such words would have been used as are used in the very same dispositive clause with reference to the lands. But as regards the fishings, we have absolutely nothing except the use of the words "the just and equal half of the salmon-fishings," and in the case of the other half of the estate it is even more remarkable to observe the difference between the two parts of the dispositive clause, for the lands are given out in two separate quarters. There is, first of all, that quarter of the lands "occupied by James Blair and now by myself;" then there is that other quarter or fourth part of the lands of Inchyra "presently occupied and possessed by Gilbert Lyell;" but the fishings are given not as two-fourths, not first one-fourth of the fishings and then another fourth of the fishings, but as one-half of the fishings—not the fishings of the two-fourths, not the fishings of the half of the lands of Inchyra—but the just and equal half of the fishings of Inchyra, that is, the entire estate of Inchyra. I am therefore of opinion that, in so far as these titles are concerned, what the disponees of Sir Alexander Blair got was, each of them, a *pro indiviso* half of the salmon-fishings and other fishings in the water of Tay of the entire estate of Inchyra, and the terms of the titles have never varied. The pursuer of this action is to the present day infeft in the same terms, and therefore, so far as the titles are concerned, there cannot be the least doubt in my mind that the pursuer would be a *pro indiviso* proprietor of the salmon-fishings to the extent of one-half.

But there are a number of very instructive facts connected with the history of these fishings, constituting, I think, a contract between the two *pro indiviso* proprietors of the entire fishings, and by which both of them are bound to the pre-

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sent day. At an early period there seem to have occurred disputes between them as to the way in which these fishings should be possessed; and accordingly in the year 1756 there was an action brought by the Lady Gray of that day in the Court of Session against the Blairs of Inchyra and Mr Blair of Balthayock, who had then also an interest in the other half of the estate of Inchyra, concluding that it should be found and declared that the pursuers have the good and undoubted right to the half of the whole salmon-fishings of the said lands of Inchyra, and that the defenders have no exclusive right to any particular fishings thereon, and that the defenders should be ordained to desist from appropriating to themselves any particular fishings of the said lands. Now, it appears to me that unless there was something to bar the pursuer of that action from insisting in that conclusion, she must have prevailed in it. But observe what took place. The process was judicially referred apparently to the Lord President and Lord Prestongrange; and the two arbiters seem to have come to a provisional conclusion at all events as to what the rights of the parties should be, for we have a scroll decree-arbitral bearing as its date the year 1757, and by that the arbiters proposed to find that "the parties submitters, as holders of the two half lands of Inchyra and salmon-fishings thereto belonging, have, each of them, a distinct and divided right and possession of the said salmon-fishings belonging to the parties, and lying opposite to the greens adjoining to the different kavels or glebes of the said lands, and that they and their heirs and successors may continue to possess the said fishings or any other fishings to be made out by them belonging to the said lands, and to sett, use, and dispone thereon in a separate divided manner in all time coming as they have done in times past, unless the parties submitters or their heirs and successors shall find it their mutual interest, and shall agree, to alter the manner of possession; in which event the arbiters find that they may possess the same, and sett, use, and dispone thereon in a joint and divided manner if they shall think it convenient; and the arbiters further find and declare that the said Margaret Lady Gray has the only good and undoubted right to the passage or passage place of the water of Tay, called the Ferry of Inchyra, with the passage boats and privileges of the same." Now, if that decree-arbitral had been executed—if the parties had not objected to this scroll, and the decree-arbitral had been executed—it would certainly have settled the possession at all events between these parties in all time coming, reserving to them, as it does, to revert, if they shall both agree to it, to the mutual and undivided manner of possession. But it is quite plain from the documents before us, independently altogether of the absence of any final decree-arbitral, that this was not acquiesced in by the parties. On the contrary, we have pleadings dated in the year 1758, from which it appears clearly enough that the parties had come to differ very seriously about one fishing called the Hurle Carle, in consequence of which, as far as we can judge, the proceedings in that submission became abortive. The position taken up by Lady Gray was this—She said that she had condescended to agree to their demand that each party shall possess the fishings opposite to the kavel of lands which belonged to them, but they contend that the fishing called the Hurle Carle, which is opposite to the kavel belonging to Lady Gray, may be adjudged to them. She says she cannot agree to that upon any consideration, and she is of opinion, she says, that considering the concessions that they—meaning herself and her husband—"have made to the Miss Blairs, they should not make any opposition with regard to this fishing of the Hurle Carle; if they should still insist upon its being common, the memorialists must

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be excused to adhere to their first claim, viz., that the whole fishings be in common, and that each party draw their equal shares of the profits thereof in terms of their rights and infeftments." And the Miss Blairs, on the other hand, expressed a hope that the arbiters would find and declare that not only the other fishings are to continue to be possessed as the separate property belonging to the parties submitters, but also that the Hurle Carle was to be declared a joint property. The evidence regarding this submission there comes to an end, and, as I have said before, I think the natural conclusion is that the whole affair became abortive. But then a period of nearly forty years elapses before we hear any more of these fishings or their owners; and it is very important, if possible, to ascertain what is the state of the matter during that period of forty years. Did they possess these fishings in their character of *pro indiviso* owners of them, or had they come to any arrangement by which a separate possession had been established, or, without any arrangement, had they acted upon the suggestion contained in the scroll decree-arbitral? Now, we have a great deal of most important light on that question, derived from the submission and decree-arbitral of 1795. No doubt the matter of the fishing is excluded from the division which is intended to be made by that decree-arbitral. The lands are to be divided,—that is to say, the possession by kavels is to be brought to an end, and Inchyra is to be divided into two separate and compact estates. That is what the parties then desired, and they resort to arbiters for the purpose of having this done justly and equally. But they do not give the arbiters power to divide the fishings; but, on the contrary, introduce into their submission a very important reservation concerning these fishings,—"Reserving always to both parties a right of the salmon-fishings in the river Tay respectively belonging to them according to their present boundaries, and which boundaries are not to be affected by any division that may be made in consequence thereof, but that the said arbiters, after such division, shall have power to put in march-stones in the ground belonging to either party to asertain the boundaries of the salmon-fishings belonging to the parties respectively, which are not to be affected by the said division." Now, this is a deed executed by the predecessors of the parties before us—I am speaking now of the two parties who own the lands of Inchyra between them —Lady Gray on the one hand, and Mrs Fleming on the other. Their predecessors declare in this contract that their fishings are marked out by boundaries, and that the fishings defined by these boundaries belong to them in property respectively. And they desire that this division, ascertained by such boundaries, shall stand and remain in all time coming, and shall not be altered or affected by anything to be done by the arbiters in making the division of lands. In short, their agreement is that when the estate of Inchyra is divided into two separate compact estates, each of the proprietors shall not have the fishings *ex adverso* of his estate for the future, but shall continue to possess the fishings which they had possessed, and which had been defined by boundaries before this submission was entered into. And, accordingly, the arbiters, in disposing of this matter of the fishings, act entirely in the spirit of this reservation, and give it full effect. But the manner in which they do give effect to it throws a great light upon what was the meaning of the parties in making the reservation, because they find that the lowest or eastmost fishing belongs to Lady Gray, and is altogether opposite to the lands of Pitfour, being bounded to the west by the old march-stone "between the lands of Pitfour and Inchyra which we ordered to be marked No. 1;" and then they declare that the several fishings between the different stones that they have laid down belong alternately to the one party

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and the other, with the exception of one, and that is the Hurle Carle, which is the joint property of Lord Gray and Mr Anderson, Mr Anderson being then the owner of the other half of Inchyra. "And in terms of said submission (they go on) we do hereby declare that the said fishings respectively belonging to each of the said parties shall not be hurt or affected by the division now made of the lands, but that the said fishings shall be enjoyed and possessed according to rights, customs, and usages heretofore observed by the said parties, their authors and predecessors." Now, there cannot be the slightest doubt in point of law that these joint owners of the fishings of Inchyra were quite entitled to divide them if they chose to do so. Nobody can dispute that. What right one of them might have by a process of law to force a division of the fishings is another affair; but that they could by agreement divide these fishings I do not entertain the smallest doubt, and it is impossible, I think, to read this probative instrument—the submission to arbiters in 1794—without coming to the conclusion that although they do not by that deed make a division, they declare in so many words that such a division has been made, and that in virtue of that division the fishings of Inchyra are held and possessed by them, not *pro indiviso*, but, on the contrary, in a divided form, with the single exception of the fishing called the Hurle Carle. Now, in a question between the pursuer, and the defender Mrs Fleming, it appears to me that after that decree-arbitral, and more particularly after the lapse of nearly eighty years since that decree-arbitral was pronounced without any alteration being made on the boundaries, or anything being done to undo what was then declared to be the state of possession and the rights of the parties, Mrs Fleming is altogether precluded from maintaining that Lady Gray is not entitled to the sole and exclusive property and possession of the lowest fishing, which is altogether opposite to the lands of Pitfour. But then these proceedings are no doubt not directly binding on Sir John Richardson, and it is necessary to ascertain whether he is not entitled to maintain that Lady Gray cannot pursue this action as against him, because she had no title to sue a declarator of sole and exclusive right. I observe, however, that Sir John Richardson has not pleaded this as an objection to Lady Gray's title to sue, and, indeed, I do not think that he has pleaded any good objection to her title at all. His objections to her title are entirely different, and it might perhaps be enough for the present judgment to say that, there being no challenge of this title of Lady Gray upon either of these views of it, Sir John Richardson has no defence against the declarator unless he can make out some right in himself, and that defence I have already disposed of. But I am not desirous to rest my opinion upon any mere technicality in the way of pleading, because I think there is another very good ground upon which Lady Gray is entitled, in respect of this matter, to prevail against Sir John Richardson. Supposing there are two *pro indiviso* proprietors of a certain subject, it is very true that the one cannot sue a declarator of right without the other; but supposing that one of them insists that he is not a *pro indiviso* proprietor, but that in respect of transactions with the other co-proprietor he has become a separate and independent proprietor of a particular part of the subject, what is he to do then? He must of course sue the other proprietor to have that established, if it be disputed, and I have said that having sued Mrs Fleming to that effect, I think Lady Gray has proved her case, and is entitled to prevail against Mrs Fleming, and having prevailed against Mrs Fleming, and having established in a question with her that she (Lady

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Gray) is the exclusive proprietor of this portion of the Inchyra fishings by virtue of her title, she is then in a position to go against any stranger in the character of sole and exclusive proprietor, and to maintain her possession and her right against those strangers just as effectually as she did against her co-proprietor. The only person having an interest to maintain that her right is *pro indiviso* merely having been put to silence, I apprehend that nobody else can come forward to maintain that such is the state of the title. Now, the only peculiarity here is that the stranger, if I may so call Sir John Richardson, or neighbour, is convened in the same action with the co-proprietor as a defender, but I do not think that introduces any difficulty. I think it comes exactly to the same thing as if Lady Gray had first brought her action against Mrs Fleming to put her to silence, and establish, as against her, that she (Lady Gray) is entitled to deal with these fishings as her exclusive property, and then, having finished that process, had brought a declarator against Sir John, because the question which she has got to try with Sir John is an entirely separate and distinct question from that which she had to try with her co-proprietor. The question which she has got to try with Sir John is whether he has any title to the fishing *ex adverso* of this portion of the Pow Meadow; and in regard to the merits of that question I think she is entitled to prevail, for the reasons that I have already very shortly given. Upon the whole matter, therefore, I am very clearly of opinion, with your Lordships, on the grounds that I have now stated, that Lady Gray is entitled to prevail to the extent which I have indicated. What precise form of words may be adopted for the purpose of expressing the limits of her right to the fishing I am not prepared at this moment to suggest, but probably that may not be very difficult to adjust with the help of the counsel for the parties.

THE COURT, on 11th January 1876, pronounced this interlocutor:—"The Lords having heard counsel on the reclaiming note for the Right Honourable Margaret Baroness Gray against the interlocutor of the late Lord Mackenzie, dated 5th January 1875, Recall the said interlocutor: Find and declare that the pursuer has the sole and exclusive right of salmon-fishing in the river Tay *ex adverso* of that piece of ground formerly called the Meadowpows or Powlands of Inchyra, which lies to the westward of the stone indicated by the letter C on the plan No. 79 of process: To this extent and effect repel the defences, and decern: Find that neither of the defenders have any right of salmon-fishings *ex adverso* of the said piece of ground: Interdict, prohibit, and discharge the defenders, or either of them, from fishing in the river Tay *ex adverso* of the said piece of ground, and decern: *Quoad ultra* assoilzie Sir John Richardson from the conclusions of the summons, and decern: Find the pursuer entitled to expenses against the defenders Mrs Fleming and her husband to the extent of two-thirds of the taxed amount thereof: Find the pursuer entitled to expenses against the defender Sir John Richardson to the extent of one-half of the taxed amount thereof: Allow an account or accounts of the said expenses to be lodged, and remit the same to the Auditor to tax and report."

On considering the report of the Auditor,—

THE COURT, on 14th July 1876, pronounced the following interlocutor:—"Approve of the Auditor's report on the pursuer's account of expenses, No. 162 of process, and decern against the defender Sir

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John Stewart Richardson for payment to the pursuer of £137, 9s. 0¼d., being the modified amount of the whole taxed expenses, so far as payable by him, and against the defenders Mrs Fleming and her husband for payment to the pursuer of £274, 3s. 3¾d., being the modified amount of the said whole taxed expenses, so far as payable by the said Mrs Fleming and her husband."

HOPE, MACKAY, & MANN, W.S.—MURRAY, BEITH, & MURRAY, W.S.—HAMILTON, KINNEAR, & BEATSON, W.S.—Agents.

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THE SCOTTISH WIDOWS' FUND AND LIFE ASSURANCE SOCIETY, Pursuers.—*D.-F. Watson—Asher.*
ROBERT BUIST AND OTHERS, Defenders.—*Fraser—Scott.*

Insurance—Warranty—False statement—Assignation—Assignatus utitur jure auctoris.—A policy of life assurance contained a stipulation that in case it should afterwards appear "that any untrue averment was contained in the declaration by the assured as to his age or state of health, the policy should be void." *Held* that false statements by the assured in the declaration were a relevant ground of reduction of the policy in the hands of an onerous assignee.

Process—Jury Trial—Proof.—In an action brought by an insurance company to reduce a policy of life assurance on the ground of false statements by the insured, *held* that it was expedient that the case should be tried by a Lord Ordinary without a jury.

1ST DIVISION. Lord Young. B.

ON 16th August 1871 the Scottish Widows' Fund and Life Assurance Society granted a policy on the life of George Moir for the sum of £1000. This policy contained the following provision:—"In case the assured shall depart beyond the limits of Europe, or die upon the high seas, or shall enter into or engage in any military service except in Great Britain, or naval service whatsoever, or shall come by his death by suicide; or in case it shall hereafter appear that any untrue averment is contained in the declaration before recited as to the age, state of health, or description of the assured; or in case payment of the said contributions shall not be regularly made as aforesaid, then, and in every such case, this certificate shall be void."

The proposal signed by Mr Moir bore,—"That if any untrue averment is contained in the above declaration, or if the answers given to any of the above queries shall be inconsistent with the real facts of the case, all claim to any benefit out of or interest in the funds of the said society in virtue of any certificate or policy that may be issued or delivered in relation hereto shall be barred and excluded; and all payments that may have been made in consequence thereof shall belong to the society."

On 21st March 1872 Mr Moir assigned the policy to Robert Buist, Hugh Mitchell, and James M'Caul, and the assignation was duly intimated to the insurance company.

On 28th June 1875 Mr Moir died, and the defenders applied to the insurance company for payment of the sum in the policy.

The insurance company subsequently raised the present action of reduction. They averred that Mr Moir had died at the age of thirty, the cause of death being stated to be "otorrhæa, disease of the internal ear, suppurative arachnitis;" that the pursuers had discovered, and that it was the fact, that the statements made by Mr Moir in his proposal and declaration were in several material respects untrue; that Mr Moir knew that they were so at the time he made the statements; that Mr Moir had represented himself to be a man of temperate habits, and one who had never suffered from any but slight and childish complaints, while in point of fact he was addicted to drink, and had suffered severely from

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suppuration and other serious diseases; that the said diseases were among those which tend to shorten life; and their tendency in this direction was greatly aggravated by habits of dissipation such as those in which Mr Moir indulged, and which ultimately caused his death.

The pursuers also averred fraudulent misrepresentation on the part of the insured.

The pursuers pleaded;—(1) The statements and answers made by Mr Moir as aforesaid having been untrue the said policy and the assurance bearing to be thereby effected are void in terms of the stipulations to that effect, and the same ought to be reduced, with all that has followed thereon. (2) At all events, Mr Moir having, in making the said statements and answers, made misrepresentations and concealed facts and circumstances material to the said contract of assurance, and, *separatim*, having done so fraudulently, and having thereby induced the pursuers to enter into the same, the said policy, and all that has followed thereon, is reducible, and ought to be reduced. (4) The defenders, as assignees of the policy, have no higher or other right than the assured himself had.

The defenders denied any misrepresentation on the part of Mr Moir. They also averred that Mr Moir had referred the pursuers for information to a medical man, and that the pursuers had never gone to him for information.

They pleaded, *inter alia*;—(1) Any mis-statement or omission on the part of the assured, even if made, although it might have furnished a good objection against him, cannot affect the policy in the hands of onerous assignees. (3) Especially, it not being averred that the alleged omissions or mis-statements had any reference to the disease of which the assured died, there is no relevant statement as against onerous assignees. (4) Assuming the inaccuracy of statements of the assured, the pursuers might have ascertained this with ordinary diligence before the intimation of the defenders' assignation, and, *separatim*, having obtained from the assured the means of ascertaining it, and not having done so, they are barred from objecting to the claims of the defenders, whose assignation they accepted, and from whom they received the premiums. (5) The assured having given a reference to a medical man, from whom information might have been received, and the pursuers not having availed themselves of said reference, they cannot now object to the policy in the hands of onerous assignees. (8) The statements made by the pursuers are not relevant even against the assured, much less against onerous assignees, and the summons should be dismissed, with expenses. (10) In the circumstances condescended on, the pursuers are barred from disputing the claim.

The Lord Ordinary, in respect that the defenders did not insist in their prejudicial pleas as an objection to leading proof, allowed the parties a proof of their averments.

The defenders reclaimed, and moved the Court to direct the Lord Ordinary to appoint issues to be given in.

The Court desired to hear the parties on the prejudicial pleas 1, 3, 5, 8.

At the suggestion of the Court the pursuers amended their first plea as follows:—(1) The truth of the statements and answers made by Mr Moir as aforesaid having been warranted by him, and these statements and answers being untrue, the said policy, and assurance bearing to be thereby effected, are void, in terms of the stipulations to that effect, and the same ought to be reduced, with all that has followed thereon.

Argued for the defenders;—(1) Purchasers of policies of insurance at a public sale could not be prejudiced by the declarations, which were private documents belonging to the insurance company. This was contemplated by the company, who affixed a notice on the back of the de-

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claration that the policy when issued would be an article "of known negotiable value." (2) The pursuers relied on the maxim *assignatus utitur jure auctoris*. This maxim was really no older in the wide sense now contended for than Erskine. Stair, in treating of the subject, did not use the maxim.[1] In the early law of Scotland, as in England, assignees were merely procurators *in rem suam*. This might be traced in the style books. Ross gave the old form. Dallas introduced the words "cessionars and assignees;" and, lastly, the word "irrevocable" was added to make the present style.[2] Stair, when he applied the doctrine expressed in the maxim *assignatus utitur jure auctoris* meant such assignees as were merely procurators *in rem suam*. But where an obligement was taken to an assignee *eo nomine*, and where, consequently, an assignee had a *locus standi* of his own, the maxim did not apply. Erskine introduced the maxim as of general application, but the passage in Stair, on which he relied, was not in the original editions,[3] and Bankton expressly said it was not a universal rule. Lord Kames observed the distinction.[4] Even to the doctrine as laid down by Erskine there were certain exceptions, *e.g.*, the oath of the cedent was not allowed to prejudice the assignee. For purposes of commerce the maxim was not allowed to apply to corporeal moveables or commercial documents. The case of Redfearn[5] extended these exceptions still further, and the same considerations of utility as were present to induce the decision in Redfearn's case were present here. The English decisions were not in point, as it required an Act of Parliament to allow assignees of policies of life assurance to sue in their own name.[6]

Argued for the pursuers;—This was not an exception to the general rule *assignatus utitur jure auctoris*.[7] There were only three cases to which that rule did not apply,—(1) heritable property; (2) corporeal moveables; (3) commercial documents.[8] Redfearn's case did not apply. In it the question was between an assignee and a person claiming in right of the cedent. The condition here was not latent, but patent, and formed a part of the contract. The defenders were aware of the risk when they acquired the policy, and were in the position of one taking a bill with an indorsation "without recourse" upon it. The word "assignee" was introduced into deeds to put the debtor in bad faith if he paid to the cedent after intimation. The application of the principle here contended for by the defenders would put an end to compensation. Both Stair and Bankton treated an assignee not as a mere procurator, but as one having a completed right.[9] It had been decided in England that an onerous assignee was in no better position than the original holder.[10] In Scotland the contrary had not been thought worth pleading.

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[1] See Brodie's Stair, i. 10, 16, note; iii. 1, 23; iv. 40, 21; Appendix, p. 788 More, or 834 Brodie.

[2] Ross' Lect. i. 191-192; Dallas, 4th ed., vol. i. p. 2; Jurid. Styles, 3d ed., vol. ii. 667.

[3] Ersk. iii. 5, 10; Brodie's Stair, i. 10, 16, p. 120, note; Bankton, ii. 191-8.

[4] Kames' Elucidat., art. 2, *ad fin.*

[5] Redfearn v. Somervail, June 1, 1813, 1 Dow, 50, 5 Pat. 707.

[6] 30 and 31 Vict. c. 144.

[7] Pandects, De Reg. Juris., l. 172.

[8] Ersk. iii. 5, 10; Stair, iv. 40, 21; Bell's Com. i. 284, 5th ed.; Bell's Pr. 1468.

[9] Schaw, Dec. 19, 1622, M. 829; Muir, Dec. 8, 1635, M. 831.

[10] British Equitable Insurance Co. v. Great Western Railway Co., Nov. 10, 1868, 38 L. J. Chancery, 133; Scottish Amicable Society v. Fuller, 16 Weekly Reporter, 274; Forbes v. Edinburgh Life Assurance Co., March 9, 1832, 10 S. 451, 4 Scot. Jur. 385; Menzies on Conveyancing, 3d ed. 264; White v. British Empire Life Assurance Co., Nov. 5, 1868, 7 L. R., Eq. 394; Borrodaile, March 9, 1847, 10 Beav. 335; Philips on Insurance, i., 61; Bunyan on Insurance, 219.

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LORD PRESIDENT.—This case was brought before us upon a reclaiming note, the object of which, as we understood it, was to determine in what manner this case ought to be tried—whether in the ordinary way by a jury, or before the Lord Ordinary and without a jury. But upon looking into the record with a view to determine that question, it appeared to the Court that there were several pleas stated for the defenders Buist and Mitchell which ought to be cleared away and disposed of before the consideration as to the mode of trial should be taken at all. Those pleas are the 1st, 3d, 5th, and 8th. As regards the 3d plea, that has been abandoned by the defenders in the course of the discussion, because they think that a certain addition which has been made to the averments of the pursuers removes the ground of that plea. The 8th, which is a general plea of irrelevancy as against the case of the pursuers stated on record, is, I think, not seriously insisted in; at all events it may be disposed of in a single word, because this is an action for reduction of a policy upon the ground, in the first place, that there has been a breach of warranty, and, in the second place, upon the ground of fraud as regards the representations made by the assured concerning his own health and habits, and it would be very difficult indeed to understand how, if anything like distinct averments are made upon that subject, they could be open to the objection of irrelevancy. The only matters, therefore, which really require consideration now are the 1st and 5th pleas, and these two, I think, must be considered separately.

The first plea is as follows:—"Any mis-statement or omission on the part of the assured, even if made, although it might have furnished a good objection against him, cannot affect the policy in the hands of onerous assignees." Now, that raises a very general question, but one that, in my opinion, is not attended with any difficulty. The contract which is contained in a policy of insurance is a mutual contract, by which the insurance company or insurance society on the one hand come under an obligation to pay a certain sum of money upon the death of the assured, and the assured, on the other hand, becomes bound to pay certain sums, either annually or otherwise, in the name of premium; and these obligations are counterparts of one another. But this particular policy of insurance, like most other policies of insurance, at least in modern times, contained certain conditions, the non-fulfilment of which is declared to be visited with the absolute invalidity of the contract. The provision is this,—"In case the assured shall depart beyond the limits of Europe, or die upon the high seas, or shall enter into or engage in any military service except in Great Britain, or naval service whatsoever, or shall come by his death by suicide; or in case it shall hereafter appear that any untrue averment is contained in the declaration before recited as to the age, state of health, or description of the assured; or in case payment of the said contributions shall not be regularly made as aforesaid, then, and in every such case, this certificate shall be void." Now, the first ground of action in this case depends upon the view of this condition (that any untrue averment contained in the declaration shall void the policy) being a warranty upon the part of the assured, and it is pleaded that the declaration contained several very important false statements, and upon that ground the policy is, under the special provision of the contract, necessarily void. But the action is also laid upon a separate ground, and that is the ground of fraud. It is averred that the assured, in making his proposal for the policy, and carrying through the transaction with

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this insurance society, made fraudulent representations in regard to his health and habits. Now, there is this distinction between these two grounds of action, that one of them is founded upon a clause in the contract and the other is not. The plea of the defenders is that neither of these grounds of action is available against an onerous assignee of this policy. It appears to me to be long ago settled in the law of Scotland—and I have never heard of any attempt to disturb the doctrine—that in a personal obligation, whether contained in a unilateral deed or in a mutual contract, if the creditor's right is sold to an assignee for value, and the assignee purchases in good faith, he is nevertheless subject to all the exceptions and pleas pleadable against the original creditor. That is the doctrine laid down in all our institutional writers, and it has been affirmed in many cases. But it seems to be said that this doctrine admits of some exceptions. Now, that I entirely dispute. I think the true view of the law is that these things that are called exceptions are classes of cases to which the doctrine does not apply. The doctrine does not apply to the transmission of heritable estate; the doctrine does not apply in the sale of corporeal moveables. But within the class of cases to which the doctrine is applicable—I mean the transmission to assignees of a creditor's right in a personal obligation—I know of no exception to the application of the doctrine. It is the merest mistake to suppose that the case of Redfearn introduced any exception to that doctrine, because the doctrine is this—that in a question between the debtor in a personal obligation and the assignee of the creditor, the assignee is open to all the objections that would have been pleadable against the cedent. Now, what is the case of Redfearn? It is not a case between the assignee and the original debtor at all, and therefore in the case of Redfearn the doctrine had no application. We find the ground of judgment in the House of Lords in both the reports we have of the case, viz. in Dow's report, and in that contained in Paton's more recent publication. Lord Redesdale, in stating his objections to the judgment of the Court below, cited the authorities in the law of Scotland for the purpose of shewing to what case the doctrine I am now speaking of was applicable. For example, he cited this passage in Stair,[1]—"The common rule of law is more rational, that the assignee *utitur jure auctoris*, and is in no better case than the cedent unless it be in the matter of probation, that the cedent's oath will not prove against him *nisi in jure litigioso*, and therefore *in personalibus* all exceptions against the cedent are competent against the assignee, even compensation itself;" and after citing other authorities his Lordship proceeded in the following terms:—"It was manifest that all this applied to the exceptions or counter claims which the original debtor might have against his creditor, and not to another title set up by a third party in competition with the claim of an assignee, which is the case here." So that the case then before the House of Lords was the case of a question between the assignee and a third party altogether, and to such a case the House of Lords determined that the doctrine did not apply, and that the Court here had been wrong in so applying it. But the doctrine itself, so far from being questioned by the noble and learned Lords who decided the case, is set up and commended. The Lord Chancellor in like manner says,—"If the glass company was the debtor, the question here was not between the assignee and the debtor but between the assignee and a person setting up a collateral claim under an alleged equity;" and further on,—"The question was not between the debtor of Stewart and his assignee, but between the assignee and one possessing

[1] Brodie's Stair (i. 10, 16), p. 120, note.

a secret equity. This disposes at once of the argument respecting an assignment by an executor."

I hold it therefore to be clearly established that in all cases of personal obligation, whether constituted by unilateral deeds or mutual contract, this doctrine is universally applicable; and it appears to me that that is a conclusive answer to this first plea in law.

With regard to the only remaining plea to which it is necessary to advert, I confess I do sympathise a good deal with the difficulty which has been expressed in understanding what it precisely means. It is as follows:—"(5) The assured having given a reference to a medical man, from whom information might have been received, and the pursuers not having availed themselves of said reference, they cannot now object to the policy in the hands of onerous assignees." Assuming, as I now do, that the onerous assignee is liable to all the objections pleadable against his cedent, I must take this to mean that if the assured gives a reference to a medical man, and the insurance company or society do not go to that medical man and take the information which he has to give them, they cannot afterwards reduce the policy, as in a question with the assured, either upon breach of warranty or upon the assured's fraud. Now, that to my mind is a very startling contention. I do not see upon what view of justice it is founded. A reference to a medical man may be asked and taken by the insurance company, but it is asked and taken by them only for their own benefit, not for the benefit of the assured, and if they choose to depend upon the warranty of the assured instead of resorting to the medical man or to any other source of information, they are quite entitled to do so. I cannot imagine that under any circumstances a plea of that kind could be maintained. But more particularly is this plea untenable when viewed in reference to the facts stated upon record, and practically admitted by the pursuers, that Dr Watson, the medical man in question, was referred to only as a person who had attended the assured two years previously for a violent cold and an eruptive complaint. I do not understand it to be questioned that it was the truth that Dr Watson had attended the assured for such a complaint, and if it was true the company could have got no more from Dr Watson than we have now, viz., that he had attended the assured for such a complaint. Would that have prevented them or would the non-possession of that knowledge now prevent them from challenging this policy either on the ground of breach of warranty or on the ground of fraud? I must say I fail altogether to understand the principle upon which this plea is founded, and I am therefore compelled to say I think it utterly untenable as a defence against this action.

LORD DEAS.—This question arises upon a mutual contract. The contract was that the insurance office upon the death of Moir should pay a certain sum to him, his heirs, executors, or assignees. But it was made an express condition of that contract, *inter alia*, that in case "it should hereafter appear that any untrue averment is contained in the declaration before recited as to the age, state of health, or description of the said George Moir, this certificate shall be void, and all claim to any benefit out of or interest in the funds of said society in virtue of these presents shall cease and determine." Now, the assignee who purchased Moir's right under this contract, of course, saw beforehand that such were the terms of the contract. But then it is said that though these were the words of the contract there were various other writings, and, in particular, a

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declaration there referred to, necessary to be seen before the whole import and effect of the contract could be understood. It is said on behalf of the assignee that he had no means or opportunity of seeing those other writings. The answer to that, I think, is that there was nothing to have prevented him from seeing all those writings if he got the authority of the party assured to do so, and communicated that authority to the insurance company. I think the observation that the insurance company were not entitled, far less bound, to reveal things of that kind to whoever chose to apply is quite sound; but then the reply to that is, that upon production of authority from the party assured the office were not only entitled but bound to allow the documents to be seen. Well, then, this is a contract, the whole of which either was or might have been before the party obtaining the assignation. It is not, therefore, a case in which there is any latent equity, or any latent condition, or anything latent at all. The party taking the assignation was entitled to see everything, and if he did not do so that was entirely his own fault. Now, as applicable to a case of that kind, I have no doubt at all that the plea of an onerous assignee, that he is not bound by the undertakings or by the fraud of the party from whom he purchased, cannot be supported. There was a good deal of force in many of the observations Mr Fraser made with reference to the history of our law and the authority of our institutional writers upon this matter of assignee and cedent, that down to a comparatively recent period the assignee was merely procurator for or mandatary of the cedent, and, consequently, the obligations pleadable against the cedent were necessarily pleadable against the assignee, so that as regards writers of that period, speaking of the law in its then state, we ought to be cautious in deducing the doctrine that the assignee is in no better situation than his cedent. I am not prepared to affirm that doctrine in the abstract, and it is not the least necessary to this case to do so. There may be exceptions to that doctrine in cases of what are called latent equities, not open to be ascertained by the assignee, and yet open or known to the cedent. Be that as it may, however, there is here no latent equity,—nothing which was not equally open to the assignee as it was to the cedent. In that state of matters I cannot help thinking that the assignee is clearly in no better position than the cedent. It may be very true, as Mr Fraser said, that this may put a restraint upon the use of life policies as a fund of credit upon which to go into the market and raise money. There is great force in that as producing a certain amount of inconvenience, but I am afraid far greater inconvenience and far greater injustice would arise if it were to be held that as soon as a party, however fraudulently and however falsely, has obtained a policy upon his life, he may go into the market and sell it—it may be to a friend or a relation who knows a great deal, as well as the party himself, though that knowledge cannot be brought home to him, and then the insurance office must be liable for the whole sum insured. I think that is more startling upon the one side than any of the inconveniences Mr Fraser urges upon the other. There may be some hardship in these inconveniences, but the party who takes an assignation to a contract must take it as it is; and if he has the means of ascertaining everything about it, and does not do so, I am of opinion that whatever may be said of other and different cases, the assignee is, in that case, in no better position that the cedent.

As regards the other plea or pleas, they seem to be directed entirely against the relevancy of the action. The argument seems to be, that because the insurance office did not apply to Dr Watson for something he could have told

them, therefore all the rest of the allegations in this record must be held to be irrelevant. It can only be put in that way at this stage of the case. I cannot listen to that for a moment. I do not think that any of the objections here, which resolve themselves into objections to relevancy, are well founded, and therefore, both upon the first plea and upon the case generally, I concur in the result arrived at by your Lordship.

LORD MURE.—I agree in the result at which your Lordships have arrived. I do not think it necessary for the decision of the case to enter at any length upon the question as to the precise extent to which the doctrine *assignatus utitur jure auctoris* can be carried; but I am satisfied that your Lordship in the chair has given a correct exposition of the bearing of the case of Redfearn upon that doctrine, and that the general rule, as laid down in the passage quoted from Lord Stair and Mr Erskine, has not been set aside by the decision in that case, because that decision appears to me to have proceeded expressly upon the ground that the claim which was there ultimately rejected was made in respect of certain latent equities which had not been notified to the party holding the right assigned. But in the present case there is no question of latent equity raised. On the face of the policy, which is the defenders' title, the right is declared to be defeasible in certain specified events; and when the assignee took that policy from the cedent he took it with that declaration upon the face of it, and knew that if a breach of warranty or fraud could be substantiated the policy was void. That is on the face of the parties' own title; and on that ground alone I am of opinion that the first plea in law should be repelled. Upon the fifth plea I agree with the observations made by your Lordship in the chair.

LORD ARDMILLAN was absent.

On the question as to whether there should be a proof before the Lord Ordinary or a jury trial the defenders argued;—The case is peculiarly suitable for trial by jury. It is not like the case of Foster, where there was only one fact in dispute.[1] Here there are many facts, involving an inquiry into habits of intemperance, defraud, and conspiracy.

The pursuers argued;—There are intricate questions of law as regards warranty and construction of contract, and the case will fall to be tried along with two similar cases regarding policies effected by the deceased upon his life with two other insurance offices now depending before the Lord Ordinary. The case was therefore not suitable for a jury.

LORD PRESIDENT.—I have looked very carefully into these cases for the purpose of determining in what way it is most expedient that they should be tried, and I have come to the conclusion that they ought to be tried before the Lord Ordinary without a jury. My reason is very much this, that I anticipate there will necessarily arise at the trial some important legal principles which must be applied to the evidence, and some of which would perhaps be difficult for a jury to follow, and with regard to some of which there might even be a natural prejudice in the minds of the jury. It is for these reasons that I think these cases are suited to be tried in the mode I have suggested.

We had occasion to see an example, not very long ago, of the effect of trying a question of this kind without a jury, and the result was to my mind very satisfactory,—I mean the case of Foster v. The Life Association of Scotland. That

[1] Life Association v. Foster, Jan. 31, 1873, 11 Macph. 351, 45 Scot. Jur. 240.

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was a very delicate case, as the present may turn out to be for anything we can now see, and it turned very much upon the question whether, in point of fact, in the negotiations between the parties, the insured had knowingly undertaken a warranty. Whether that question will arise here I cannot tell. But for all I can now see it may occur, and that is a question which I think had better be determined by a Judge and not by a jury.

LORD DEAS.—I am of the same opinion, and on the same grounds. An additional reason occurs to me for not going to a jury, that there are really three cases here, some points in which may be identical and some not. It would be both inconvenient and expensive to have three jury trials, and if the cases were all tried together the trial would be a very complicated one. That inconvenience is entirely obviated by the course your Lordship has suggested.

LORD MURE.—Had this been a pure question of alleged fraudulent representation on the part of the assured that might have been a reason for sending the case to a jury. But that is not the only question raised; and, in the whole circumstances, I concur in thinking that the case is better fitted for the determination of a Judge than for trial before a jury.

LORD ARDMILLAN was absent.

THIS interlocutor was pronounced:—"Recall the interlocutor, except in so far as it finds the defenders liable in expenses; and having heard counsel on the first, third, fifth, eighth, and tenth pleas for the defenders, repel the said pleas, and decern: Remit to the Lord Ordinary of new to allow the parties a proof of their averments, and to proceed further in the case as shall be just, reserving all questions of expenses.

GIBSON-CRAIG, DALZIEL, & BRODIES, W.S.—JAMES M'CAUL, S.S.C.—Agents.

No. 164.
July 15, 1876.
Batchelor v. Pattison, and Mackersey's Executor.

ALEXANDER BATCHELOR, Appellant.
GEORGE HANDASYDE PATTISON, AND MACKERSEY'S EXECUTOR,—Respondents.—*D.-F. Watson—Black.*

Expenses—Fees to Counsel.—Circumstances in which *held* that the Auditor might allow fees to counsel to be charged as between party and party though they had not been sent to counsel until after the judgment had been given.

1ST DIVISION.
Sheriff of Midlothian.
M.

SEE *ante*, p. 914.

In this case the appellant objected to the Auditor's report, in so far as he had allowed charges for fees to the respondents' counsel which had not been sent at the time when instructions were sent to counsel, they having, in the circumstances, declined to accept fees with their instructions.

The respondents stated that the practice was well known, and, in cases like the present, quite reasonable, and referred to Tough's Trustees v. Dumbarton Water Commissioners, *ante*, vol. i., p. 879.

LORD PRESIDENT.—What the Auditor proposes to do in this case, viz., to allow reasonable fees although they were not actually paid at the time, is consistent with a practice of long standing—a practice with which I was quite familiar while at the bar, and of which your Lordships are quite aware. The practice is reasonable in itself, and is not inconsistent with the provisions of the Act of Sederunt.[1] The principle is that counsel and agents may feel that the circumstances of a case are such that the agent cannot consent to make charges or the counsel to receive

[1] Act of Sederunt, Dec. 19, 1835.

fees from their client, but they cannot have the same feeling to their client's opponent, and when he is found liable this feeling will therefore disappear. Accordingly, it is quite reasonable that when the client's opponent has to pay such a charge should be allowed by the Auditor.

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LORD DEAS and LORD MURE concurred.

LORD ARDMILLAN was absent.

THE COURT approved of the Auditor's report.

WILLIAM SAUNDERS, S.S.C.—Agent.

THE UNIVERSITY OF ABERDEEN AND OTHERS, Pursuers.—*Asher—Jameson.* THE MAGISTRATES AND TOWN-COUNCIL OF ABERDEEN, Defenders.—*D.-F. Watson—Keir.*

No. 165.
July 18, 1876.
University of Aberdeen v. Magistrates of Aberdeen.

Property—Trust—Prescription—Mortification—Act 1696, *c.* 25.—By deed of mortification the granter assigned certain sums to the town-council of a burgh to be invested and the proceeds applied towards the maintenance of a professor in a university. The funds were invested in land, which were managed for many years by the master of mortifications, an officer of the corporation, in whose name the title was taken. Afterwards the town-council appointed a portion of the lands, including a strip of land on the sea-coast, to be exposed for sale by public roup. The subjects were sold for payment of a feu-duty, and to a person who afterwards declared that he had purchased on behalf of the treasurer of the town, and the latter was infeft upon charter in his favour for behoof of the magistrates, council, and community. Soon afterwards the town-council, upon a representation that they were proprietors of the ground, obtained from the Crown a grant of the salmon-fishings *ex adverso* of the strip of land.

In an action of declarator brought more than forty years afterwards by the university, with concurrence of two professors interested in the mortification, *held* (1) that the town-council still held the lands in trust for the mortification, and that they could plead no prescriptive right against the trust; (2) (*rev.* judgment of Lord Young) that, having acquired the fishings in the character of proprietors of the trust-property, they were bound to communicate the benefit to the trust, and hold them for behoof the trust; (3) (*rev.* judgment of Lord Young) that the consent and concurrence of the two professors gave the university a sufficient title and interest to sue for arrears.

Observations (*per* Lord Deas) on Trust Act 1696, c. 25.

1ST DIVISION. Lord Young. M.

THE following narrative of the facts is taken from the opinion of Lord Deas:—"By deed of mortification, dated 9th December 1613, Dr Duncan Liddell assigned and conveyed to the council of New Aberdeen, and Mr Thomas Nicolson, so long as he should be in life, 6000 merks Scots, to be employed on land and other sufficient security, and the annualrent thereof applied, to the extent therein mentioned, in maintaining a professor of mathematics in the college of New Aberdeen,—that is to say, Marischal College,—and out of the surplus revenue to apply twenty merks annually in maintaining the library he had left to the college, twelve merks for poor scholars at the college and grammar school, and eight merks to the common poor of New Aberdeen.

"By three separate deeds of mortification, executed respectively in 1613, 1622, and 1627, Patrick Coupland, a preacher in the Navy of the East India Company, gave, mortified, and destined to 'the provost, bailies, and council of the burgh of Aberdeen, and to their successors, provost, bailies, and council thereof, in all time coming,' 2000 merks Scots each, to be laid out by them on land or annualrent, 'and the yearly annualrent thereof to be given by them towards the maintenance of a learned divine

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and linguist, skilful in the Hebrew and Greek tongues,' in the college of the burgh—to be chosen by the provost, bailies, and council of the burgh for the time being.

"It is proved by documentary evidence, and admitted in the record, that the sums thus mortified by Dr Liddell and Mr Coupland were accepted and received by the provost, magistrates, and town-council of Aberdeen, or, in other words, by the corporation of the burgh, in trust for the purposes for which they were thus mortified, and placed under the management of one of their number, chosen annually, called the hospital master. In 1704 they invested the amount, along with the funds of four other mortifications under their management, in the purchase of the *pro indiviso* half of the lands and barony of Torrie, then belonging to Sir William Forbes of Monymusk. The disposition executed by Sir William acknowledged receipt of the price from Alexander Hepburn, the then master of mortifications, out of the funds of the respective mortifications, and disponed the lands to him 'and his successors, master of mortifications of the said burgh of Aberdeen, heritably and irredeemably,' for the use and behoof of the mortifications therein enumerated, including those of Liddell and Coupland now in question. I understand it to be admitted that on this disposition infeftment followed in favour of the master of mortifications, and that when the lands and barony were afterwards divided in 1785, under a submission between the master of mortifications and the proprietor of the other *pro indiviso* half, the title of the master of mortifications to the one-half was completed in the same terms on which he had held the *pro indiviso* half,—that is to say, expressly as held by him in his official capacity in trust for the purposes of the several mortifications,—the free rents being apportioned amongst them according to a scheme arranged with that view,—the professor of divinity receiving the proportion of the income derived from Coupland's mortification, and the professor of mathematics his share of the income derived from Liddell's mortification, and the balance being appropriated to the other purposes specified in Coupland's deed.

"Prior to 1796 the master of mortifications had, by authority of the provost, magistrates, and council, feued out various portions of the eastern half allotted to them in the division of the lands and barony of Torrie to different parties for payment of certain specified feu-duties. These feu-rights were granted in favour of third parties, and the feu-duties were made applicable and applied to their proper purposes. Consequently these feu-rights were quite within the power of the administrators of the mortifications, and are not sought to be challenged in this action, which relates solely to what came to be called the reserved portion of the divided half of the lands and barony of Torrie, so far as the university, which now comprehends what was formerly the College of Aberdeen, and the professors of divinity and mathematics are interested therein.

"But in the year 1797 a transaction of a different description took place. By the feu-charter, dated 14th September of that year, James Dick, designing himself master of mortifications of the burgh of Aberdeen, in consideration of a feu-duty of £50 a-year agreed to be paid to him in that capacity, and to his successors in office, by Gavin Hadden, treasurer of the burgh, and his successors in the office of treasurer, for behoof of the burgh sold, alienated, and in feu-farm disponed to and in favour of the said Gavin Hadden and his successors in office, 'treasurers of the said burgh, and their assignees, for the use and behoof of the provost, bailies, council, and commnnity of the said burgh, and their successors, heritably and irredeemably, without reversion or regress, All and Whole that part of the east division of the said lands and barony of Torrie belonging in

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property to the said master of mortifications, lying on the south side of the town of Torrie and south pier of the harbour of Aberdeen,' occupied by the tenants therein named; as also 'All and Whole that slip or piece of moor and pasture ground of the said lands and barony of Torrie lying along the Girdleness and Bay of Nigg, interjected betwixt the lands of North Kirkhill and South Kirkhill on the west, as distinguished by the march-stones thereof, and the sea on the east, and betwixt the north-east part of North Kirkhill on the south, and the south pier of Aberdeen on the north,' as the same was then occupied by the tacksman thereof therein named; and in like manner All and Whole these several tenements or houses, yards, crofts, and butts of land therein mentioned, all lying on the east end of the village or fish-town of Torrie, and adjacent to the west end of Torrie pier, viz., the crofts and feu-duties therein enumerated, reserving to the feuars their feu-rights; likewise the said master of mortifications, his share, interest, and concern in the ferry-boat on the south side of the river Dee, belonging to the said lands and barony, as then possessed by Alexander Robertson, 'all which subjects above specified were excepted and reserved by the said master of mortifications when the remainder of his division of the said lands and barony were sold and feued out by public roup upon the 17th of June 1786.' Upon the precept of sasine contained in this deed, sasine was given to Gavin Hadden, treasurer of the burgh, for the use and behoof of the provost, bailies, council, and community of the burgh, on 20th April 1797, and the instrument of sasine was duly recorded on the 26th of the same month and year. This feu-charter and sasine, which shew upon the face of them how the burgh acquired the subjects, form the only feudal title thereto in favour of the burgh at the present day."

In 1801 the town-council applied by petition to the Lords of the Treasury, setting forth that they were infeft in the said lands, and craving a grant of the salmon-fishings in the sea opposite the slip of moor and pasture ground lying along the Girdleness and Bay of Nigg, the rent of which was 5s. per annum, This petition was referred to the Barons of Exchequer,* and a crown-charter of the salmon-fishings opposite a considerable part of the lands was granted in 1804 in favour of the town-council, as proprietors infeft in the lands. No consideration was granted to the Crown therefor.

The charter, upon which infeftment followed, bore to be granted—"Propter favorem quem habemus erga praedilectos nostros prepositum, balivos, thesaurarium, concilium et communitatem civitatis de Aberdeen."

From that time forward the town-council paid a feu-duty of £50 for the purposes of the mortifications, and themselves drew the rents of the strip of ground and salmon-fishings, which greatly increased in value since 1796.

After the universities and colleges of Aberdeen were united by Act of Parliament in 1858 it was enacted by ordinance of the university commissioners that Liddell's mortification should be attached to the faculty

* The petition stated, *inter alia*, "that a right of salmon-fishing is *inter regalia*, and belongs to the Crown, but where no private right has been formerly granted or established it has been the practice of the Crown graciously to grant such right to the heritors of the adjacent lands, which occasions the trouble of this application to your Lordships," and in a memorial to the Barons of Exchequer, the magistrates stated that in 1786 the slip of ground along the coast was reserved when the rest was feued, "principally with a view of enabling the town-council to purchase the same when necessary, to extend and increase the improvements of the harbour, which they were then, and at present are, carrying on at a very considerable expense, as well as with the express view of obtaining a grant of salmon-fishing opposite to those reserved lands."

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This action was raised against the magistrates and town-council of Aberdeen, as representing the community of the city, by the university, with consent and concurrence of Dr John Cruickshank, sometime professor of mathematics, and Rev. W. R. Pirie, professor of divinity and church history. It concluded for declarator that the reserved strip of ground, the share of the ferry-boat, and the right of salmon-fishing, were, to the extent of twenty-one twenty-second parts of twenty-seven one-hundredth parts, and to the further extent of twelve one-hundredth parts, held by the defenders, as trustees for behoof of the pursuers as beneficiaries under the mortifications of Liddell, Coupland, and Chalmerlaine,* and that the sale in 1797 was null. There were also conclusions for accounting and for reduction of the charter and sasine of 1797.

The pursuers, besides the statements embodied in the foregoing narrative, averred that the price of the ground was grossly inadequate, and that the fishings were very valuable; also that the management of the mortifications having been in the hands of the town-council, the university authorities were not cognisant of the manner in which it had been attempted to defeat the just rights of the beneficiaries.

The defenders averred that the feu-duty was higher than the rent of the ground at the time, though it had subsequently increased in value, and that the rent of the fishings was only £10 for a long time, though now they were let for £605; further, that the university authorities were fully cognisant of the transaction.

The pursuers pleaded;—(2) The lands of Torrie and others, set forth in the summons, having been acquired to the extent foresaid by the funds of said mortifications, and having been thereafter allocated to the extent foresaid for the purposes of the said mortifications, were thereafter held in trust for the purposes foresaid, and could not be lawfully alienated. (3) The said salmon-fishings having been granted by the Crown to the town-council as proprietors of the said lands and others, the same accrued to and now belong to the said mortification to the extent of their interest in the said lands and others. (5) The alleged transaction by which the predecessors of the defenders are said to have acquired said lands and others, and everything which has followed thereon, is null and void, or at least reducible, in respect that the defenders and their predecessors could not lawfully purchase or acquire the subjects which they held in trust for the purposes foresaid. (6) The defenders and their predecessors, having received the profits and revenues of the foresaid subjects, the defenders are bound to count and reckon therefor in terms of the conclusions of the libel.

The defenders pleaded;—(1) No title to sue. (2) Statements not relevant. (3) The defenders having possessed the subjects libelled on charters and sasines in their favour for more than forty years the present action cannot be maintained. (4) The present investments of the mortified funds having been made by the defenders within their powers as trustees the present action is unfounded. (5) In particular, the sale of the reserved portion of Torrie in 1797 was a fair and reasonable change of investment, and cannot now be challenged by the pursuers. (6) The pursuers and their predecessors having been cognisant of the purchase of the subjects libelled, other than the salmon-fishings, in 1797, and of the grant of the fishings in 1804, and having annually accepted the free revenue of the

* Chalmerlaine's mortification was apparently inserted in the summons under a misapprehension.

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mortifications and granted receipts therefor to the defenders without objection until 1872, are barred by *mora* and acquiescence from insisting in the present action. (7) The defenders having obtained a crown-grant of the salmon-fishings libelled in 1804, after due advertisement, and the pursuers never having objected to the said grant, or claimed the rents of the said fishings until 1872, are barred from insisting in the present action as regards the said fishings.

The Lord Ordinary, on 25th November 1874, delivered the undernoted opinion,* and on 25th March 1875 pronounced this interlocutor:—"Finds

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* "OPINION.—The defenders admit the constitution and subsistence in them as trustees of the several trusts created by the deeds of mortification referred to in the first three articles of the condescendence. They dispute, however, that these trusts attach to the lands and fishings specified in the conclusions of the summons, which, according to their contention, were held by them not as trustees under the mortifications, but as representing and for behoof of the community of the burgh of Aberdeen.

"It being admitted that the funds of the mortifications referred to in articles 1 and 2 of the condescendence were (without any admixture of other funds) invested by the defenders as trustees in the purchase of the lands libelled, and that they were, accordingly, prior to the transactions now challenged, held by them as trustees under these mortifications,—the leading question in the case is whether they have ceased to be so held, and in such manner as to liberate them from the the trusts which originally attached to them.

"It is unnecessary to refer otherwise, than in outline, to the facts, which are not disputed. The defenders, as trustees or office-bearers of the burgh in 1796, took the lands in feu from their own hospital master, *i.e.* from themselves, as trustees under the mortifications, for the annual feu-duty of £50. It was conceded, and is clear, that this proceeding could not have been maintained against a challenge at the time, or within forty years. But being fortified by prescriptive possession on an *ex facie* valid feudal title in favour of the treasurer of the burgh, who is the defenders' officer, as the official trustees of the community, just as the hospital master is their officer, as trustees under the mortifications, it is contended that it is no longer challengeable. I am of opinion that this contention must be rejected, on the ground that a trust originally attaching to property cannot, while it remains in the title and possession of the trustees, be cast off by such a change as was here effected, by the mere action of the trustees themselves in the title on which they held it. The arguments on the one side and on the other are obvious, and I should not aid the decision of the case by endeavouring to summarise them.

"The result of this opinion is that since 1796 the rights of the beneficiaries under the mortifications were not satisfied by dividing among them the feu-duty of £50, and that they were entitled to the actual free rents of the lands. But as they only received the feu-duty, thus leaving a considerable arrear of short payments, *i.e.* of sums to which they were entitled year by year in excess of what they received, the question arises whether the pursuers are entitled to recover these, and this is the second question in the case.

"The pursuers contended that short payments to the beneficiaries must be regarded as so much trust money in the hands of the trustees, and that so regarded they are *in titulo* to sue for the amount. They do not contend that it ought to be added to capital, and I should think such a contention inadmissible. But the only other view is that the money belongs to those (or the representatives of those) to whom it ought to have been paid year by year. There may or may not be a good answer to their demand, but I am unable to find that the pursuers have any title through them or otherwise to recover the arrears in question.

"The only other question in the case regards the fishings which the defenders in 1801 acquired by crown-grant for behoof of the community of the burgh. It was not contended that the defenders committed any breach of trust in apply-

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and declares that the lands specified in the summons and on the record as purchased by the defenders' predecessors with funds belonging to the mortifications referred to in articles 1 and 2 of the pursuers' condescendence, are held and possessed by the defenders on the subsisting title thereto, in name of the treasurer of the burgh of Aberdeen, subject to the trusts of the said mortifications, and that the beneficiaries under the said mortifications are, according to their respective rights, entitled to the whole free rents and income arising therefrom subsequent to the date of the summons in this action; but finds that the pursuers are not entitled to an accounting with a view to ascertain or recover the amount of any arrears of short or deficient payments which prior to the action may have been made to the several beneficiaries under said mortifications, reserving to the beneficiaries themselves, or the representatives of such of them as may be dead, to sue for any such arrears according to their respective rights; and with respect to the fishings as distinguished from the lands specified in the summons and record, finds that the pursuers have no right or title thereto, and with respect to them therefore assoilzies the defenders from the conclusions of the action, and decerns: Finds the pursuers entitle to one-half of the expenses hitherto incurred by them in the process, as the same may be taxed, and remits the account thereof to the Auditor to tax and report: Allows either party to move further in the cause in case a more distinct specification of the lands to which the judgment applies, or any reduction or reformation of the existing title, shall be considered necessary or desirable: Grants leave to either party to reclaim."

Both parties reclaimed.

The pursuers argued;—As to the land the interlocutor was right. The town-council, who held the land as trustees, had sold to themselves. No length of time would bar challenge of such a transaction. The property had remained with the trustee ever since, just as before. There had been no right created in a third party, and no adverse possession. Therefore the law of prescription did not apply. Prescription could never be pleaded by a trustee in answer to a charge of breach of trust.[1]

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ing for the grant in favour of the community, or that they were under any obligation of trust duty to apply for such a grant for behoof of the mortifications. The Crown may have attached importance or not to the representation that the seaboard lands were the beneficial property of the burgh. The fishings were undoubtedly granted to the burgh, and the Crown is not seeking, on the ground of misrepresentation, or on any other ground, to rescind the grant. It cannot transfer them from the burgh to the university, or declare that they are held subject to the trusts of the mortifications founded on.

"The result of the opinion which I have expressed on the several questions referred to, is, 1st, That the lands specified in the summons are held and possessed by the defenders subject to the trust of the mortifications referred to in the first and second articles of the condescendence, and that the pursuers are entitled to have this declared, with such further decree or order as shall be found necessary or convenient to reform the existing title to the lands, and ascertain the right of the beneficiaries to the whole free income for the future subsequent to the date of the action; 2d, That the pursuers are not entitled to an accounting with a view to recover or ascertain the amount of any arrears of short or deficient payments which, prior to the action, may have been made to the several beneficiaries; and 3d, That with respect to the fishings libelled, the defenders are entitled to absolvitor."

[1] Baird v. Mag. of Dundee, Feb. 5, 1862, 24 D. 447, 34 Scot. Jur. 215, March 3, 1863, 1 Macph. H. L. 6, 35 Scot. Jur. 305; Univ. of Aberdeen v. Irvine, Feb. 8, 1866, 4 Macph. 392, 38 Scot. Jur. 259, March 26, 1868, 6 Macph. H. L. 29, 40 Scot. Jur. 459; Presb. of Dundee v. Mag. of Dundee, March 19, 1858, 20 D. 849, 30 Scot. Jur. 452, July 24, 1861, 23 D., H. L., 14, 33 Scot. Jur. 707.

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As to the fishings they were granted to the town as proprietors of the adjacent land, but they were so only in trust, and the advantages which they thus acquired as trustees enured to the trust.

The pursuers, Professors Cruickshank and Pirie, had a title to recover arrears due within the last forty years.

The defenders argued;—1. There were two separate trusts—the common good of the burgh, managed by the treasurer, and the mortifications, managed by the master of mortifications. No doubt the town-council were trustees in both. But though a trustee could not prescribe against the trust, when a trustee under one trust entered into a *bona fide* transaction with another trust, in which he was also trustee, the beneficiaries under the one trust had the benefit of the law of prescription against the other.[1] In the Dundee case, and also in the case of Irvine, the fund remained under the original investiture. There was no change in the title, but only in the mode of administration.

2. The fishing was a substantive grant by the Crown in favour of the city and community of Aberdeen, bearing to be granted out of favour to the city. There was no evidence of trust, and therefore the action was untenable as regards the fishings under the Act 1696, c. 25. Mere physical propinquity was not enough to prevent a trustee from purchasing or acquiring ground beside the trust-estate. Further, where there was a title by gift, there was no obligation on the trustee to communicate that, even if a man falsely represented himself to be proprietor of an estate, and by a private Act of Parliament or grant from the Crown proceeding on that preamble received a gift of it, a Court of law could not hand the gift over to another. The Court had no power to transfer the goodwill of the donor, and could not listen to the statement that the motive of the gift was not really love, favour, and affection to the city of Aberdeen, but some other cause. Suppose it had been represented to the Crown that here was a barren strip of shore belonging to one of the mortifications of Aberdeen, and it was said, "there is a valuable fishing *ex adverso*,—will you give it to the city?"—was it not very probable that the Crown would have complied with that request?

At advising,—

LORD PRESIDENT.—(After stating the facts of the sale in 1797)—The first question that we have to determine is, Whether that is a valid sale, and if so, what is the effect of it? Now, I do not think that is a question that admits of any doubt at all. The town of Aberdeen, acting through the provost, magistrates, and council, were trustees for the parties entitled to benefit by these mortifications, and they were not, as such trustees, entitled to purchase the trust-estate. Yet that is the very thing that they did by this sale in 1797. The master of mortifications was merely their representative in holding the land under the title beginning in 1704, and the treasurer, on the other hand, was merely their hand and instrument in holding the property for their own behoof —I do not say for behoof of the community, because I am speaking of the corporation or community itself in saying that they were trustees. And therefore this is nothing short of a direct sale of the estate by the trustees to themselves for their own behoof, and as such it is plainly an illegal sale, or, in other words, the estate continues to belong to the beneficiaries under the trust just as if no such transaction had ever taken place. We were told indeed that the title which

[1] Barns v. Barns' Trustees, March 5, 1857, 19 D. 626, 29 Scot. Jur. 292; Marshall v. Lyell, Feb. 18, 1859, 21 D. 514, 31 Scot. Jur. 282.

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was acquired by the treasurer of the burgh in 1797 had been fortified by prescription; but that admits, I think, of a very short answer. No trustee of such an endowment as this can by any course of time prescribe a right to perpetuate a breach of trust. I hold that to be clear in legal principle and settled on authority, and therefore it is needless to dwell further upon the plea of prescription.

Then, if these lands do truly belong to this trust, just as much as if this transaction had never taken place, the next question comes to be whether the fishings which were acquired by a separate title by these trustees also belong to the beneficiaries under the trust. That raises a question of much greater nicety and difficulty. At the time that this illegal sale took place the community of Aberdeen did not, as trustees, possess those fishings. They were acquired after the illegal sale had taken place, in a manner which needs to be very carefully followed and described, but not until about four years after the sale which is said to be illegal, and which, in my opinion, is manifestly illegal. But although that length of time elapsed between the illegal sale of the lands and the acquisition of the fishings, I think it is pretty clearly established by some evidence to which I am about to refer that the very object of the illegal sale by the trustees to themselves was to give an opportunity of acquiring these fishings. One thing is quite clear, that without the title to the lands which they acquired by the illegal sale, they would not have obtained these fishings in the way in which they did obtain them. Whether they could have obtained them in any other way is a different matter; but I think it is pretty clear that without the title to the lands which they acquired by the illegal sale they could not have proceeded to acquire the fishings in the manner they did.

In the year 1801 a petition was presented by the council and community of the burgh of Aberdeen to the Commissioners of His Majesty's Treasury. That petition is dated the 16th of May 1801; but it is not immaterial to notice in connection with that a minute of meeting of the town-council of Aberdeen, which bears date 1st of July, just two months afterwards. The provost reported that a committee had inspected the lands of Torrie on the sea-coast "now belonging in property to the treasurer of Aberdeen," that it appeared to them that a salmon-fishing might be carried on in several parts of these grounds; "and as it appeared that the property of the said salmon-fishing in the sea within the said bounds had never yet been granted to any person the committee were advised to apply to the Crown for a grant thereof in favour of the treasurer of Aberdeen, as standing infeft in and proprietor of the adjacent grounds of Torry along the said part of the sea-coast." Now, the ground referred to in that minute is unquestionably the piece of ground which they had acquired by the illegal sale in 1797. It is clear from it, even apart from what is stated in the petition to the Treasury, that the ground upon which the town-council relied in approaching the Crown was, that they were proprietors of this piece of land in the barony of Torry which they had acquired in the manner already described, and in their petition they set themselves out as being proprietors for the use and behoof of the burgh of this piece of ground; and they say, "That a right of salmon-fishing is *inter regalia*, and belongs to the Crown, but where no private right has been formerly granted or established it has been the practice of the Crown graciously to grant such right to the heritors of the adjacent lands, which occasions the trouble of this application to your Lordships;" and accordingly, they pray that His Majesty may be graciously pleased to grant to the treasurer of Aberdeen, for

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behoof of the petitioners, a right of salmon-fishings in the sea opposite the aforesaid lands, and to remit to the Barons of Exchequer to expede the charter in the usual manner. A remit is made to the Barons of Exchequer by the Lords of the Treasury, and there is a good deal of discussion before the Barons of Exchequer. The proprietors of the neighbouring fishings were very anxious apparently to prevent this grant from being made, as affecting their interests. It is immaterial to inquire how it affected their interests, but they appear as opponents of this petition, and of the grant which was sought for; and there are written memorials for the magistrates in support of their application, and written memorials on the other side against them. The ground taken up by the town is throughout that they are proprietors of the land, and that it is the practice of the Crown to grant to the proprietors of lands on the sea-coast the fishings on the sea-coast *ex adverso*. The opponents of the petition take up, generally, this ground—that the petitioners' title as landowners is a mere pretence, and an illusory thing altogether; that that bit of ground which they have, and in which the treasurer was infeft, is worth nothing, and to represent it as a landed estate to which those sea-fishings could be attached is a mere mockery and a delusion. Now, it is important to observe how it is that the town meets this allegation of the parties on the other side. They say in their memorial—"In the year 1786 the memorialists, for the further improvement of the master of mortifications' half of the said lands of Torry, and of the funds to which they belonged, sold and disposed thereof by way of feu, by public roup, in several different lots, for payment of certain annual feu-duties in victual and money, and by the articles of roup a verge of ground of a certain extent of breadth from the sea-bank, and skirting along part of the south bank of the river Dee to the harbour-mouth, and from thence southward along the coast to the south side of the Bay of Nigg, according to a plan made out at the time, was reserved from the roup, principally with a view of enabling the town-council to purchase the same when necessary, to extend and increase the improvements of the harbour which they were then, and at present are, carrying on at a very considerable expense, as well as with the express view of obtaining a grant of salmon-fishings opposite to those reserved lands." Thus the design of obtaining a grant of salmon-fishing opposite to these reserved lands is represented by the town as having been entertained by the magistrates and council so early as the year 1786. And accordingly it was in pursuance of that plan that the lands were acquired by the town for their own behoof, and to the extinction of the trust by that strange sale from the master of mortifications to the treasurer of Aberdeen. In another place they say, in answer to the case of the parties on the other side—"The memorialists," that is, the town, "paid a consideration for their right," that is, their right to the lands, "with the express view of obtaining a grant of the sea-fishings *ex adverso* of these lands." Here, again, it is represented that in obtaining the lands under the sale of 1797 they had still the same object in view, viz., the ultimately obtaining a grant to the sea-fishings *ex adverso* of these lands. Now, the Crown being advised by the Barons of Exchequer, listened favourably to this proposal, and ultimately granted a charter, which we have before us, and which is written to the seal and registered the 27th day of February 1804, by which the salmon-fishings in question are given to the treasurer of the city of Aberdeen and his successors, for the benefit of the provost, bailies, treasurer, council, and community of the said city, and bears to be granted on account of the favour which

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the Crown had towards the said provost, bailies, treasurer, council, and community of the city of Aberdeen.

Now, it has been contended with great force that whatever may be said of the way in which this right of salmon-fishing was obtained, or the representations which were made to the Crown as the reasons for asking this grant, the crown-charter is granted to the town of Aberdeen expressly on account of the favour which the Crown bears to the town, and that it is impossible to get the better of that grant,—to have that grant recalled and another grant made in favour of the town as trustees of this charity. I think there is a great deal of force in that, but it does not appear to me that that is the form of the question we have to consider. The question we have to consider is whether, although the town of Aberdeen has got a grant out and out in its own favour of these salmon-fishings, it is not bound to hold them in trust for the beneficiaries under the mortifications in question. It is not proposed, and does not require to be proposed, that any alteration shall be made in this crown-grant. The only question is whether, though being *ex facie* an absolute grant in favour of the town for its own behoof, the town is not under a legal obligation to communicate the benefit of that grant to the beneficiaries under the mortifications. I have felt that to be a question attended with very considerable difficulty, but upon a full consideration of the matter I have come to be of opinion that the beneficiaries under the mortifications are entitled to the benefit of the crown-grant.

It must be observed, to begin with, that the proper trustee under the deed of 1704 was not the master of mortifications who was the party infeft, nor the provost, and magistrates, and council, as individuals, or even as a collective body, but it was the corporation of Aberdeen that was the trustee. In other words, it was the community of Aberdeen that was the trustee. No doubt, such a corporation or community, being in the position of a trustee, can manage the trust only through its representative and administrative officers—the magistrates and town-council; but still that does not make it the less clear that the true trustee is the corporation itself, and not the administrative officers who for the time represent the corporation. The community of Aberdeen therefore being trustee, sold to itself the lands in question, and it has been shewn, I think by very clear evidence, that that illegal proceeding was entered upon and carried through with an express view to the acquisition of these salmon-fishings. Without the lands the salmon-fishings could not have been acquired; and if the salmon-fishings had been acquired before the lands were transferred from the community, as representing the trust, to the community, for its own behoof, then of course the salmon-fishings so acquired would have enured to the use and benefit of the trust. It was with an express view therefore to prevent that from taking place that they first of all converted the title from a trust title into an absolute title for their own behoof; and that was but a step in the proceeding towards acquiring the salmon-fishing. Having, then, got this absolute title to the lands in themselves, they approach the Crown, and state as the ground of their application that they are the proprietors of these lands. We know quite well—it is a matter of notoriety, and does not require to be established in evidence—that the allegation contained in the petition is quite true, that at that time the Crown was in the habit, where fishings in the sea had not been previously granted, to grant them in favour of the owners of the adjoining land when they applied for them. And accordingly the town of Aberdeen, having apparently, *ex facie* of its title, a good right of proprietorship in the lands adjoining the coast, asked and

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obtained, according to that practice, the salmon-fishings in the sea adjoining that land. Now, it appears to me that without the use of the lands, and without the use of the title to these lands, the town never could have got the salmon-fishings.

Then we come to consider whether there is not applicable to the circumstances of such a case this important legal principle, that a trustee can never use either the property of the trust or the title of that trust to advance his own private interests, and if he does so, and is successful in advancing his own private interest, he must communicate that benefit to the trust-estate. Now, it appears to me that that principle is clearly applicable to the circumstances of the case, as disclosed in the evidence to which I have referred. Without the land they could have got no salmon-fishing; by reason of their possession of the property in the lands they did get the salmon-fishing; but they were bound to hold that land which they so used for the purpose of procuring the benefit to themselves for the purposes of the trust, and for no other purpose whatever, and they were not entitled to use it in any way for their own benefit. And yet they did use it for their own benefit, to the effect of obtaining this grant of salmon-fishing. It appears to me that it is very difficult, if not impossible, to resist the conclusion that, acting upon that well-known principle in the law of trusts, the town are bound to communicate the benefit of the fishings so obtained to the persons interested in this trust-estate.

There remains only one other question raised by the Lord Ordinary's interlocutor, and that refers to the petitory conclusion of the summons. The petitory conclusion of the summons is expressed in very general terms,—as the result of an accounting for the rents of the lands and of the fishings, to make payment to the pursuers of a random sum of £10,000, and so forth. The Lord Ordinary seems to have been of opinion that the pursuers have no title to sue this petitory conclusion at all, but I think his Lordship is under a certain misapprehension in coming to that conclusion. No doubt the leading pursuer, and in one view the only direct pursuer, is the University of Aberdeen; but then the action is brought with the express consent and concurrence of the two gentlemen who at the time were interested in the mortifications in question, viz., Dr Cruickshank, who was professor of mathematics, and so entitled to the proceeds of Dr Liddell's mortification, and Dr Pirie, professor of divinity and church history, who as such was entitled to the proceeds of Coupland's mortification. The action is brought, I say, with their consent and concurrence, and I understand that, in so far as Dr Pirie is concerned, his claim would not extend backwards to so long a period as forty years, and that, as regards Dr Cruickshank, although his tenure of office might extend perhaps beyond that period, it is not proposed that the town should be held liable for anything but the revenues and rents of the subjects within the years of prescription. Now, I must say I cannot quite see what difficulty there is in the University of Aberdeen, with the concurrence of the two persons beneficially interested in these trusts, seeking an accounting and payment for the period within the years of prescription; and therefore, without entering into details at present, I shall merely say that when the amount is ascertained I should be prepared to give decree either in favour of the pursuers in the way in which they are set out on the face of the summons, or in favour of the parties who are individually beneficially interested in the revenue for the time. Dr Cruickshank has died since this action came into Court, but his representatives have been sisted in his place, so that all difficulty on that account is very easily avoided.

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Upon the whole matter, therefore, I agree with the Lord Ordinary in so far as he holds the sale in 1797 to be illegal, and the parties interested in the trust to be entitled to the full rents of the lands notwithstanding of that pretended sale. But I differ from him in so far as he excludes from the operation of the trust the salmon-fishings acquired in the manner which I have described; and I differ from him also in so far as regards his view upon the conclusion for accounting and payment.

Lord Deas.—(After narrating the facts as given above)—Now, this was a somewhat peculiar transaction in various respects. More particularly—1st, The minutes of council of 20th and 25th October 1796, by which the magistrates were authorised to bring the subjects to a public sale, and to set up the same at such annual feu-duty as they should deem reasonable and adequate, contained no authority to any one to offer for or purchase the subjects for behoof of the burgh. No written allusion whatever to such an intention was made anywhere prior to the sale.

2d, The most anxious directions were given that the multifarious subjects which were to be sold should be sold in one lot only, the effect of which, of course, was that no competitor who was not prepared to bid for and buy the whole could come into the field at all. Thus the minute of council of 25th October 1796 bears that the committee who had visited and inspected the reserved grounds "were unanimously of opinion that it would be for the interest and advantage of the funds to which they belong that the same should be sold and disposed of altogether by public roup in way of feu at such time as the magistrates think proper," and the magistrates were thereupon authorised "to cause advertise the said reserved lands to be sold by public roup accordingly by way of feu altogether in one lot." The advertisement accordingly intimated that on 21st January 1797 there would be "exposed to public roup and sale by way of feu, all together in one lot, within the Laigh Tolbooth of Aberdeen, sundry parcels of ground lying on the south side of the town of Torry and south pier of Aberdeen," &c. And the articles of roup, after enumerating the various subjects, bore,—"The foresaid whole subjects particularly before-mentioned are to be exposed and set up to roup altogether in one lot at the sum of £50 yearly rent or feu-duty." This was precisely the opposite of the course adopted on the previous occasion in June 1786, when the lands, other than what are called the reserved lands, were feued out under articles of roup in a great variety of lots to suit purchasers.

3d, The provost of the burgh, George More, Esq., was appointed judge of the roup, and the minutes of roup bear that he, as judge foresaid, "appointed the subjects before-described to be entered and set up at the foresaid sum of £50 sterling of yearly feu-duty, and a sand-glass having been set up" (what sort of sand-glass, whether hourly, half-hourly, or what else, is not said) "compeared David Morice, advocate in Aberdeen, and offered the upset price of £50 sterling, and bound himself in terms of the articles of roup; and the said David Morice being the only offerer was declared by the judge of the roup to be the purchaser." All this took place on 21st January 1797, and the minutes to the above effect with a testing-clause in regular form, were duly signed by the provost as judge of the roup, and Mr Morice as purchaser, apparently for his own behoof, on that date accordingly.

The prize being thus, as it was supposed, secured, the true nature of the trans-

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action was not disclosed till more than two months thereafter, when Mr Morice, and Gavin Hadden, the treasurer, signed a minute, dated 27th March 1797, declaring that Mr Morice had purchased the subjects for Mr Hadden, "the treasurer of the burgh of Aberdeen, in consequence of powers and authority committed to him for that effect by the magistrates of the said burgh; and transferred and gave up the said purchase accordingly in favour of Gavin Hadden, the present treasurer of Aberdeen, and his successors in office, in name and behalf of the magistrates, town-council, and community thereof." And Mr Hadden, on the other hand, as treasurer foresaid, for himself, by virtue of his office, and in consequence of an Act of council of even date with the minute, accepted of the said purchase in and upon the terms foresaid." Upon the report of the provost, avowing that the magistrates had authorised Mr Morice to purchase the subjects for the burgh, an Act of council was passed of even date with the above minute, ratifying and approving all that had been done, and authorising the treasurer to accept of the purchase for the magistrates, town-council, and community, and to grant an obligation to James Dick, master of mortifications, and his successors in office, for behoof of the united fund called the Six Mortifications, for yearly payment of the feu-duty and performance of the other prestations incumbent on the purchaser by the articles of roup, and empowering Mr Dick to grant a feu-charter in these terms accordingly. The feu-charter I have already narrated, and an obligation by Mr Hadden binding himself and his successors in the office of treasurer to pay the feu-duty to Mr Dick and his successors in the office of master of mortifications followed, and it is not disputed that all that the beneficiaries have since received from the subjects has been the free proceeds of the feu-duty of £50 a-year.

Now, it is quite obvious that if this transaction be not protected by the long prescription of forty years, it cannot for a moment be supported on any ground known in law. The argument at the bar that it was in their individual and not in their corporate capacity that the provost, bailies, and councillors of Aberdeen, and their successors in office, were trustees for the mortifications, will not hold water for a moment. The trust was vested in the corporation or community, and it was the representatives of the corporation or community who in their character of trustees for the mortifications sold the subjects in dispute to themselves in their separate character of a burgh or community. It is unnecessary to say that such a sale was quite illegal, even if it had not been gone about in the covert and collusive manner in which it was, to the manifest injury and defraud of the interests of the beneficiaries under the trust.

Then, as to the plea of the long prescription, I am clearly of opinion that neither the positive nor the negative prescription can avail the defenders in such a case. I had occasion to consider that question in circumstances greatly more complicated and more favourable to the plea than the circumstances of this case, —I mean in the case of Baird and Others v. The Magistrates and Town-Council of Dundee, decided in this Court on 5th February 1862, 24 D. 447, and in the House of Lords, March 3, 1863.[1] The strength of the opinions of the majority of this Court in that case lay in the view taken by the Lord President, that the magistrates and town-council were not there retaining or applying anything for the purposes of the burgh, but were simply alleged to have bestowed

[1] 1 Macph., H. of L., 6.

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upon one class of poor persons a portion of the funds belonging to another class of poor persons, and which could not be got back again. His Lordship said—"I would have held a very different opinion in regard to an action against trustees who had kept possession of the property themselves, and had been mismanaging or misapplying it, and especially an action in reference to the future management of the property,"—(p. 455).

That did not appear to me to be a satisfactory distinction, and accordingly I observe that I am reported to have said—"I desiderate any authority for saying that because they are trustees for two charities they can prescribe in favour of themselves in the one capacity and against themselves in the other capacity, although it was all along their duty to challenge and rectify in the one capacity what they did wrong in the other capacity." I have only to repeat that opinion as *a fortiori* applicable to the plea of prescription in the present case. The judgment of the House of Lords in Baird's case, reversing the decision of the majority of this Court, seems to me to leave that question no longer open. The previous case of the Presbytery of Dundee v. The Magistrates of Dundee, as decided in the Second Division of this Court on 19th March 1858, 20 D. 849, and afterwards in the House of Lords, has also an important bearing on the question of prescription; but as I had occasion to go into that matter very fully in the case of Baird I do not resume it here.

The question which remains in the present case as to the salmon-fishings is a more difficult question than that which relates to the lands.

The defenders have a grant from the Crown of these fishings, dated 27th February 1804, being more than forty years ago. It bears to be conferred upon them "*propter favorem*," in their corporate capacity, and it is contended that the pursuers cannot competently get behind that grant so as to shew that it is held in trust for them, 1st, because it is fortified by the long prescription as a grant not only to but for the benefit of the corporation; 2d, because there is no written evidence of that trust sufficient to satisfy the statute 1696, c. 25; and 3d, because it does not in any view sufficiently appear that the Crown would have granted the fishings in trust for the mortifications in respect of the proprietorship of the lands, nor that the grant would not have been made to and for the benefit of the corporation although possessed of no adjacent or neighbouring lands.

As regards prescription, and, indeed, as regards the defenders' pleas generally, I have great difficulty in distinguishing the question as to the fishings from the question as to the lands. The one transaction appears to me to have been just the carrying out of the other to its natural and contemplated completion. Very soon after completing the title of the burgh to the lands the defenders set about an investigation into the nature and capability of the fishings locally connected with the lands, with a view to applying to the Crown for a grant of these fishings, with the probable value of which they were previously pretty well acquainted. In the print furnished to us of the minutes of meetings of the town-council there is a *hiatus* between the date of the town's infeftment in the lands in April 1797 and the 1st July 1801, but it appears from the minute of meeting of that date that a remit upon the subject of the fishings had been made to a committee on 1st October 1800, and that at the meeting on 1st July following, the provost, on behalf of the committee, reported that the committee had been "advised to apply to the Crown for a grant thereof in favour of the treasurer of Aberdeen as standing infeft in and proprietor of the adjacent grounds of Torry

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along the said part of the sea-coast,"—in pursuance of which report a petition had been presented to the Lords of the Treasury in the council's name for such a grant, which had been remitted to the Barons of Exchequer, and by them to the King's Remembrancer.

The petition itself sets forth that the treasurer of the burgh stood heritably infeft and seised for the use and behoof of the petitioners, the provost, bailies, treasurer, council, and community of Aberdeen, in All and Whole that part of the east division of the lands and barony of Torry therein described, being the lands and others acquired from the master of mortifications in the manner already explained,—that salmon-fishings might be advantageously carried on in the sea adjacent to the foresaid lands, and where no private right "has been formerly granted or established it has been the practice of the Crown graciously to grant such right to the heritors of the adjacent lands, which occasions the trouble of this application to your Lordships." On this footing the petitioners prayed the Commissioners of the Treasury to move His Majesty "to grant to the treasurer of Aberdeen, for behoof of your petitioners, a right of salmon-fishings in the sea opposite to the aforesaid lands;" and on this footing, so far as appears, the grant was ultimately made.

This petition was very solemnly signed and authenticated as the act of the corporation by the signatures of the provost and treasurer appended thereto in name and presence and by appointment of the provost, bailies, treasurer, council, and community, and by attaching thereto the corporate seal, all on 16th May 1801.

I can have no doubt that this petition is admissible and competent evidence to get behind the terms of the crown-grant as in a question between truster and trustee, supposing the proof to be limited to writ or oath of party in terms of the Act 1696, c. 25. It may or may not be thought sufficient to prove the fact that the grant was given to the defenders as proprietors of lands which they held in trust for the mortifications, but its admissibility and competency as evidence under the statute is undoubted. A probative document under the hand of the alleged trustee or trustees is not required by the Act. Any document signed by him or them is admissible and sufficient for that purpose if the trust be thereby acknowledged, as was decided in the case of Taylor or Bryson v. Crawford, 14th November 1833, 12 S. and D. 39. If the petition be admissible and competent evidence, it would be very difficult to say that the memorials and other relative documents presented in explanation and support of that petition could be excluded under the Act 1696, c. 25; and if these be admissible in evidence they make it very clear, not only that it was exclusively in their character of proprietors of the lands in dispute that the petitioners applied for the grant of the fishings, but that the petition was really only the following out of the illegitimate transaction by which they acquired the lands in 1797. The excerpt printed from their memorial bears, *inter alia*—"The memorialists are asking no more in the present case than what should belong to every proprietor at common law, namely, a right to fish for salmon opposite their own lands. It was with this view, accordingly, that they purchased the greater part of these lands, and reserved from the feu-rights, which they afterwards granted, a space of ground along the coast for the purposes of fishing."

While, however, I think there is here competent and admissible written evidence even as in a question of trust under the Act 1696, I am not to be understood to be of opinion that the statute is applicable to a case of this kind. That

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statute proceeds on the narrative that the practice of granting blank bonds and other blank writs, "as also that the entrusting of persons without any declarator or back-bond of trust in writing, are occasions of fraud, as also of pleas and contentions," therefore blank writs were in future declared null; and it was enacted that no action of declarator of trust should be sustained "except upon a declarator or back-bond of trust lawfully subscribed by the person alleged to be trustee, and against whom or his heirs or assignees the declarator shall be intented, or unless the same be referred to the oath of the party *simpliciter*."

The object of this enactment was to discourage latent trusts by subjecting the truster to the risk of being taken advantage of by the trustee unless he could produce written evidence of the trust, and at the same time to protect third parties *bona fide* dealing with the trustee as apparent proprietor from the risk of having their rights defeated by parole testimony of a latent trust. It is a ruled point that the Act does not apply to questions with third parties, but only as between truster and trustee. It contemplates a transaction betweeen two parties—the one the granter of the acknowledgment of trust, and the other the receiver and holder of the document. That enactment cannot, I think, apply here, where the same parties were both trusters and trustees. They might no doubt have voluntarily executed a declaration of trust, but if they did not choose to do so there was no party to demand or exact from them such a document. They were themselves the sole representatives of the only parties who had an interest to insist that such a document should be executed, and the defenders availed themselves of their fiduciary character to claim the grant for themselves which they ought to have claimed for the benefit of the trust, if they claimed it at all. It is not, however, necessary to decide whether the Act 1696, c. 25, is or is not applicable here, because, supposing it to be so, there would still be enough of written evidence clearly competent and admissible to prove the trust. The transaction as to the fishings was in either view just, as I have said, the following out and completing the illegal transaction by which the defenders acquired the lands; and on the whole I do not think it is in their mouths to plead a distinction, either as respects prescription or any of their other pleas, between their position as alleged proprietors of the lands and as alleged proprietors of the fishings. In short, I am of opinion that it ought to be found and declared that both lands and fishings, so far as the interests of the present pursuers are concerned, are held by the defenders in trust for behoof of the mortifications and beneficiaries whose rights are here sought to be vindicated. The terms of the interlocutor to be pronounced, in order to place the titles on a proper footing with reference to the conclusions for declarator and reduction respectively, and likewise for giving due effect to the petitory conclusions so far as insisted in, may require consideration, but in the general result I think the pursuers must be held to be successful.

Lord Mure.—On the first branch of this case I have had no difficulty in concurring with the Lord Ordinary and your Lordships in holding that the lands in question were held in trust for the mortifications. The proceedings shew distinctly that the lands which were so held in trust were purchased by the town, who were the trustees, from themselves; and the statements of parties on record are sufficient, in my opinion, to put that beyond all doubt. In these circumstances, and having regard to the decision in the case of Baird and Others, to which

Lord Deas has referred, no plea of prescription can avail the defenders, or entitle them to hold the lands on any other terms than that of a trust for the mortifications.

The question of the fishings is certainly attended with a good deal of nicety; but in dealing with this question we must keep in view the broad fact that at the date when these fishings were acquired the lands *ex adverso* of which they lay were held by the town in trust. It was in respect of the town holding these lands that they applied for the grant, and it was given to them on that account. The charter no doubt contains the usual words about its being granted for the benefit of the community; but it declares that the grant made to the treasurer is a grant of the salmon-fishings in the sea adjacent to the lands which the treasurer held for the community. Now, the treasurer did not hold these lands for the benefit of the community. The community held the lands for the benefit of the mortifications, and the town state in their petition as ground on which they mainly rely for obtaining the grant, that "where no private right has been formerly granted or established it has been the practice of the Crown graciously to grant such right to the heritors of the adjacent lands." In respect of this application the Crown took the matter into consideration, and made a grant of the fishings. In these circumstances it appears to me that the principle upon which we have proceeded in disposing of the question of the lands applies as clearly and distinctly to the fishings. The town got them as parties holding a property for the benefit of the mortification, and they must, I think, be held upon the face of their own petition and the proceedings following upon it, to have acquired the fishings under the same condition as that on which they held the lands, viz., of holding them for the benefit of the trust-estate. I therefore concur with your Lordships.

LORD ARDMILLAN was absent, but it was stated that he concurred in the judgment.

THIS interlocutor was pronounced:—"Recall the said interlocutor: Find that the lands specified in the conclusions of the summons were purchased in 1704 by the corporation of Aberdeen with funds belonging to the mortifications mentioned in the first and second articles of the condescendence, and to four other mortifications: Find that the said lands were held by the said corporation till the year 1797 on titles expressing *in grœmio* the several trusts subject to which the lands were so held: Find that in the year 1797 the said lands were sold by the corporation, as trustees for the mortifications to the said corporation for its own behoof, in consideration of a feu-duty of £50: Find that the said sale was illegal and void, and that the said lands, notwithstanding the said sale, are held and possessed by the defenders on the subsisting title thereto in name of the treasurer of the burgh of Aberdeen, subject to the trusts of the said mortifications: Find that the corporation in entering into the illegal transaction aforesaid acquired or attempted to acquire the said lands as the estate of the corporation itself, for the purpose of being thereby enabled to apply to the commissioners of His Majesty's Treasury for a grant in favour of the corporation of the salmon-fishings in the Dee *ex adverso* of the said lands, according to a practice then prevalent of the Crown granting rights of salmon-fishing in the sea to proprietors whose lands were bounded by the shore, merely on the consideration of

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their being proprietors of such lands: Find that in pursuance of such purpose, the corporation, in the year 1801, presented a petition to the Lords of the Treasury, setting forth that they were absolute proprietors of the said lands, in their own right, and on that ground praying for a grant of salmon-fishings in the sea *ex adverso* of the said lands, for the benefit of the corporation: Find that the prayer of the said petition was granted, and a crown-charter in favour of the corporation conveying the said salmon-fishings was expede, which is written to the seal and registered 27th February 1804: Find that the corporation have ever since possessed, and do now possess, the said salmon-fishings, in virtue of the said charter: Find that the corporation, being the trustee for the said mortifications, having thus used the trust-estate, and the title thereof vested in them, for the purpose of obtaining a benefit to themselves, are bound to communicate that benefit to the trust-estate and the parties interested therein, and are bound to hold and administer the said salmon-fishings as part of the said trust-estate, and to apply the revenues and profits thereof to the benefit of the parties interested as beneficiaries in the said mortifications: Therefore find, declare, and decern, in terms of the declaratory conclusions of the summons: Find under the petitory conclusions that the concurring pursuer, Dr W. R. Pirie, is entitled to a share of the revenues and profits of the trust-estate corresponding to his tenure of the professorship of divinity and church history from December 1843, the date of his appointment, till the date of citation: Find also under the petitory conclusions that the late John Cruickshank, as concurring pursuer, was, and his representatives, who have been sisted in his place, are entitled to a share of the profits and revenues of the trust-estate corresponding to his tenure of the professorship of mathematics from or about the year 1833 till the year 1858: Find that the said shares of the profits and revenues of the trust-estate for the said periods may competently be ascertained and decerned for in the present action: Find the pursuers entitled to the expenses hitherto incurred by them," &c.

M'EWEN & CARMENT, W.S.—T. J. GORDON, W.S.—Agents.

No. 166.

JOHN ROBERTSON, Petitioner.—*Begg.*

July 18, 1876. Robertson.

Process—Petition—Reclaiming Note—Competency—Law Agents Act, 1873 (36 *and* 37 *Vict. cap.* 63, *sec.* 7).—Sec. 7 of the Law Agents Act provides "that a petition by a person to be admitted as a law-agent may be presented to any Judge of the Court officiating as a Lord Ordinary, and the proceedings under the same may take place and be conducted before the same or any other Judge according to the judicial arrangements in the Court for the time being, and a single Judge shall be entitled to act as the Court with reference to all petitions for admission as a law-agent under this Act." *Held* that a reclaiming note against the judgment of the Lord Ordinary was competent.

Observed (*per* Lord President) that the power of the Inner-House to review any interlocutor of a Lord Ordinary is not taken away by implication.

1ST DIVISION. Lord Young. B.

THIS was a petition presented in terms of the 10th section of the Law Agents Act, 36 and 37 Vict. cap. 63.

The petitioner maintained that he was entitled to be admitted without examination, in respect that, at the passing of the Law Agents Act, he was entitled to be admitted under the Procurators Act of 1865.

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Robertson.

The Lord Ordinary pronounced the usual interlocutor, remitting to the examiners to take trial of the petitioner's qualifications.

The petitioner asked leave to reclaim, which was granted, reserving all questions of competency.

On the question of competency the petitioner argued;—The expression "Lord Ordinary" in sec. 7 of the Law Agents Act* shewed that review was intended. Review of a Lord Ordinary's judgment was always competent, unless expressly excluded.[1]

At advising,—

LORD PRESIDENT.—The first point to be disposed of here is as regards competency. It arises in the matter of a petition by John Robertson, writer in Edinburgh, for admission as enrolled law-agent. Lord Young, to whom the petition was presented, has remitted to the examiners to make trial of the petitioner's qualifications, &c. The petitioner is dissatisfied, because he thinks he is entitled to be admitted without examination. The Lord Ordinary has suggested a doubt as to a point of importance, whether his interlocutor here could be submitted to review. That depends on the 7th section of the Law Agents Act, which provides—"The petition may be presented to any Judge of the Court officiating as a Lord Ordinary, and the proceedings under the same may take place and be conducted before the same or any other Judge according to the judicial arrangements in the Court for the time being, and a single Judge shall be entitled to act as the Court with reference to all petitions for admission as a law-agent under this Act."

The difficulty arises from the last clause of this provision. But, notwithstanding the ambiguity of the expression, we are of opinion, and the Judges of the Second Division, whom we have consulted, agree with us, that this reclaiming note is not incompetent. The true meaning is that the petitioner is, in the first instance, to apply to a Lord Ordinary, it may be in the Outer-House, but it may also be to a Lord Ordinary on the Bills. The form of the expression arises from the fact that it is meant to include any Judge who may for the time being be the Lord Ordinary. But the power of the Inner-House to review any interlocutor of the Lord Ordinary is not to be taken away by implication, and there is nothing here which expressly takes it away.

LORD DEAS and LORD MURE concurred.

LORD ARDMILLAN was absent.

THE COURT, after hearing further argument on the merits, pronounced the following interlocutor:—"Sustain the competency of the reclaiming note, but refuse the same on the merits, and adhere to the interlocutor complained against."

.—Agent.

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* Quoted in the Lord President's opinion.

[1] Judicature Act, 6 Geo. IV. cap. 120, sec. 18; Otis v. Kidston, Jan. 31, 1862, 24 D. 419—see Lord Justice-Clerk's remark, p. 426, 34 Scot. Jur. 206.

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their being proprietors of such lands: Find that in pursuance of such purpose, the corporation, in the year 1801, presented a petition to the Lords of the Treasury, setting forth that they were absolute proprietors of the said lands, in their own right, and on that ground praying for a grant of salmon-fishings in the sea *ex adverso* of the said lands, for the benefit of the corporation: Find that the prayer of the said petition was granted, and a crown-charter in favour of the corporation conveying the said salmon-fishings was expede, which is written to the seal and registered 27th February 1804: Find that the corporation have ever since possessed, and do now possess, the said salmon-fishings, in virtue of the said charter: Find that the corporation, being the trustee for the said mortifications, having thus used the trust-estate, and the title thereof vested in them, for the purpose of obtaining a benefit to themselves, are bound to communicate that benefit to the trust-estate and the parties interested therein, and are bound to hold and administer the said salmon-fishings as part of the said trust-estate, and to apply the revenues and profits thereof to the benefit of the parties interested as beneficiaries in the said mortifications: Therefore find, declare, and decern, in terms of the declaratory conclusions of the summons: Find under the petitory conclusions that the concurring pursuer, Dr W. R. Pirie, is entitled to a share of the revenues and profits of the trust-estate corresponding to his tenure of the professorship of divinity and church history from December 1843, the date of his appointment, till the date of citation: Find also under the petitory conclusions that the late John Cruickshank, as concurring pursuer, was, and his representatives, who have been sisted in his place, are entitled to a share of the profits and revenues of the trust-estate corresponding to his tenure of the professorship of mathematics from or about the year 1833 till the year 1858: Find that the said shares of the profits and revenues of the trust-estate for the said periods may competently be ascertained and decerned for in the present action: Find the pursuers entitled to the expenses hitherto incurred by them," &c.

M'EWEN & CARMENT, W.S.—T. J. GORDON, W.S.—Agents.

No. 166.

JOHN ROBERTSON, Petitioner.—*Begg.*

July 18, 1876.
Robertson.

Process—Petition—Reclaiming Note—Competency—Law Agents Act, 1873 (36 *and* 37 *Vict. cap.* 63, *sec.* 7).—Sec. 7 of the Law Agents Act provides "that a petition by a person to be admitted as a law-agent may be presented to any Judge of the Court officiating as a Lord Ordinary, and the proceedings under the same may take place and be conducted before the same or any other Judge according to the judicial arrangements in the Court for the time being, and a single Judge shall be entitled to act as the Court with reference to all petitions for admission as a law-agent under this Act." *Held* that a reclaiming note against the judgment of the Lord Ordinary was competent.

Observed (*per* Lord President) that the power of the Inner-House to review any interlocutor of a Lord Ordinary is not taken away by implication.

1ST DIVISION.
Lord Young.
B.

THIS was a petition presented in terms of the 10th section of the Law Agents Act, 36 and 37 Vict. cap. 63.

The petitioner maintained that he was entitled to be admitted without examination, in respect that, at the passing of the Law Agents Act, he was entitled to be admitted under the Procurators Act of 1865.

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July 18, 1876.
Robertson.

The Lord Ordinary pronounced the usual interlocutor, remitting to the examiners to take trial of the petitioner's qualifications.

The petitioner asked leave to reclaim, which was granted, reserving all questions of competency.

On the question of competency the petitioner argued;—The expression "Lord Ordinary" in sec. 7 of the Law Agents Act* shewed that review was intended. Review of a Lord Ordinary's judgment was always competent, unless expressly excluded.[1]

At advising,—

LORD PRESIDENT.—The first point to be disposed of here is as regards competency. It arises in the matter of a petition by John Robertson, writer in Edinburgh, for admission as enrolled law-agent. Lord Young, to whom the petition was presented, has remitted to the examiners to make trial of the petitioner's qualifications, &c. The petitioner is dissatisfied, because he thinks he is entitled to be admitted without examination. The Lord Ordinary has suggested a doubt as to a point of importance, whether his interlocutor here could be submitted to review. That depends on the 7th section of the Law Agents Act, which provides—"The petition may be presented to any Judge of the Court officiating as a Lord Ordinary, and the proceedings under the same may take place and be conducted before the same or any other Judge according to the judicial arrangements in the Court for the time being, and a single Judge shall be entitled to act as the Court with reference to all petitions for admission as a law-agent under this Act."

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LORD DEAS and LORD MURE concurred.

LORD ARDMILLAN was absent.

THE COURT, after hearing further argument on the merits, pronounced the following interlocutor:—"Sustain the competency of the reclaiming note, but refuse the same on the merits, and adhere to the interlocutor complained against."

.—Agent.

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* Quoted in the Lord President's opinion.

[1] Judicature Act, 6 Geo. IV. cap. 120, sec. 18; Otis v. Kidston, Jan. 31, 1862, 24 D. 419—see Lord Justice-Clerk's remark, p. 426, 34 Scot. Jur. 206.

No. 167.

July 18, 1876.
Cooper and M'Leod v. Edinburgh Improvement Trustees, &c.

COOPER AND M'LEOD, Pursuers.—*D.-F. Watson—J. P. B. Robertson.*
JOHN KNOX CRAWFORD, Clerk to and as representing the Edinburgh Improvement Trustees, Defender.—*M'Laren—Mackay—Harper.*
JOHN M'KELLAR, Defender.—*Campbell Smith—M'Kechnie.*
THOMAS BRADY, Defender.—*Guthrie Smith.*

Property—Access.—Circumstances in which *held* that an obligation to construct an access to certain subjects in a town "in a proper and sufficient manner, so as to admit of a carriage or cart to pass thereon," was not implemented by leaving a passage nine feet wide, the passage so left being an access to dwelling-houses having doors in the passage as well as to the subjects behind, and a minimum width of twelve feet fixed.

Property—Servitude—Real Burden.—The front portion of certain house property was sold, the seller retaining the back portion. The disposition, which was duly recorded in the Register of Sasines, contained an obligation upon the purchaser forthwith to construct at his own expense a sufficient access from the street to the back portion, but the position and width of the stipulated access were not defined. The purchaser resold the subjects without having constructed a sufficient access, stipulating that his disponee should not be entitled to inspect the titles, and not giving him notice of the obligation in question. *Held* in an action by the proprietor of the back portion against the original purchaser of the front portion and his disponee that an effectual servitude of passage had been constituted.

2D DIVISION. Ld. Curriehill. I.

SIR GEORGE and Miss Cecilia Kinloch were the proprietors of tenements of houses and ground behind situated on the south side of the Grassmarket, Edinburgh.

In May 1874 the Edinburgh Improvement Trustees, for the improvement of that part of the town, purchased a part of the subjects, being that part which immediately fronted the Grassmarket.

The disposition by Sir George and Miss Kinloch to the improvement trustees, which was duly recorded in the Register of Sasines, contained this declaration:—"It is hereby expressly conditioned and declared that our said disponees shall be bound and obliged, as by acceptation hereof they bind and oblige themselves, at their own expense, forthwith to make and construct, in a proper and sufficient manner, an access from the Grassmarket to the property belonging to us, lying to the south of that hereby conveyed, in lieu of East and West Smith's Closes, by which access is at present obtained, and which access shall be constructed so as to admit a carriage or cart to pass thereon, and shall be upheld and maintained in good and sufficient repair by our said disponees or their foresaids." *

Nothing was said in the disposition as to the manner in which the property lying behind to the south was to be occupied, nor were the dimensions and position of the access specified.

The improvement trustees pulled down the houses upon the ground acquired by them from Sir G. Kinloch, as well as the houses upon contiguous properties facing the Grassmarket, which they had also acquired. They exposed the area for sale, one of the conditions of sale being that the disponees should be bound to erect buildings conform to a plan prepared by the architects of the trust; and another condition being, that the disponees should not be entitled to require inspection of the titles.

* The dispositive clause was,—"We, in consideration of paid to us by the trustees under the 'Edinburgh Improvement Act, 1867,' do hereby sell, alienate, dispone, convey, assign, and make over from us, our heirs and successors, to the said improvement trustees, their successors and assignees, for ever, according to the true intent and meaning of the said Act, heritably and irredeemably."

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The access from the Grassmarket to the back property retained by Sir G. Kinloch was formerly by two closes named East and West Smith's Closes. In place of these, the proposed access, as laid down in the plan, consisted of a covered passage or pend much in the line of East Smith's Close, nine feet wide, through the tenement facing Grassmarket, and thence an open passage, about twelve feet wide, running up by steep gradients to Sir G. Kinloch's property. On each side of the pend there was a door leading to a common stair.

In May 1875 Cooper and M'Leod, brewers, acquired from Sir G. Kinloch the remaining portion of the property belonging to him, with an assignation to the right of access provided in the disposition of the front property to the improvement trustees.

Cooper and M'Leod proceeded to erect a brewery upon their property.

In November 1875 they raised the present action against the improvement trustees, and also against John M'Kellar and Thomas Brady, who had, as the pursuers alleged, purchased or agreed to purchase from the improvement trustees the ground which the latter had purchased from Sir G. Kinloch. The conclusions of the summons were for declarator that the improvement trustees and their disponees in the subjects were bound, "at their own expense, forthwith to make and construct, in a proper and sufficient manner, an access from the Grassmarket of Edinburgh to the property acquired by the pursuers from the said Sir George Kinloch and Miss Cecilia Kinloch, and now belonging to the pursuers, lying to the south of the property conveyed by the foresaid disposition, to be constructed, the said access, so as to admit a carriage or cart to pass thereon, and to uphold and maintain the same in good and sufficient repair in all time coming," and that the said obligation had not as yet been implemented, and for decree against the improvement trustees, and in the event of the subjects having been conveyed to the other defenders in whole or in part, against them also, to construct and maintain an access in terms of the declaratory conclusions.

The pursuers averred that the access provided was insufficient.

The improvement trustees pleaded that the access was sufficient.

M'Kellar admitted that he had acquired, by contract of ground-annual dated October 1875, a part of the ground purchased by the improvement trustees from Sir G. Kinloch, viz., the part lying to the west of the proposed access. He pleaded;—(1) This defender is entitled to absolvitor, in respect the obligation founded on by the pursuer is not a real burden, and is not a matter of contract with this defender.

Brady explained that, although he was the proprietor of the ground which formed the east side of the covered part of proposed access, he had acquired that ground from a third party and not from the improvement trustees, to whom it had never belonged. He admitted that he had acquired from the trustees a small piece of ground to the rear forming part of the subjects which they had purchased from Sir G. Kinloch. He maintained that he was under no obligation to give up ground to widen the access.

A proof was taken as between the pursuers and the improvement trustees, by the result of which the other defenders agreed to be bound, the process being meanwhile sisted as against them. The evidence consisted chiefly of the opinions of architects and engineers as to the proper breadth of an access for carts. The pursuers also adduced as witnesses persons practically engaged in carting heavy loads, who were of opinion that a passage only nine feet wide would be very dangerous in the circumstances.

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The Lord Ordinary pronounced these interlocutors:—

"22d January 1876.—Recalls the sist as to the defenders, Thomas Brady and John M'Kellar, contained in the interlocutor of the 11th December last: Finds that, under and in virtue of a disposition of Sir George Kinloch of Kinloch, and Miss Cecilia Kinloch, then residing in Carnoustie, dated 8th and 12th, and recorded 22d May 1874, of those subjects situated on the south side of the Grassmarket, more particularly described in the said disposition in favour of the trustees under the Edinburgh Improvement Act, 1867, 30 and 31 Vict. cap. 43, the said Edinburgh Improvement Trustees, according to the true intent and meaning of the foresaid Act, became bound, at their own expense, forthwith to make and construct, in a proper and sufficient manner, an access from the Grassmarket of Edinburgh to the property then belonging to the said Sir George Kinloch and Miss Cecilia Kinloch, lying to the south of the property conveyed by the foresaid disposition, to be constructed, the said access, so as to admit a carriage or cart to pass thereon, and to uphold and maintain the same in good and sufficient repair in all time coming: Find that the pursuers afterwards acquired said property lying to the south of the property so acquired by the said improvement trustees, conform to disposition in the pursuers' favour, granted by Sir George Kinloch with consent of Miss Cecilia Kinloch, dated 15th and 20th May 1875, which last mentioned disposition contains an assignation in favour of the pursuers of Sir George Kinloch's right to the said access, provided for in the disposition to the said improvement trustees: Finds that the said access must be of the width of at least twelve feet; and before farther answer, appoints the cause to be enrolled for further procedure, reserving all questions of expenses."

"4th March 1876.—Finds, with reference to the findings in the interlocutor of 22d January 1876, and in addition thereto, that the defenders, the Edinburgh Improvement Trustees, were duly infeft in the property in the Grassmarket, acquired by them from Sir George Kinloch and Miss Cecilia Kinloch, by the registration of the disposition thereof in their favour in the Register of Sasines for the city of Edinburgh on 22d May 1874, and that the obligation to make, construct, uphold, and maintain the access mentioned in said interlocutor is contained at length in the disposition so recorded: Finds that after the said disposition was so recorded the said improvement trustees conveyed part of said property to the defender, John M'Kellar, and part to the defender, Thomas Brady, and that the said John M'Kellar and Thomas Brady are the successors and assignees of the improvement trustees in the foresaid parts of said property: Finds that, according to the sound construction of said disposition, the said access is to be constructed from the Grassmarket through the said property to the property on the south thereof, now belonging to the pursuers, and that the obligation to make, construct, uphold, and maintain the said access is effectually imposed, not only upon the said improvement trustees, but also upon their successors and assignees in said property: Finds that the obligation to make and construct said access has not been implemented: Therefore, decerns and declares in terms of the declaratory conclusions of the summons: Ordains the defenders, the Edinburgh Improvement Trustees, John M'Kellar, and Thomas Brady, forthwith to make and construct, in a proper and sufficient manner, an access from the Grassmarket to the pursuers' said property of the width of not less than twelve feet, all in accordance with the findings of the interlocutor of 22d January last, and of this interlocutor, and that at the sight of Mr George Cunningham, civil engineer, Edinburgh, and thereafter to uphold and maintain the said access in good and sufficient repair in all

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time coming, and decerns; reserving to the defenders all claim of relief *inter se* which may be competent to them, or any of them: Finds the defenders liable to the pursuers in expenses," &c.

The defenders reclaimed. Besides maintaining that a sufficient access had been constructed, they argued that the obligation, being indefinite as to the position and dimensions of the access, was not one of the recognised servitudes, nor was it validly made a real burden on the lands. It was a mere personal obligation on the disponees, which should have been enforced before the buildings were commenced.[1]

At advising,—

LORD GIFFORD.—It is much to be regretted that in a special stipulation in a mutual contract, whereby a new and different entrance from that formerly in existence from the Grassmarket to Sir George Kinloch's back property was to be constructed, the width and nature of that access should not have been more clearly and precisely defined, and it is still more to be regretted that when the improvement trustees came, at their own hands, to make and construct the access, they should have done so without consulting the creditors in the obligation, or even without intimating to them what sort of access they proposed to make and to hand over in terms of their obligation. If any inconvenience shall arise to the improvement trustees from thus determining at their own hands, and without consultation with or intimation to anybody, the extent of the obligation to construct the access, I think the trustees have themselves to blame. It appears to me that the present pursuers have timeously challenged the sufficiency of the proposed access, and that the present question must be decided very much in the same way as if no building operations had yet been commenced.

I concur in opinion with the Lord Ordinary that, looking to the nature of the proposed access, and the whole surrounding circumstances, the width offered by the defenders, being nine feet, is not sufficient either for safety or convenience, but that the access should be at least twelve feet in width. It is true that the question to a large extent is one of discretion, and it is also true that there may be in the city or elsewhere entrances not very dissimilar from the present which are only nine feet in width, or even less; but the question in the present case is not what is the narrowest possible entrance which will be practicable, or barely practicable, for the necessary traffic, but what is the true and reasonable meaning of the obligation to construct an access in a proper and sufficient manner, "so as to admit a carriage or cart to pass thereon." Now, this must mean that the carriage or cart shall pass with reasonable convenience and with reasonable safety, so as not to endanger either the carriage or cart and its loading, or any other persons entitled to use the passage. Perhaps it might have been held that if the access had been handed over to the pursuers for their exclusive use, so that the pursuers might themselves command it wholly, and protect it with a gate at either end, so as to keep it clear on each occasion of the passage of a carriage or cart, a width of nine feet might have been enough. But this is not the condition of the case before us. The access offered is not for the exclusive use of the pursuers; it is to serve also as an access for the new tenements which are

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[1] *Authorities cited.*—Stair, ii. 3, 55; Bell's Com., M'L.'s edn., vol. i. p. 727; Bell's Pr. 919; Tailors of Aberdeen v. Coutts, Aug. 3, 1840, 1 Rob. App. 296; M. Bell's Lectures on Conveyancing, vol. i., p. 574, &c., vol. ii., p. 1063.

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being erected facing the Grassmarket, and, as I understand, common stairs enter from it on either side, at or very close to its narrowest portion. Now, it is impossible not to see that, taking even six feet as the breadth of a loaded cart or carriage, and there is evidence that this is less than often occurs, a breadth of 1½ feet on each side between the loaded cart and the wall or the entry to the common stairs is not enough to secure the reasonable safety of inhabitants or foot passengers having occasion to use this access. That safety might possibly be secured by the exercise of unusual care or precautions may be true, but in construing the obligation to give an access I think such an access must be given the use of which will not involve unusual precautions or uncommon care on the part either of the carters or of the foot passengers. The mere existence of risk must if possible be avoided, and that can best be done, when such a passage is to be used both by carts and by foot passengers, by securing a sufficient foothpath free of and outside the flanged tramway, by which, as I understand it, carts and carriages are confined and guided.

I concur with the Lord Ordinary, therefore, in finding that the access, in present circumstances, should not be less than twelve feet in width.

The next question is, how is this access to be enforced and made, and can it be enforced against all the defenders, or any and which of them? In the first place, I hold the obligation to subsist and to be still incumbent on the defenders, the improvement trustees. They are the direct obligants in the original contract; they themselves expressly undertook to make and construct the access; and nothing has occurred, nothing has been done by the pursuers or anybody else, which relieves the improvement trustees from this obligation. They are plainly still bound thereby, and if, by reason of rights acquired by singular successors, to whom the obligation has not passed, or if in any other way the trustees are no longer able specifically to implement their obligation, they would be liable in damages for breach thereof; but if they can still specifically give performance they must do so, unless the creditors choose to waive or to compromise their claim.

The other defenders, however, Thomas Brady and John M'Kellar, stand in different positions; and in order to see how far the improvement trustees can give specific implement of their obligation it is necessary to inquire how far the other defenders are bound either to implement the obligation themselves, or to submit to have it implemented by the trustees—that is, to allow the ground necessary for the access to be taken from their respective feus. The Lord Ordinary has decerned *ad factum præstandum* against the whole three defenders without distinction, and without defining their respective rights. I hardly think that this part of his Lordship's interlocutor should be affirmed, and I doubt how far or in what manner it could be wrought out, even if it were affirmed.

The defender Brady and the defender M'Kellar stand in different positions. Brady's property is on the left-hand of the proposed access—that is, on the left side as you enter the access from the Grassmarket; but then it appears that this part of Brady's property was not acquired from the improvement trustees at all, although another and back part of his property was so acquired. I am of opinion that, according to a sound reading of the contract between the trustees and Sir George Kinloch the servitude of access, assuming a servitude of access to be thereby constituted, does not apply to the property now belonging to Brady, in so far as that did not flow from the trustees, or from their author, Sir George Kinloch. It seems plain that if Brady had not purchased anything from the trus-

tees, but had contented himself with remaining proprietor of the ground to the left of the proposed access, which he had acquired from a third party free from all burden or servitude, that ground would have been subject to no servitude whatever in favour either of Sir George Kinloch or of his successors, the present pursuers. If this be so, it seems to make no difference that Brady has acquired from the trustees, besides his original front subjects, a back piece of property originally belonging to Sir George Kinloch. That circumstance will never subject his front property, independently acquired from a third party, to any servitude from which it would otherwise have been free, unless there had been some special bargain to this effect, and of this there is no averment or pretence. It follows that Brady, not being as to his front property a successor of the improvement trustees, and not being liable, *qua* proprietor of that property, to any servitude, is not bound to submit to have any part of his front property taken for the purpose of widening the proposed access. But then it is said that Brady, in building his new wall on the left side of the passage going south, has encroached upon the old line of East Smith's Close, and therefore has really built upon land subject to the servitude. I am not sure that I fully understand the state of the titles, and the exact position of the boundary of Mr Brady's property. Probably, if the alleged encroachment has taken place, merely as an arrangement for straightening or squaring the line of the gable, so as to make it run at right angles to the street instead of in a slightly slanting or oblique direction, this may make no difference. I understand that Brady's old boundary was the centre line of the old gable, and if the new gable has been built in a somewhat different position by mere arrangement, for the purpose above mentioned, and without any new title or conveyance, and if the title stands just as it was before, I cannot think that this makes any difference on the rights of parties, or subjects Brady's property to a servitude or liability from which it was formerly free. If Brady's back property were required to widen the access the case would be different; but if I am right in the view above suggested, then I think Brady must ultimately be assoilzied from this action. It would, however, be unsafe to grant absolvitor at present.

I come to a different result as regards M'Kellar. I think the obligation to give an access contained in the disposition by Sir George Kinloch to the improvement trustees, and made real by infeftment or registration, effectually constituted a servitude of access in favour of Sir George's back property over the front property conveyed to the improvement trustees—a servitude indefinite as to the position of the access, which was in the option of the servient proprietor, but real *quoad* the dominant tenement and its owner, and effectually running with the lands. This servitude was published on record. It was on the face of the improvement trustees' title, and I think was well made a real burden affecting the servient subjects. I am, therefore, of opinion that M'Kellar, though in some senses a singular successor in the servient subject, is bound by the servitude—that is, is bound to submit to have the access properly constructed, and made of a proper width, and the result is that he is bound, as servient owner, to submit to have taken from his ground, and added to the existing access, the additional width of three feet. It seems to be true that under the articles of roup the improvement trustees did not disclose their title to Mr M'Kellar, and did not tell him the terms of the servitude, or of the obligation they were under to give an access; and although this might have been discovered from the records, I see no reason to doubt that Mr M'Kellar took his feu, and

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proceeded to build according to the plans furnished to him by the trustees, in the *bona fide* belief that he was entitled so to do, and was not bound to leave any wider access than the access shewn upon the plans of nine feet in width. Indeed I think this may be held to have been warranted to him by the trustees; and therefore, while I think he is bound now to give from his feu, on the right-hand of the access going up from the Grassmarket, sufficient ground—that is, about three feet—so as to make the access twelve feet wide, I would reserve to Mr M'Kellar his whole claims of relief or damages against the improvement trustees, on the ground that he has been misled or misdirected by them into taking his feu according to their measurements, and building thereon according to their plans, and to the trustees their answers as accords. In the present action I doubt whether we can do more than reserve these claims; but I cannot help thinking that they should not be disputed, and abatement or compensation should be made to Mr M'Kellar upon reasonable terms.

The result is that, adhering to the Lord Ordinary's view as to the width of the access, I would humbly propose that we should in the meantime decern against the improvement trustees alone to make the passage of the width now fixed, and in a proper manner. But I think we should also find that the trustees are entitled to take from their feuars, so far as these feuars derive right from them, and from the ground feued from the trustees, whatever land may be necessary to make the proper access, and of the proper width, and that to this extent their feuars, as such, are bound to give or allow to be taken the ground necessary so to widen the access; and farther, that we should reserve all claims for relief or damages as accords, and all other questions in the case.

Lord Neaves concurred.

Lord Ormidale.—In regard to the width of the passage I entirely concur with Lord Gifford in thinking that the Lord Ordinary has come to a right conclusion. But I cannot agree with his Lordship as to how far the obligations in question are incumbent on all the defenders alike. The obligations are to the effect, 1st, to construct the access, and 2dly, to uphold it. Now, it rather appears to me that these obligations are subject to different considerations. If the passage had been originally constructed of the proper width by the improvement trustees before they disponed the ground in feu, it occurs to me that they would have done all that was required of them to fulfil any obligations incumbent on them. I cannot think that the obligation to maintain the access was intended to remain for ever in operation against the improvement trustees, notwithstanding that the access had been properly constructed. On the contrary, I am disposed to think that the obligation to keep up the access would, after its proper construction, lie on the parties in possession as proprietors for the time. But, in point of fact, the access never has been properly constructed, and therefore, while I throw out these observations, I do not think it necessary to pronounce any precise findings on the subject of them, at least at present. Let us first have the access constructed of a proper width. I am of opinion, accordingly, that the interlocutor of the Lord Ordinary should be adhered to in so far as it ordains the improvement trustees to construct an access of twelve feet in width, but that the question of the maintenance of the access after it is constructed should be in the meantime reserved. It is not improbable, at least it is to be hoped, that an equitable arrangement may be come to, so as to avoid all farther litigation and expense.

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LORD JUSTICE-CLERK.—I concur substantially in the opinions delivered. This is a perplexing, and in some respects a difficult case. The difficulty has been caused by the irregular action of the improvement trustees. In the first place, they prepare their feuing plan without any communication with the party in right of the obligation, and at their own hands fix the dimensions of the access. In the second place, they introduce into the articles of roup a clause by which the disponees are not to know anything of the titles of their authors. The present case is a strong illustration of the inconvenience of such a stipulation. Here we have a purchase made by so many feet of frontage, which it now turns out the trustees have not to dispose of. The buildings have been completed, and apparently the only way in which our judgment can be given effect to is by pulling down one or both of the buildings which adjoin the entry. This would be a most unfortunate necessity, should it turn out to be so.

I wish to guard my opinion on one or two points.

I am not prepared to say that these obligations in favour of the subjects which belonged to Sir George Kinloch do not transmit with the land against singular successors to their full extent. A distinction has been drawn between the construction of the access and the subsequent upholding and maintenance of it when made. There are grounds for the distinction, but I reserve my opinion on it. But our judgment proceeds on the ground that whether a real burden has been constituted or not, there is at least a servitude well constituted, which necessarily transmits to singular successors, and this is sufficient for the decision of this case.

Farther, I say nothing as to the mutual relations of Brady and M'Kellar, or as to whether Brady has any ground subject to the obligation in question.

Lastly, the question of maintenance between the feuars, as well as with the improvement trustees, must be reserved entire.

With these explanations, I propose the following interlocutor—[reads draft of interlocutor given below]. That will apply solely to the ground contained in the disposition to the improvement trustees. If Brady has no ground included in the disposition it will not apply to him.

THIS interlocutor was pronounced:—"Having heard counsel on the reclaiming note for the defenders, the Edinburgh Improvement Trustees, against Lord Curriehill's interlocutor of 4th March 1876, Adhere to the said interlocutor, in so far as it is directed against the defenders, the improvement trustees: Find, further, that the defenders, John M'Kellar and Thomas Brady, are, in virtue of their feu-rights, bound to submit to a servitude of a cart and carriage access from the Grassmarket to the property of the pursuers, over so much of the ground included in their respective rights which abuts on the existing access as was acquired by their authors, the improvement trustees, from Sir George Kinloch by the disposition No. 8 of process, and that of the dimensions set out in the said interlocutor: But before farther answer on the remaining points of the case, including any question relative to the future maintenance of the entrance in question, appoint the defenders, the improvement trustees, to state in a minute what steps they are prepared to take in order to carry out this judgment: Find the defenders, the improvement trustees, liable in additional expenses, and remit to the Auditor to tax the same, and report: Reserve in the meantime all other questions of expenses."

KEEGAN & WELSH S.S.C.—J. KNOX CRAWFORD, S.S.C.—THOMAS SPALDING, W.S.—J. DUNCAN SMITH, S.S.C.—Agents.

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Davie v. Stark.

JOHN DAVIE, Pursuer and Respondent.—*Balfour—J. A. Reid.*
WILLIAM C. STARK, Defender and Appellant.—*Mackintosh—Laidlay.*

Lease—Mutual Obligation—Compensation—Retention—Liquid and Illiquid—Rescission of Contract.—A shop was let for seven years to a clothier, with the condition that an adjoining shop, also belonging to the lessor, should not be let to a person in the same trade. Disputes having arisen in consequence of the landlord (a singular successor of the granter of the lease) selling in the adjoining shop articles which the tenant claimed to fall within his monopoly, the tenant, at the end of three years, after warning the landlord, threw up the lease, and quitted the premises.

In an action by the landlord for the rent of the half year after the tenant had left the premises the tenant produced a correspondence which shewed that there had been repeated complaints on his part of the landlord's selling articles usually sold by a clothier, and a persistent refusal on the part of the landlord to acknowledge any right on the part of the tenant to control his trade in the adjoining shop.

The Court allowed the defender a proof before answer, and upon the proof found that the defender had in fact suffered damage, in consequence of the pursuer's violation of the lease, to a greater extent than the sum sued for, and that he was entitled, without raising a separate action, to set off the damages due to him in extinction of the sum sued for.

Opinion (*per* Lord Justice-Clerk, Lord Neaves, and Lord Gifford) that the landlord having not only violated a material condition of the lease, but intimated his intention of continuing to do so, the tenant was entitled to rescind the lease, and that consequently no rent was due for the period after he had quitted the shop.

2D DIVISION. Sheriff of Mid-Lothian and Haddington.

I.

THIS action was raised in November 1875 in the Sheriff Court at Edinburgh by John Davie, proprietor of the shop No. 92 High Street, Edinburgh, against William Stark, clothier, who was tenant of the said shop, under a lease for seven years from Whitsunday 1872, at a rent of £100 per annum.

The summons concluded for payment of £50, being the rent due at Martinmas 1875 for the half year immediately preceding.

The defence was, that the missives of lease under which the defender possessed the shop, entered into in February 1872 between the defender and Messrs M'Kellar and Swan, who were then proprietors of the shop, contained a condition that the adjoining shop (No. 94 High Street), which belonged to the same proprietors, should not, during the defender's lease, be let to any person in the drapery, clothing, or ready-made clothing trade; that the pursuer purchased both shops, with entry at Whitsunday 1872, under burden of the defender's lease; that he entered upon the personal occupation of No. 94 at that date, and immediately began to expose for sale in that shop articles forming part of the ordinary stock of a draper, clothier, and ready-made outfitter; that notwithstanding repeated remonstrances on the part of the defender, the pursuer persisted in this violation of the lease, and expressly refused to recognise any right of interference in his trade on the part of the defender; that at last, on 23d April 1875, the defender, through his agent, wrote the pursuer that unless he discontinued, on or before 1st May 1875, infringing the terms of the lease, the defender would hold himself entitled to renounce the lease and vacate the premises, and he would do so at the term of Whitsunday 1875; that the pursuer's reply was, that, as he was not aware that he was infringing the terms of the lease, he declined to alter the conduct of his business; that in consequence of the pursuer's refusal to perform his part of the contract of lease the defender rescinded the lease at Whitsunday 1875, and vacated the premises.

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The defender's complaints and the pursuer's answers thereto were instructed by the production of the correspondence between the parties and their respective agents.

The pursuer pleaded, *inter alia;*—(5) In any case, the defender's claim being merely one of damage, and illiquid, the same cannot be set off or pleaded against the pursuer's claim for rent.

The defender pleaded, *inter alia;*—(2) If the missive letters between the defender and M'Kellar and Swan and their agents constitute a binding lease, the restriction therein contained not to let the shop No. 94 High Street to any person in the drapery, clothing, or ready-made outfitting trade, forms an integral part of that lease, and the pursuer, as landlord, cannot enforce implement of the defender's part of the lease while he declines to perform his own counterpart obligations. (3) The pursuer having refused to perform his obligations, after being repeatedly required so to do, and the defender having in consequence renounced the lease and ceded possession of the premises to the pursuer at Whitsunday 1875, is not liable in payment of the sum sued for.

The Sheriff-substitute (Hallard), on 16th February 1876, pronounced an interlocutor upon the closed record and productions, finding that the defender was not entitled, on the ground of the alleged violation of the lease by the pursuer, to put an end to the lease and abandon possession, and therefore that he was bound to pay the rent concluded for.*

The defender appealed to the Court of Session, and argued;—The stipulation for a monopoly was a material condition of the lease. The pursuer having violated this condition, the defender was entitled either to rescind the contract or to claim damages.[1] The pursuer could not enforce payment of the rent, in respect that he had failed to give the defender what was stipulated in the lease.[2] Assuming that the defender could not now rescind the contract, he was entitled to have the damages liquidated in this action.[3] The correspondence in process was conclusive evidence of violation of the contract by the landlord, and of his declared intention to continue the violation. It only remained to ascertain the amount of the damages sustained by the tenant.

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* The following note was appended to the Sheriff-substitute's interlocutor:—"On the assumption that the defender's complaint was well founded, it is thought that the remedy adopted by him was not the competent one. He might have sought redress for the past by damages, and protection for the future by interdict. But his right to break the lease is not clear, and required at all events to be ascertained by declarator.

"At the very interesting debate with which the Sheriff-substitute was favoured, the pursuer relied on the case of Drybrough v. Drybrough, 21st May 1874. The defender justly pointed out the distinction between that case and the present. There the tenant remained in possession, and refused payment of his rent in respect of an unconstituted and illiquid claim for abatement of rent. Here the tenant ceased to possess. But it is thought that that authority applies here *a fortiori*. If the tenant remaining in possession is not entitled to oppose to a demand for rent an illiquid claim expressly contemplated in the lease, still less is he entitled at his own hand to break the lease, cease possession, and leave the premises without a tenant. A claim to abate rent is surely a smaller thing than a claim to void the lease. If decree of constitution be needed for the one, decree of declarator seems to be much more needed for the other."

[1] Turnbull v. M'Lean and Co., March 5, 1874, *ante*, vol. i. p. 730.

[2] Guthrie v. Shearer, Nov. 13, 1873, *ante*, vol. i. p. 181; Kilmarnock Gas-light Co. v. Smith, Nov. 9, 1872, 11 Macph. 58, 45 Scot. Jur. 43.

[3] M'Bride v. Hamilton, June 11, 1875, *ante*, vol. ii. p. 775; Johnston v. Robertson, March 1, 1861, 23 D. 646, 33 Scot. Jur. 335.

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Argued for the pursuer;—The defender had mistaken his remedy. If his allegations were true, he ought to have raised an action of interdict and damages.[1] The present case was unlike that of Guthrie v. Shearer, where possession of the subject let was not given, and where the remedy of interdict was not available to the tenant. Here the defender was unquestionably put in possession of the subjects let, and all that was alleged was that the pursuer had violated an incidental stipulation by doing something in regard to another subject. The defender was bound to have the alleged violation judicially declared. He was not entitled to take the law into his own hands, and leave the premises without a tenant, which was the position taken up by him on record. No plea of retention on the ground of damages was stated on record; but even if it were, the case fell under the usual rule, that a demand for rent past due could not be met by an illiquid claim of damages.[2] None of the cases relied on by the defender in support of this part of his argument had reference to the contract of lease, and the cases in which the plea of retention had been refused were very numerous.[3] The general rule of retention applicable to mutual contracts had no application to cases between landlord and tenant, because the two obligations were not contemporaneous. The rent was payable at a fixed term, but the damages were not due till liquidated.[4]

In the course of the debate the defender craved leave to amend his record by adding the following averment:—"The defender has suffered loss and damage from the pursuer's breach of contract in the premises to an extent largely in excess of the sum sued for;" and relative plea in law:—"The defender having suffered loss, injury, and damage by the pursuer's breach of contract in the premises to an extent largely in excess of the sum sued for the pursuer is not entitled to insist in the action."

Lord Justice-Clerk.—The question of law in this case depends very much on the question of fact, and I think it unfortunate that the Sheriff-substitute did not adopt the course of allowing a proof before answer. If there was only an occasional sale of the articles complained of—if, in short, there was no substantial injury to Stark—I do not think that he would have a right to rescind the contract, or that the claim of damages at his instance could be maintained in answer to the demand for rent; but it may be otherwise if there was a deliberate violation of the lease by the landlord. Without indicating my opinion on this point, I propose to allow a proof before further answer.

Lord Neaves, Lord Ormidale, and Lord Gifford concurred.

This interlocutor was pronounced on 9th June 1876:—"Allow the amendment proposed by the defender to be made upon the record, and before answer allow to both parties a proof of their respective averments in the record, the defender to lead in the proof; and appoint the same to be taken by Lord Ormidale; . . . reserving all questions of expenses."

A proof was accordingly taken, which shewed that the pursuer carried on the trade of a hatter and bootmaker in No. 94, but that he also sold to

[1] Simson v. Crippin, Nov. 26, 1872, L. R. 8 Q. B. 14; Johannsohn v. Young, June 2, 1863, 32 L. J. Q. B. 385.

[2] Drybrough v. Drybrough, May 21, 1874, *ante*, vol. i. p. 909.

[3] See cases cited in Hunter on Landlord and Tenant, vol. ii. p. 264, &c.

[4] *Per* Lord Justice-Clerk Inglis in Johnston v. Robertson, March 1, 1861, 23 D. p. 656, 33 Scot. Jur. p. 340.

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a considerable extent minor articles, such as caps, ties, braces, &c., falling within the usual business of a clothier and outfitter, and therefore, as regards these articles, competed with the defender's trade. It appeared that the total prices of these articles sold by the pursuer between Whitsunday 1872 and Whitsunday 1875 was about £100; but it was not easy to estimate precisely the amount of injury to the defender's business caused by such sales.

The debate was resumed.

After hearing junior counsel on the proof the Court intimated their opinion that the amount of damage suffered by the defender in consequence of the pursuer's contravention of the lease was sufficient to entitle him to raise the legal question involved, and directed senior counsel to confine their argument to the point of law.

For the defender the argument was repeated—(1) that the circumstances justified rescission of the contract, which necessarily extinguished all claims for rent for the period after Whitsunday 1875; and (2) that in any view the pursuer could not recover the half year's rent sued for, in respect that the proof shewed that he was due to the defender a larger sum by way of damages.

Argued for the pursuer;—There were two questions in the case—(1) whether anything had occurred to entitle the tenant to rescind the lease; and (2) whether, if he was not entitled to rescind the lease, he was entitled to extinguish the rent by setting off damages against it. As to the first point, so far as the pursuer was a lessor he had fulfilled the contract of lease. The breach he had committed was of a collateral obligation, and looking to the doubt which had existed whether there had been any violation of the contract, and to the comparatively trifling character of that violation, this was not a case which justified rescission of the lease by the tenant. He was no more entitled to take this step than the tenant of an agricultural farm who had suffered some damage from game. In all such cases, where the breach was not of the essence of the contract, the remedy of the party aggrieved was to claim damages, and protect himself for the future by interdict. The new defence stated was equally untenable. To hold that while the lease existed the defender was nevertheless entitled to extinguish the rent by a claim of damages, the amount of which was not even now stated, would lead to this result, that the pursuer would have to bring seven more actions for each half year's rent as it fell due, in each of which actions he would, for all that appeared, be met by the defence that the damage still due to the defender was in excess of the sum sued for. Such would be the consequences of abandoning the well established rule that a tenant must constitute a claim of damages before he could set it off against a claim for rent past due.

At advising,—

LORD JUSTICE-CLERK.—This is an action at the instance of Mr Davie, proprietor by purchase of a shop in the High Street of Edinburgh, against Mr Stark, tenant of the shop under a lease for seven years from Whitsunday 1872, and concludes for a half year's rent due at Martinmas 1875. The defence is substantially, admitting that the defender was in possession of the subjects down to Whitsunday 1875 under missives constituting a lease for seven years from Whitsunday 1872, that there was a condition contained in these missives of lease which has not been implemented by the pursuer, and which he has refused to implement, that in consequence the defender was entitled to rescind the contract of lease, and that he has rescinded it. Further, the defender says that even if he is not entitled to rescind the contract, he has suffered damages by the

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pursuer's refusal to implement the stipulation in question, which damages he is at all events entitled to set off against the rent claimed.

The Sheriff-substitute has found that the defender was not entitled to put an end to the lease, and has decerned in terms of the conclusions of the summons. I have come to the conclusion that the defender was entitled to rescind the contract, because there was a substantial violation by the pursuer of one of the fundamental conditions of the lease; and in the second place, as the case now stands, and with all the facts before us, I am of opinion that in any view the defender would be entitled to set off the damages which he has suffered by the pursuer's breach of contract against the rent which is now claimed. But I propose to put my judgment entirely upon the first ground, viz. that the pursuer has not only failed to fulfil, but refused to fulfil a substantial and material part of the contract of lease, and that therefore the defender is entitled, without seeking to enforce implement of the stipulation in question, to throw up the position of tenant.

The terms of the lease are contained in certain letters which passed between Mr Stark and Mr Davie's authors, Messrs M'Kellar and Swan, or their agent. On 5th February Mr Stark writes to M'Kellar and Swan as follows:—"I offer to take that new shop No. , lowmost shop, High Street, with cellarage below, for a period of seven years, at the yearly rental of one hundred pounds sterling, on conditions that it is fitted up with gas-fittings according to my instructions, —that the two shops above, No. and High Street, are not let during the term of my lease to any person or persons in the drapery, clothing, or ready-made outfitting trade." On 6th February 1872 the agent for M'Kellar and Swan replies that his clients "are willing to consent to the restriction you propose as to the shop next to the one you offer for, but they cannot consent to any restriction as to the uppermost of two shops above, to which you refer." On 7th February Mr Stark writes—"In reply to yours of the 6th, I agree to find security for the rent, on the condition that all the gas-rods are fitted up wholly and entirely at the expense of the landlord; that the shop next to the one I offer for be subject to the restrictions referred to in my last letter." This offer is accepted by M'Kellar and Swan by letter dated 12th February 1872.

I have no doubt that it was a material, and even an essential part of the contract of lease that this other shop referred to should not be let to any person "in the drapery, clothing, or ready-made outfitting trade." The landlord was as much bound to fulfil that part of the contract as the tenant was to pay rent.

On 29th May 1872 we find Mr Davie's agent writing to Mr Stark's agents—"My client was not aware that Mr Stark possessed the premises occupied by him under a lease, as he was applied to the other day to give his consent as purchaser of the premises to a lease in your client's favour containing some absurd provisions as to what your client was to sell, or rather not to sell, and which he declined to have anything to do with." Some correspondence follows, the result of which is that Davie positively refuses to be controlled in any way in the use of the adjoining shop.

So the matter ends till 1875. Davie not only takes the position that he is not bound by the stipulation in regard to the adjoining shop, but does not admit that Stark is other than a yearly tenant, and gives him distinct notice that he does not intend to fulfil the stipulation. Accordingly, on 1st February 1875 Stark takes Davie at his word, and intimates that he will cease to occupy the shop occupied by him after Whitsunday 1875. Some further correspondence takes place, and on 23d April 1875 Mr Stark's agents write to Mr Davie's agent

—"We now beg formally to intimate to you, as acting for Mr Davie, that unless he discontinues, on or before the 1st May 1875, infringing the terms of Mr Stark's lease, as already complained of, Mr Stark will hold himself entitled to renounce the lease in question, and vacate the premises, and he will do so at the term of Whitsunday first." Mr Davie's agent replies on 27th April—"As my client is not aware that he is infringing the terms of the lease, he declines to alter the conduct of his business."

The first question is, whether there was a violation of the contract by the pursuer. The stipulation in regard to the adjoining shop was an important condition, to secure the defender in a certain monopoly of trade. It has been ingeniously argued that the monopoly was part of the subjects let. I do not look upon it in that view, but undoubtedly it was a material condition of the contract. We have had a proof as to the extent to which this condition was violated, and here it is that my only difficulty arises. I think that the condition was violated to an appreciable, though not very great extent, but it certainly was deliberately violated in regard to some of the articles sold. The pursuer cannot defend his conduct by saying that the occupation of a hatter implies the sale of these articles. There are many things the sale of which is generally included under the nominal business of a hatter, but which the pursuer was not entitled to sell, because they fell within the defender's line of business as a clothier, which it was the object of this agreement to protect.

The next question is, what is the result of this violation. I entirely adhere to the views expressed in Turnbull v. M'Lean and Co. (March 5, 1874), that failure to perform any material part of a mutual contract by one of the parties will prevent him from insisting on implement against the other. The authorities on the subject were all gone into in that case, and I need not repeat them. The other party is entitled either to refuse implement until the stipulations in his favour have been fulfilled, or, provided that the latter are material and essential, to rescind the contract altogether. Rescission, no doubt, is a strong measure, and is only competent where the stipulations violated are material or essential. The breach of minor and incidental stipulations, although it may be a ground for damages, will not justify rescission of the contract. A good illustration is to be found in the present contract in regard to the stipulation about gas-fittings. A failure by the landlord in regard to this would not have entitled the tenant to rescind the contract. But the violation with which we have to do is of a totally different kind. It is not only that the landlord has violated the contract in the past, but he intimates his intention of violating it for the future, which is, indeed, equivalent to a rescinding of the contract on his part. In such a case I cannot doubt the right of the tenant to rescind the contract, and therefore that he is not liable for the rent sued for.

In regard to damages, I should be inclined to hold, upon the concluded proof, that there is nothing in the fact of the damages being illiquid which would prevent us from doing substantial justice between the parties.

LORD NEAVES.—I take the same view of the rights of parties as your Lordship. I think that in the circumstances of the case Stark was entitled to rescind the lease. He did not do it rashly, or take advantage of an accidental violation of the lease, in order to get quit of an unprofitable bargain. He called upon the landlord to desist from the violation of the lease, and that was refused.

Perhaps we are not put to the absolute necessity of determining whether

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Stark had a right to rescind, seeing that this is not a declarator at the instance of Stark, but a defence to an action at the instance of the landlord for a half year's rent. In answer to that demand, I think Stark entitled to prove the extent of damage suffered by him, and to set it off against the landlord's claim for rent. I think him entitled to have the damages liquidated in the present action, and, if these amount to £50, to have the landlord's claim extinguished, which it would plainly be, to the extent of the only sum concluded for. While I am willing to dispose of the case in this way, I am prepared, as I said, to go further, if thought advisable, and affirm the defender's right to rescind the lease, in respect of the landlord's resolute refusal to recognise any right of control or interference on the part of the defender as to the business carried on in the adjoining shop.

LORD ORMIDALE.—There are three questions which require to be considered and disposed of in this case:—First, was there a violation by the pursuer, the landlord, of a material condition of the lease; secondly, if there was such a violation, resulting in damages to the defender, the tenant, is he entitled to an abatement from the rent sued for, or rather to have it extinguished; and, thirdly, is he not only entitled to that, but also was he entitled to desert the premises, as he did at Whitsunday 1875, and to have the lease held as rescinded as of that date.

These, with the exception perhaps of the first, are important questions, and attended with some nicety as well as difficulty.

In regard to the first question, it is not suggested that there was any illegality in the condition that the landlord should not let the shop adjoining Mr Stark's, during his lease of seven years to any person in the drapery, clothing, or ready-made outfitting trade, nor is it disputed that this condition was binding on Mr Davie, although a singular successor. (His Lordship then examined the evidence upon the extent to which the condition was violated, and proceeded)—I have come to the result that the extent of the encroachment was not only appreciable, but considerable, with reference to the rent sued for. Without specifying in exact figures the amount of damages, it is sufficient for the purposes of this action to say that, in my opinion, they must have amounted to at least the £50 claimed by the pursuer.

This being so, we come to the other two questions, or, in other words, to consider what is Mr Stark's, the tenant's, remedy or redress.

We see that from the first there were complaints on the part of Stark of Davie selling articles in the adjoining shop contrary to the terms of the lease, and at last that Stark's agents wrote a letter, distinctly intimating and reserving his claim of damages. The violation nevertheless went on. In 1875 the correspondence is resumed. In his letter of 1st February Stark takes up the position of being a yearly tenant, which he certainly was not, although it is a position which the landlord seems at one time to have taken up himself. Afterwards, however, Stark is better advised, and on 23d April his agents write as follows:—(Reads letter of April 23, 1875).[1] This letter, however, was within, it will be observed, only about a month prior to the Whitsunday term, and was scarcely timeous notice to the landlord to look out for a new tenant. This leads me to think that the tenant's true remedy was to claim abatement of rent in respect of the damage he had sustained, and not a rescission of the lease. As to his right to

[1] Referred to on p. 1114.

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claim abatement I have very little doubt, although there are several cases in the books in which a tenant has been held not entitled to abatement of rent until he had liquidated his damages. These cases are not very easy to reconcile with others in which abatement has been allowed. Perhaps they might be reconciled by a consideration of the nature and amount of the claim of damages in the different cases. I may, however, advert to the case of Campbell v. Watt, June 18, 1795, Hume, p. 788, as closely analogous to the present, in which an abatement from the rent of an inn was allowed in defence to the landlord's claim of rent, because the landlord had erected another inn at a short distance, contrary to what was held to be the implied condition of the tenant's lease. That case is very much in point as a precedent for the present. Indeed the present case is *a fortiori* of that of Campbell v. Watt, because here there was an express condition that the landlord should not set up another shop of the same kind in the adjoining premises, whereas in Campbell v. Watt such a condition was only implied. Therefore, what I desire to rest my judgment upon is this, that the tenant here is entitled to say that the rent sued for is extinguished by his counter claim of damages. It would be very unfortunate if, after a long proof on the extent of damages, the tenant were obliged to bring a new action to liquidate the amount. This was not held necessary in the case of Campbell v. Watt, and I do not think it is necessary here.

Neither do I think it necessary to determine whether the tenant had a right to rescind the lease. I should have had great hesitation in coming to the conclusion that it was competent for a tenant under a seven years' lease, with four more years to run, to throw it up in the circumstances which have here occurred. I think the argument for the pursuer against his right to do so has not been answered, especially as no instance has been adduced in which a tenant, who had the remedy of interdict open to him and did not use it, was found entitled to rescind. In Guthrie v. Shearer (Nov. 13, 1873, *ante*, vol. i. p. 181) it was held that the tenant of a quarry was entitled to rescind the lease because he did not get possession of a road stipulated for in the lease and indispensable to the working of the quarry. But in that case the remedy of interdict was not available. The tenant could not by way of interdict obtain the road to which he was entitled. I do not therefore think that case in point.

Without saying that under no circumstances would a tenant be entitled to rescind his lease, I am not satisfied that he was entitled to resort to that extreme measure of redress in the present case. Nor is it necessary so to determine, for it is enough to entitle the defender to absolvitor that the damages due to him by the landlord for breach of the contract of lease are at least equal to the rent sued for.

LORD GIFFORD.—Although the amount of the pecuniary or patrimonial interest involved in this case is comparatively small, the case itself raises questions of some delicacy, and of great importance in the law of mutual contract.

The appellant, Mr Stark, was lessee of a shop No. 92 High Street, Edinburgh, under missives dated in February 1872, and that for the term of seven years from and after Whitsunday 1872, at the yearly rent of £100. The missives were entered into between the appellant as tenant, and M'Kellar and Swan, who were then proprietors, and the missives were followed by possession. Accordingly it is not now matter of dispute that a valid and effectual contract of

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lease was entered into for seven years, and although the present respondent, Mr Davie, is a singular successor of the original lessors, it is not now contested, and indeed could not well be, that he is bound by the missives of lease granted by his authors, and clothed with possession. It is true that in the correspondence both parties—first Mr Davie, and then Mr Stark—took an opposite view, that the lease was only valid from year to year; but this is now given up, and rightly given up, by both parties, and the validity of the seven years' lease is no longer disputed. But, whether disputed or not, I think there is no doubt whatever that a lease for seven years was validly constituted and subsisting, at least until the dispute arose which led to the present proceedings.

It was a condition of the lease, and in my view a very material and important condition, that the shop let to the appellant should have secured to it what has been called a locally limited monopoly, to this extent, that the adjoining shop, which belonged to the same proprietors, should not be occupied for the purposes of the same trade as that carried on by the appellant. The words of this condition in the missives are peculiar. They are as follows:—"On condition that the two shops above" (afterwards restricted to the shop immediately above) "are not let during the term of my lease to any person or persons in the drapery, clothing, or ready-made outfitting trade."

I am of opinion that this condition and stipulation was one which might legally and competently be made—that it was binding upon the contracting parties and on the singular successors of the lessors as an integral part of the appellant's lease; and the first question which arises is, has this condition and stipulation of the lease been observed by the respondent, who is proprietor of both shops—that is, both of the shop let to the appellant and of the shop immediately above it; and upon this point a long and somewhat elaborate proof has been led under a previous order of Court.

I am of opinion that it has been sufficiently proved that the respondent, from the commencement of the lease down to and subsequent to Whitsunday 1875, has violated and contravened this stipulation in the lease, inasmuch as the respondent during that period has used and occupied the shop immediately above the appellant's shop for the sale of articles in "the drapery, clothing, or ready-made outfitting trade." It was originally contended that as the stipulation only was that the shop adjoining the appellant's should not be "let" for such a trade, this would not prevent the respondent from so occupying the shop himself. This view, however, which was obviously against the good faith of the contract, was at once disclaimed and abandoned at the bar. It is perfectly obvious that the meaning of the agreement was to prohibit a particular trade in the adjoining shop, whether that trade should be carried on by a tenant or by the landlord himself.

As to the extent of the violation or contravention of the condition, it is true upon the proof that the contravention only went to a certain extent. The respondent did not carry on in the shop adjoining that of the appellant exactly the same trade as that carried on by the appellant. The appellant was a draper, clothier, and outfitter; the respondent was a hatter and bootmaker. But then it is abundantly proved that a great many articles which form a part of the appellant's trade as clothier and outfitter were also sold by the respondent, although he was nominally a hatter. For example, although there was not much objection to the hats, cloth caps were sold by the respondent to a very large extent—ties, mufflers, scarfs, braces, woollen shirts, collars, socks, stockings, and other such

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articles, were all found in the respondent's shop, although many of these formed staple articles in the appellant's trade. I cannot doubt that all this was a contravention of the condition, and in my view it is a most important point. It was a contravention deliberately and resolutely insisted in by the respondent. He absolutely refused to modify his trade in any way. It may also be conceded that the amount of sales effected by the respondent in what I may call contraband articles is not very great, looking to the considerable period of time which elapsed. Still I think the sales were material, and the contravention was not a trifle which it can possibly be said the law will not consider. The extent of goods sold or turned over by the respondent is not the measure of the appellant's loss or prejudice. He had a competitor next door, when his landlord had expressly guaranteed him against such competition. He may have had, as suggested in the proof, to lower prices, to press sales, and to submit to the annoyance of seeing possible customers seduced by his neighbour's window and his neighbour's display. And then the appellant could never tell to what extent the rivalry and competition might go—what sacrifices it might involve, and what classes or consignments of goods it might make useless. And so, upon the proof, and without going into details, which are minute and varied, I am prepared to hold that the respondent is chargeable with a gross and persistent violation of the stipulation in the lease, and that to a material and unjustifiable extent persisted in for three years, and this persistence is an all-important attribute of the contravention.

At last Stark puts himself in a very good position. On 23d April 1875 his agents inform Mr Davie that unless he discontinues on or before 1st May infringing the terms of the lease Mr Stark would hold himself entitled to renounce the lease and vacate the premises at Whitsunday. Now, this was perhaps a little late. Still it was the right ground to take. If the answer had been that Mr Davie regretted that there had been a breach of the lease on his part, and that the objectionable articles would be at once removed from his shop, Stark would have been obliged to continue the lease. But what is the answer of the pursuer's agent?—"As my client is not aware that he is infringing the terms of the lease he declines to alter the conduct of his business." Defiance is thus thrown down. I cannot doubt the defender's right to renounce the lease after he got this answer. I do not think he was bound to resort to interdict—a possible but a troublesome remedy. The remedy of rescission of the contract was fairly open to him. It would be impossible to hold, for instance, that where a proprietor had let a hotel, guaranteeing that there should be no other hotel within a certain distance, if he were to proceed to build another within the distance stipulated, he could oblige the tenant to continue in possession, leaving the tenant to claim damages. The general rule of law is that if one party to a mutual contract will not fulfil a material condition of the contract, the other party is entitled to rescind the contract. Although, as has been observed, there are very few cases in the books in which this doctrine has been applied to the contract of lease, the reason is that a material condition of the lease is seldom violated by the landlord except where he does not give possession of the subjects let, and there are cases falling under this head. Suppose that a right of access to the subjects let were guaranteed by the landlord, could it be doubted that if this access were shut up, especially if it were shut up by the landlord himself, the tenant would be entitled to rescind?

I am therefore of opinion that the tenant was entitled to rescind the lease. I

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conveyance of the fee to him and the heirs of his body did not take effect, and that his disposition of April 1833 in favour of his mother and her heirs is inoperative; 3d, That on the death of Mrs Ralston (the last liferentrix) in 1872, the conveyance of the fee to Alexander Drummond, the testator's nephew (son of his brother, Robert Drummond), and his heirs, took effect, and that the said fee can now be claimed only under or through the medium of that conveyance: Allows both parties to propose such amendments of the record with reference to these findings as they may judge proper: Grants leave to either party to reclaim." *

The pursuers reclaimed, and argued;—The fair presumption was that Gordon Drummond was dead in 1833 when John executed his deed, or at all events previous to John's death in 1858. But if Gordon was dead, John was fiar. The fee could not be *in pendente*, and it could be in no one else. The words "whom failing by predecease" meant by predeceasing the testator.

The defenders argued;—There was no proof that Gordon was dead even in 1858, and he might have left children. Even if he were dead without issue, John never was fiar. He was only to become fiar if he did not predecease the liferenters. Till the end of their liferent they were themselves fiduciary fiars.

At advising,—

LORD PRESIDENT.—The pursuers of this action claim right as heirs-portioners of their mother to a piece of land which was settled by the testamentary disposition of the late Alexander Drummond, of date 9th September 1816, and they claim that property on the footing that the testator's son, Gordon Drummond, who was first called in the destination, predeceased his father without issue, and, farther, that John Drummond acquired a vested right to the fee of the property and disponed it to his mother, of whom the pursuers are heirs-portioners. On the other hand, it is maintained by the defenders that there is no proof or presumption that Gordon Drummond predeceased his father; and even if he did, that according to the true construction of the settlement John, having predeceased certain liferenters, took no vested fee.

The question therefore turns on the consideration of (1) whether Gordon Drummond must be presumed to have predeceased his father, and if there is no such presumption, then at what period he must be presumed to have died—for that he is dead now is admitted; and (2) whether on construction of the settlement John Drummond ever took a vested right of fee.

The Lord Ordinary has found, "1st, That the testator's son, Gordon Drummond, predeceased his father, the testator, without issue, and that on this footing the property in the record referred to was possessed under the liferent

* "NOTE.— . . . The record takes no notice of Alexander Drummond and his heirs, and I am without information respecting them. If Alexander was legitimate, of which no doubt the Crown has information, the Crown advisers are probably right in concluding that the parties to the case, or some of them, would take preferably to the Crown as his heirs; and the Crown officers are certainly not bound to lend their aid to ascertain the state of the right under a conveyance, which—although, in my opinion, the governing conveyance—both parties in this case ignore. If the Court shall think that my view of the law is erroneous, the case may be decided on the record as it stands; but if it is the right view, it will be necessary to ascertain in some way whether Alexander Drummond is in life, and if not, who is now in his right as heir-at-law or otherwise. The conveyance to him and his heirs constitutes a fee-simple, and if it came into operation, as I think it did, it must govern the right to the property."

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daughters, in liferent, for their joint and *pro indiviso* liferent right and use, and to the survivor of them, in liferent, and after the decease of the survivor of them, to John Drummond, my grandson, son of my daughter, Margaret Drummond, and the heirs of his body, whom failing, by predecease without lawful issue, to Alexander Drummond, my nephew, son of my brother, Robert Drummond, and his heirs in fee."

Gordon Drummond had run away to sea in 1799 when thirteen years of age. He wrote two letters to his father during the next twelve months. About two years afterwards information was received by his father that he had been drowned, and he was never heard of again.

The testator was survived by his three daughters, of whom Margaret (Mrs Halley) died in 1858 leaving issue, Janet in 1867 without issue, and Agnes (Mrs Ralston) in 1872 leaving issue, and by John Drummond abovementioned, who was an illegitimate son of Margaret. The daughters entered into possession of his heritage, and their possession continued till the death of the last survivor, Mrs Ralston.

In 1833 John Drummond executed an onerous disposition of the subjects in Lauriston Street in favour of his mother, Mrs Halley, and her heirs. He died without issue in 1858.

After Mrs Ralston's death in 1872 her children took possession. But Mrs M'Lay and others, Mrs Halley's children, raised this action against them, concluding for declarator that the pursuers were proprietors.

They pleaded;—(1) The now deceased John Drummond, in terms of the disposition and settlement of Alexander Drummond, dated 9th September 1816, succeeded to the fee of the subjects mentioned in the conclusions of the summons upon the death of the disponer, and in consequence of the failure of the institute first called, and the heirs of his body, who had predeceased. (2) The right to the fee of the said subjects was effectually conveyed to Mrs Margaret Drummond or Halley by disposition by the said John Drummond in her favour, dated 5th April 1833.

The defenders pleaded;—(3) There being no proof or presumption that Gordon Drummond predeceased his father, John Drummond had never any right in the subjects, and could not convey any to his mother. (4) Farther, and *separatim*, John Drummond having predeceased the daughters of Alexander Drummond, no right ever vested in him, even assuming the existence of the alleged disposition and settlement and the predecease of Gordon Drummond without lawful issue. (5) The presumption being that Gordon Drummond is now dead, the defenders and pursuers are entitled to succeed to said subjects, partly in their own right and partly in that of their deceased aunt, as heirs of the said Alexander Drummond or as heirs of the said Gordon Drummond.

A proof was led. Neither the record nor the proof contained any information about Alexander Drummond, nephew of the testator, and neither party founded upon the conveyance to him.

The Lord Ordinary, after ordering intimation to the Queen's Remembrancer, who lodged a minute declining to appear, pronounced this interlocutor:—"Finds—1st, That the testator's son, Gordon Drummond, predeceased his father, the testator, without issue, and that on this footing the property in the record referred to was possessed under the liferent destination of the testator's settlement from the testator's death in 1823 till the death of Mrs Ralston, the last survivor of the liferentrices, in 1872; 2d, That John Drummond, the testator's grandson, being an illegitimate son of the testator's daughter, Mrs Margaret Drummond or Halley, died in January 1858, without lawful issue, and that having thus predeceased without lawful issue the last survivor of the liferentrices the

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conveyance of the fee to him and the heirs of his body did not take effect, and that his disposition of April 1833 in favour of his mother and her heirs is inoperative; 3d, That on the death of Mrs Ralston (the last liferentrix) in 1872, the conveyance of the fee to Alexander Drummond, the testator's nephew (son of his brother, Robert Drummond), and his heirs, took effect, and that the said fee can now be claimed only under or through the medium of that conveyance: Allows both parties to propose such amendments of the record with reference to these findings as they may judge proper: Grants leave to either party to reclaim." *

The pursuers reclaimed, and argued;—The fair presumption was that Gordon Drummond was dead in 1833 when John executed his deed, or at all events previous to John's death in 1858. But if Gordon was dead, John was fiar. The fee could not be *in pendente*, and it could be in no one else. The words "whom failing by predecease" meant by predeceasing the testator.

The defenders argued;—There was no proof that Gordon was dead even in 1858, and he might have left children. Even if he were dead without issue, John never was fiar. He was only to become fiar if he did not predecease the liferenters. Till the end of their liferent they were themselves fiduciary fiars.

At advising,—

LORD PRESIDENT.—The pursuers of this action claim right as heirs-portioners of their mother to a piece of land which was settled by the testamentary disposition of the late Alexander Drummond, of date 9th September 1816, and they claim that property on the footing that the testator's son, Gordon Drummond, who was first called in the destination, predeceased his father without issue, and, farther, that John Drummond acquired a vested right to the fee of the property and disponed it to his mother, of whom the pursuers are heirs-portioners. On the other hand, it is maintained by the defenders that there is no proof or presumption that Gordon Drummond predeceased his father; and even if he did, that according to the true construction of the settlement John, having predeceased certain liferenters, took no vested fee.

The question therefore turns on the consideration of (1) whether Gordon Drummond must be presumed to have predeceased his father, and if there is no such presumption, then at what period he must be presumed to have died—for that he is dead now is admitted; and (2) whether on construction of the settlement John Drummond ever took a vested right of fee.

The Lord Ordinary has found, "1st, That the testator's son, Gordon Drummond, predeceased his father, the testator, without issue, and that on this footing the property in the record referred to was possessed under the liferent

* "NOTE.— . . . The record takes no notice of Alexander Drummond and his heirs, and I am without information respecting them. If Alexander was legitimate, of which no doubt the Crown has information, the Crown advisers are probably right in concluding that the parties to the case, or some of them, would take preferably to the Crown as his heirs; and the Crown officers are certainly not bound to lend their aid to ascertain the state of the right under a conveyance, which—although, in my opinion, the governing conveyance—both parties in this case ignore. If the Court shall think that my view of the law is erroneous, the case may be decided on the record as it stands; but if it is the right view, it will be necessary to ascertain in some way whether Alexander Drummond is in life, and if not, who is now in his right as heir-at-law or otherwise. The conveyance to him and his heirs constitutes a fee-simple, and if it came into operation, as I think it did, it must govern the right to the property."

destination of the testator's settlement from the testator's death in 1823 till the death of Mrs Ralston, the last survivor of the liferentrices, in 1872; 2d, That John Drummond, the testator's grandson, being an illegitimate son of the testator's daughter, Mrs Margaret Drummond or Halley, died in January 1858 without lawful issue, and that having thus predeceased without lawful issue the last survivor of the liferentrices the conveyance of the fee to him and the heirs of his body did not take effect, and that his disposition of April 1833 in favour of his mother and her heirs is inoperative; 3d, That on the death of Mrs Ralston (the last liferentrix) in 1872, the conveyance of the fee to Alexander Drummond, the testator's nephew (son of his brother, Robert Drummond), and his heirs, took effect, and that the said fee can now be claimed only under or through the medium of that conveyance," with what purpose I do not understand, because it appears to me that his findings lead to the legitimate and logical conclusion that the pursuers have failed, and so the defenders are entitled to judgment of absolvitor.

According to the view I take of the settlement of Alexander Drummond in 1816 I am not very much concerned to fix the date of Gordon Drummond's dying, as seeing the time which has elapsed no one disputes his being dead now.

I therefore pass that by in the meantime to call attention to the terms of Alexander Drummond's settlement. At that time his son was abroad, and had been so for some time, and that accounts for the way in which the first member of the destination is expressed—"To and in favour of my son, Gordon Drummond, presently abroad, if in life, and the lawful heirs of his body, heritably and irredeemably; whom failing, to Margaret Drummond, Janet Drummond, and Agnes Drummond, my daughters, in liferent, for their joint and *pro indiviso* liferent right and use, and to the survivor of them in liferent."

Failing Gordon Drummond and heirs of his body there is no doubt, so far, that these three ladies take in liferent. It is not contended that they took a fee. If that were so the difficulty would be solved, but I am of opinion that, looking to the other clauses of the deed, it is not possible to consider them as more than liferenters allenarly. If, then, Gordon Drummond failed, the liferent went to these ladies; but where was the fee? The words following are these—"And after the decease of the survivor of them, to John Drummond, my grandson, son of my daughter, Margaret Drummond, and the heirs of his body."

These words, if taken alone, would give a fee to John Drummond, for it might very reasonably be contended that the right of John Drummond so postponed to the right of the liferenters was not the right of fee, but only the right of beneficial enjoyment, he being still fiar; but then other words follow—"Whom failing by predecease without lawful issue, to Alexander Drummond, my nephew, son of my brother, Robert Drummond, and his heirs in fee."

"Whom failing" applies to John Drummond, and his failure, which opens the succession, is failure by predecease, and the question is, what is meant by predecease within the meaning of this settlement. It is contended for the pursuers that predecease here means predecease of the testator. I think that is not admissible, because John Drummond's failure is a condition on the purification of which only the estates go to Alexander Drummond, the nephew. Now, surely Alexander Drummond is not a mere conditional institute, and in no circumstances a substitute, and yet that would be the consequence if predecease here meant predecease of the testator. If that interpretation be excluded as unreasonable the only alternative left is that predecease means predecease of the

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liferenters; and taking it with the words preceding, which introduce John Drummond for the first time, I confess that the only reading that seems at all reasonable to me is that John Drummond was not to take the fee unless he survived the liferenters or left issue to do so.

If that be so then John Drummond's deed made during the lifetime of the liferenters was of no effect. He predeceased them without issue, and accordingly the estate went to Alexander, the nephew, and his heirs.

As far as intention goes this is a fair and legitimate construction of the testator's deed. But we must now attend to the legal difficulty, which seems to be to satisfy the maxim that a fee cannot be *in pendente*. If Gordon Drummond died without heirs, and the liferenters took up the estate, where was the fee? One view is that it was in John Drummond. That is maintained by the pursuers, but, for the reasons I have given, I do not think that admissible. I confess I have had no satisfactory solution of this difficulty from the defenders, but I think it can be got over in this way. Gordon Drummond and John Drummond were both conditional fiars on the face of the deed. Gordon Drummond was to take if in life—a matter of doubt—and, accordingly, if he be not alive another destination is provided. But if the fact of Gordon Drummond being alive never appears, then the condition is purified. I do not think, however, that till that be made certain the fee should remain in suspense, and so putting Gordon Drummond out of the question I find the necessity of vesting the fee in some one. If John Drummond holds it he will only hold it conditionally, subject to defeasance. Now, if this is necessarily a fee held under a resolutive condition, is it not possible that it should be held under two resolutive conditions? I think it vested in Alexander Drummond, the nephew, under two resolutive conditions, one depending on the life of Gordon Drummond, the other depending on John Drummond or his issue surviving the liferenters. The condition under which John Drummond takes is a suspensive condition, but Alexander Drummond's right is under resolutive conditions only, and so they do not prevent him from holding it in the meantime. As in the case of the emergence of a nearer heir, so Alexander Drummond takes under the condition that he gives up the estate if Gordon Drummond appears, and, further, if John Drummond survives the liferenters; but neither of these events having occurred, Alexander is absolute fiar, and the pursuers fail in their contention.

It will now be apparent why I attach so little consequence to when Gordon Drummond died.

I am therefore for adhering to the judgment of the Lord Ordinary, but on different grounds.

Lord Deas.—I agree with your Lordship in the chair in thinking that we must hold that Gordon Drummond died before any of the events which could affect this case.

When the last account was heard of him he was in friendly and affectionate correspondence with his father. That correspondence suddenly ceased on his part, and no reason has been suggested why it should have done so except the accuracy of the news which ultimately reached his father that he had been drowned. The cessation of the friendly and constant correspondence between the father and son is very important in considering the question how long a period requires to have elapsed before the absentee is to be presumed to be dead. That is a question of circumstances in each case,—for the law is really now reduced to that. I

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believe that Gordon Drummond was drowned very soon after his correspondence with his father ceased—certainly long before any date which affects the result of this case.

The deed of John Drummond is dated in 1833, and Gordon Drummond was no doubt dead before that date. John Drummond himself did not die till 1858, and it is, if possible, still clearer that Gordon Drummond was dead before that date.

This being so, I now come to the construction of this deed. With deference to your Lordship in the chair I have no doubt that the granter's intention was that, failing Gordon Drummond, the property should be liferented by the three ladies; that they had no more than a liferent is very clear, and consequently some one else must have been all along the fiar. The Lord Ordinary's observations appear to me to lead necessarily to there having been a period when the fee was *in pendente*, which cannot be listened to. There must always have been a fiar. The question then is, failing Gordon Drummond, who was that fiar? I think the fiar in the lifetime of the liferenters was John Drummond, the grandson. The property is disponed to him, whom failing, to Alexander Drummond. That I take to be the order of fiars under this deed. The time when the beneficial enjoyment emerged has nothing to do with the feudal question of the fee. The words "after the decease of the survivor of them" (the liferenters) refer, in my opinion, only to the beneficial enjoyment and not to the feudal fee, the vesting of which could not be postponed. That view satisfies these words, and the destination of the fee is "to John Drummond, my grandson, ... whom failing, by predecease without issue, to Alexander Drummond." It would be a new use of the words "whom failing," if they were to bring in the person who is to be made way for by the failure before the person who is to fail. The only consistent way is to read the deed as giving the fee to John, whom failing, to Alexander, subject to the condition that the beneficial enjoyment is postponed till the death of the last of the liferenters. That meaning gets clearer as the deed goes on to provide "that my said grandson, John Drummond, and nephew, Alexander Drummond, if they shall succeed to the foresaid property, shall be bound and obliged" to pay £80 to the children of Agnes—that is, on the failure of Gordon Drummond. If Gordon fails then John comes in as fiar, and Alexander after him. The words of the obligation to infeft point distinctly to the same conclusion,—"to infeft and seize the said Gordon Drummond, my son, and his heirs, whom failing, my said daughters in liferent, and the other persons before mentioned in fee." These other persons are—1st, John, and then Alexander and his heirs. I have no doubt that that was the intention—the grandson being nearer than the nephew.

The Lord Ordinary suggests nothing to get over the fee being (according to his view) *in pendente*. Your Lordship in the chair finds it necessary to get over that difficulty by a suggestion which I think contrary to the plain meaning of the granter. That suggestion I understand to be that the fee was all along in Alexander, who is named last and conditionally. But why reverse the plain order? The view I take is, I think, in accordance both with the law and the intention.

LORD MURE.—The construction of this deed is not free from difficulty. But I concur with your Lordship in the chair, and with the Lord Ordinary, in thinking that the intention of the clause in question, having regard to the words

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"whom failing by predecease without lawful issue," was that John Drummond should get the fee in the event of his surviving the longest liver of the liferenters.

As to the question with whom the fee was during their life, I am satisfied with the explanation given by your Lordship that the fee was in Alexander, but defeasible in the event of Gordon Drummond appearing, or of John surviving the liferenters.

LORD ARDMILLAN was absent.

THIS interlocutor was pronounced:—"Recall the said interlocutor: Find that Gordon Drummond, the testator's son, is now dead, and has left no issue: Find that on the death of the testator, Alexander Drummond, in 1823, the fee of the estate vested in Alexander Drummond, the testator's nephew, subject to defeasance in the event of it appearing that Gordon Drummond survived the testator or left lawful issue, and also subject to defeasance in the event of John Drummond surviving the last survivor of the liferenters: Find that John Drummond having predeceased the last survivor of the liferenters, the fee of the estate never vested in him, and he had no power to make the deed conveying the estate in 1833, in virtue of which the pursuers claim the estate; sustain the defenders' fourth plea in law; assoilzie the defenders, and decern: Find the said defenders entitled to expenses, subject to deduction of one-third of the taxed amount," &c.

MACRAE & FLETT, W.S.—W. S. STUART, S.S.C.—Agents.

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Walton Brothers v. Magistrates of Glasgow.

WALTON BROTHERS, Pursuers.—*Fraser—Kinnear.*
THE LORD PROVOST, MAGISTRATES, AND TOWN-COUNCIL OF GLASGOW, Defenders.—*D.-F. Watson—M'Laren—Balfour.*
Et è contra.

Servitude—Implied Grant—Ish and Entry.—The proprietor of a piece of urban ground sold a portion of it, the occupants of which had always enjoyed an access through the remaining portion, which the proprietor retained. In a question with the purchaser, *held* that there was an implied grant of the right of access.

Servitude—Confusio.—Opinion (*per* Lord President) that when two properties, standing on separate titles, and one having a servitude of passage over the other, are united in the person of one proprietor, the servitude is not in all circumstances extinguished *confusione* to the effect of making it necessary to constitute the servitude *de novo* when the proprietor alienates the original dominant tenement.

1ST DIVISION. Ld. Curriehill. M.

WALTON BROTHERS, woollen waste manufacturers, Glasgow, were proprietors of 2130 yards of ground adjoining Charlotte Street and West Charlotte Lane in Glasgow. The magistrates of Glasgow were proprietors of a plot of 636 yards adjacent, and claimed to have a right of access over Walton Brothers' property, by means of a lane 20 feet wide, from Greendyke Street to West Charlotte Lane. Walton Brothers raised an action against the magistrates and other adjoining proprietors for declarator that they held their property free of any servitude of using the same, as a means of access from Lanark Street or Greendyke Street to West Charlotte Lane, or otherwise, in favour of the defenders, or any of them, and that the pursuers were entitled to erect houses and buildings on the whole

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of the said subjects above described, or on any part thereof, and to close up the said road or passage, &c.

The action was defended by the magistrates. They set forth the titles, and pleaded;—(1) By the deeds and clauses referred to in the defenders' statement as explained by the possession and use following thereon, a servitude is constituted in favour of the defenders' tenement of a road or passage 20 feet wide through the pursuers' tenement, and leading from the defenders' property to West Charlotte Lane. (2) The defenders being vested and seized in the said servitude, are entitled to be assoilzied from the conclusions of the action, with expenses.

The history of the titles was as follows:—The subjects belonging to the pursuers and defenders formed in 1838 one plot of 2766 yards belonging to the Royal Infirmary of Glasgow. The infirmary conveyed the whole subjects to William Brown. In 1851 Brown conveyed to John Stewart 454 yards about the centre of the plot. Stewart did not take infeftment, and his trustee conveyed to Henry Walton, who was infeft in 1853. The disposition by Brown contained a declaration, also inserted in Walton's sasine, that the said John Stewart should have a right to a cart entrance of 20 feet wide by the lane or street leading from Greendyke Street through the portion retained by Brown. In 1857 Walton acquired the remainder of the subject, and was infeft. In 1870 his trustees conveyed 636 yards to Charles Craig, author of the magistrates. This plot did not include any part of the 454 yards first acquired by Walton, and was not contiguous. No grant of access was expressed in the conveyance. The remainder was acquired by Walton Brothers in 1874.

The Lord Ordinary pronounced this interlocutor:—"Finds, decerns, and declares against the defenders, the Lord Provost and Magistrates and Town-Council of Glasgow, in terms of the conclusions of the summons: Finds said defenders liable in expenses." *

The magistrates reclaimed, and also raised an action of declarator against Walton Brothers, concluding that, as proprietors of the plot of 636 yards, they were entitled to a right of access to and from their property above described by means of a lane or street of 20 feet wide, now known as Lanark Street, which leads from Greendyke Street on the south through the property above described and thence to West Charlotte Lane on the north through the property belonging to the defenders lying immediately to the north of the pursuers' said property.

There was an alternative conclusion that if the magistrates were not entitled to an access through the Waltons' ground, the latter were not entitled to access through the magistrates' ground. In other respects the averments and pleas of parties were substantially the same as in the previous action.

The Lord Ordinary, after a proof, assoilzied the defenders.

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* "NOTE.—. . . . All possible questions as to the mutual rights and obligations of the proprietors of the 454 yards, and the remainder of the 2766 yards respectively, were excluded as soon as Henry Walton was infeft on the last-mentioned conveyance of 1857, because he then became absolute proprietor of both subjects, and the whole 2766 square yards were reunited in his person just as they had been held by Brown, so that any servitude of access which might have been created by the titles of the various parts in favour of one part over another, or any obligation on the proprietor of one or more of the parts, to perform or suffer anything in favour of the proprietor or proprietors of the other part or parts, must be held to have been then extinguished *confusione*, and to be now no longer in force, unless and in so far as afterwards expressly revived."

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The magistrates in the second action reclaimed. Both actions were heard together.

The magistrates were allowed to add two additional pleas in defence to the first action as follows:—(3) "The conveyance by Walton's trustees to Craig of the area of 636 square yards, now vested in the defenders, carried with it by implied grant a right to and access from Charlotte Lane as then existing." (4) "In respect that at the date of the conveyance by Walton's trustees to Craig there was an access by a passage of at least 9 feet wide between the defenders' property and Charlotte Lane, the defenders are entitled to have that access reserved in the decree to be pronounced in the action."

The parties agreed by minute that the proof in the second action should be held to have been led in the first action also.

The magistrates argued;—On an examination of the titles the servitude appears never to have been extinguished *confusione*, and even if it were, the proof shewed that the occupiers of the magistrates' ground had always enjoyed the access claimed through the Waltons' ground, so that a purchaser was entitled to rely upon getting that access.[1]

Walton Brothers argued;—A servitude is always extinguished *confusione* when the dominant and servient tenements come into the hands of the same proprietor, unless the titles are of different descriptions, such as an entail and a fee-simple title, and the servitude is not revived by the subsequent separation of the subjects.[2]

At advising,—

Lord President.—The object of the later of these two actions is a declarator of servitude by the magistrates of Glasgow over the property of Walton Brothers. The action by Walton Brothers is a declarator of immunity. The servitude claimed is thus described in the summons at the instance of the magistrates—"A right of access to and from the pursuers' property by means of a lane or street of 20 feet wide now known as Lanark Street, which leads from Greendyke Street on the south through the property above described, and thence to West Charlotte Lane on the north through the property belonging to the defenders lying immediately to the north of the pursuers' said property."

The entire ground was originally the property of the Glasgow Infirmary. The infirmary had under their titles a right of access from Greendyke Street of 20 feet wide. After possessing for some time they conveyed the ground to one Brown, who granted a disposition of a portion of it to Henry Walton in 1853. That portion consisted of 454 yards about the middle of the subject, not the same as the plot of 636 yards now belonging to the magistrates, and not adjacent to it. The disposition granted a right of access 20 feet wide from Greendyke Street. Subsequently to acquiring this small bit, Henry Walton acquired the whole subject—2766 yards—in 1857.

The Lord Ordinary says that the effect of this was that the servitude was extinguished *confusione*. I am not quite prepared to affirm that conclusion. The servitude can hardly be said to have been absolutely extinguished. If Walton had afterwards disponed the 454 yards to somebody else, I am not prepared to

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[1] Ewart v. Cochrane, March 25, 1861, 4 M'Q. p. 117, 33 Scot. Jur. p. 293; Ersk. Inst. 2, 6, 9; Gow's Trustees v. Mealls, May 20, 1875, *ante*, vol. ii. p. 729.

[2] Donaldson's Trustees v. Forbes, Feb. 1, 1839, 1 D. p. 449, 11 Scot. Jur. p. 284.

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say that it would have been necessary for him to create the servitude *de novo*, in order that the purchaser should have the benefit of it. The true view appears to me to be that, while the whole subject remained in the possession of Walton, there could be no existing or enforceable servitude; *res sua nemini servit.* But though two pieces of ground belong to one proprietor, there may be a right of access through one to the other *de facto*, and if it is sold it will be held to be sold with the existing access, and the disponee will be entitled to that access. The servitude, I apprehend, will revive without constitution *de novo*. Therefore, I do not think this case can be solved by holding that the servitude was extinguished *confusione*.

But, then, what followed? The ground remained with the Waltons till 1870. They then sold off a portion to Craig, who is the author of the magistrates. This piece consisted of 636 yards, not the 454 yards first acquired by Henry Walton, or including them, or contiguous to them, but disjoined. The conveyances make no mention of the access from Greendyke Street. On the titles, therefore, I come without hesitation to the same conclusion as the Lord Ordinary. It might have been an easy matter to revive the servitude. But it would have been a different and much more difficult thing to transfer it from the plot of 454 yards to an entirely different subject. And yet that is what is said to have been done.

So far, the case is very clear. But now, two additional pleas have been stated by the magistrates in defence to the action at the instance of Walton Brothers, the first of which is—"The conveyance by Walton's trustees to Craig of the area of 636 square yards, now vested in the defenders, carried with it by implied grant a right to an access from Charlotte Lane as then existing." In order to give effect to these pleas it was agreed that the proof led in the other case should be held to be led in this case.

Now, on the evidence, it seems to me plain that when this portion was conveyed by Walton's trustees to Craig there was an existing access, a moderate access not less than 9 feet wide at any part. That access had been in existence for some time prior to the conveyance to Craig, who was one of several tenants of Walton, occupying a part of the subjects which he afterwards bought. As tenant he had used the access from Charlotte Lane, and, in short, it appears quite clearly that whatever rights Walton's tenants had they all indiscriminately used the access to the south and to the north, no doubt to the north not as a carriage or cart road, but on foot, and the magistrates contend that when this portion was sold to a stranger purchaser he was entitled to rely on getting with the ground the existing access. I think that is a sound proposition. When a man sells a portion of his ground which has an access through the other portion which he reserves there is an implied grant of that access. That is the principle of the case of Cochrane v. Ewart, and a number of other decisions, and it is consistent with equity and legal principle. Nothing is better settled than that the conveyance of a piece of property implies a right of access to it. No one can possess a piece of ground without having a right of ish and entry, and the way that is to be obtained if the conveyance is silent is just the existing way. I am, therefore, for affirming the first of these additional pleas. In my view the magistrates are entitled to the access from the north which existed at the time when they purchased, as well as to an access from the south.

LORD DEAS and LORD MURE concurred.

No. 170. LORD ARDMILLAN was absent.

July 20, 1876. Walton Brothers v. Magistrates of Glasgow.

THESE interlocutors were pronounced:—

In the action at the instance of Walton Brothers against the Magistrates—"Having advised the reclaiming note for the defenders against Lord Curriehill's interlocutor, dated 13th January 1876, and heard counsel thereon, with the two additional pleas in law for the defenders, and the joint minute for the parties, No. 39 of process, and the proof therein referred to, recall the said interlocutor, sustain the third plea in law for the defenders, assoilzie the defenders from the conclusions of the summons, and decern."

In the action at the instance of the Magistrates against Walton Brothers the Court adhered to the Lord Ordinary's judgment, assoilzieing the defenders.

J. A. CAMPBELL & LAMOND—CAMPBELL & SMITH—Agents.

No. 171. ROBINOWS AND MARJORIBANKS, Pursuers.—*D.-F. Watson—Balfour—Johnstone.*
SMITH AND OTHERS (Ewing's Trustees), Defenders.—*Trayner—Hunter.*

July 20, 1876. Robinows and Marjoribanks v. Ewing's Trustees.

Marine Insurance—Foreign Average Statement—Contributory Value.—A policy of insurance effected on cargo, consisting of two lots of iron, valued therein respectively at £610 and £215, and on £25 cash advanced to account of freight, contained the following clause:—"General average payable according to foreign statement, if so made up." On the voyage the ship was damaged, and the master granted a bond of bottomry and *respondentia* over ship and cargo for repairs and other expenses. At the port of destination a general average statement was made up, in which £1293 was fixed as the contributory value of the cargo. The ship and freight being unable to pay their share of the bond, the balance fell to be paid, under German law, by the owners of cargo "on the principles of general average," and a second statement was made up embodying the first. *Held* that the policy-holders were entitled to recover the whole amount paid by them (being under £850) from the underwriters, and not only the amount effeiring to £850 out of £1293, in respect that the liability of the cargo, as shewn in the final statement, was for the general balance due under the bond after applying the proceeds of the sale of the ship and the freight.

1ST DIVISION. Lord Shand. B.

MESSRS ROBINOWS and MARJORIBANKS, merchants, Glasgow, shipped at Grangemouth in the ship "Warrior" two lots of pig-iron, of 100 and 35 tons, for delivery at Königsberg. This iron they insured with William Ewing and others, underwriters, the lots being valued in the policy at £610 and £215 respectively, which, added to £25 insured on cash advanced to account of freight, made the total value recoverable under the policy £850.

The policy contained the following clause:—"General average payable according to foreign statement, if so made up."

In the voyage the ship sustained injuries, and was obliged to put into Gottenburg to repair, where the master, having no other funds, granted a bond of bottomry and *respondentia*, hypothecating the ship and cargo. On arrival at Königsberg a general average statement was made up, according to which £629, 8s. was allocated on the ship, and £238, 19s. on the iron shipped by the pursuers. This average statement was made much in accordance with the English method, and the contributory value of the cargo was set down in it at £1293.

The master and owner being unable to pay their share of the contribution, the consignees of the two lots of iron which constituted the cargo,

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viz. the Königsberg Vulcan Company and Messrs Otto Petzke and Company, were obliged, in order to obtain delivery of the cargo, to pay the bottomry bond, £700.

The captain and owner being unable to reimburse the consignees in the shares of the average contribution payable by the vessel, the consignees were obliged to raise a suit in the Courts of Königsberg, under which a decree for the public sale of the vessel was made, and the vessel was sold by auction for £300. Out of that sum, however, seamen's wages and a variety of other preferable charges required to be and were paid, so that no sum nearly approaching the proper contribution of the vessel could be obtained from the sale of the vessel, or from the captain and owner, and consequently the liabilities of parties fell to be regulated by article 734 of the code of the general German commercial law, which declares that "if the master, in order to continue his voyage, for the purpose of an expenditure that does not come under general average, has hypothecated the cargo, or has disposed of the cargo by sale or by appropriation, the loss sustained by one proprietor of the cargo, by reason that his claim for indemnification cannot be at all or cannot be fully satisfied out of the ship and freight, shall be borne by all the proprietors of the cargo, according to the principles of general average."

Following on this a second general average statement was made up, incorporating the first, but in which, owing to the failure of ship and freight, the iron had to bear in all £720, 4s.*

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* The second average statement, after setting forth that the consignees of the cargo had paid the amount of the bond, £700, and £86 of expenses, and that they were only liable to pay as their contribution £238, 19s., and that their claim against the captain was for the balance of £547, and that the proceeds of the sale of the ship, after deducting expenses, was insufficient to satisfy the claim, and stating the law applicable to the case, proceeds—"The average statement has therefore been made up as follows:—

"*Part I. Distribution of Charges and Expenses.*

"1. The claim legally awarded to the parties interested in the cargo amounts to	£547	0	0
"Less proceeds of sale of ship, after deducting expenses,	167	0	0
	£380	0	0
"To which were added for expenses . . .	101	5	1·1
"Bringing out a total claim against the ship of .	£481	5	1·1

"*Part II. Contribution.*

"In the above case the value of the cargo alone can be considered as liable to the contribution, as such has been calculated in the first average statement, viz.:—

"1. Iron consigned to the Königsberg Vulcan Company,	£336	0	0
"2. Iron consigned to Petzke and Company, . .	957	0	0
"Amount of the value that has to contribute, . .	£1293	0	0

"*Part III. Distribution.*

"The sum to be distributed in general average amounts, according to chapter I., to £481, 5s. 1·1d., and the value laid under contribution, according to chapter II., amounts to £1293, from which an average contribution of 37·22 % results. Consequently there have to pay the underwriters of the cargo respectively.

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Messrs Robinows and Marjoribanks, with concurrence of the consignees, raised the present action upon the policy against the underwriters, pleading;—The pursuers having been obliged to pay the said sums of £533, 1s. and £187, 3s. of general average, conform to the statements made up and confirmed, according to the laws and practice in force at Königsberg, in respect of the said 100 tons and 35 tons of iron respectively, the defenders are, in virtue of the policy of insurance libelled, bound to reimburse the pursuers therein, according to the defenders' respective shares of the said sums, with interest, as concluded for.

The underwriters maintained that they were only liable for the proportion effeiring to £850 out of the real value of the cargo of £1293, £850 being the value in the policy.

The Lord Ordinary pronounced the following interlocutor:—"Having considered the cause, repels the defences, and decerns against the defenders in terms of the conclusions of the summons."*

"1. The Königsberg Vulcan Company, per average statement, confirmed by decree of 31st October 1872, .	£62	1	10·3		
"According to the present average statement, ...	125	1	2·2		
"Together, ...				£187	3 0·5
"2. The firm Otto Petzke and Company, according to the first average statement, ...	£176	17	0·9		
"According to second do. . .	356	3	10·9		
"Together, ...				533	0 11·8
"Total, . . .				£720	4 0·3"

* "This case raises a question of considerable importance in the law of marine insurance, the question, viz. what effect is to be given between the insurers and underwriters to the clause now usual in marine policies—'General average payable according to foreign statement, if so made up.'

"The pursuers insured a quantity of iron for the voyage from Grangemouth to Königsberg by a policy in which the iron was valued at £850. The vessel 'Warrior' sustained such injuries on the voyage as made it necessary, for the sake of ship and cargo, that she should run to Gottenburg in Sweden for repairs; and the captain, having no other means of payment, executed a bond of bottomry over ship and cargo at Königsberg. A general average statement was made up and confirmed by the proper authority, by which £629, 8s. was allocated on the ship, and £238, 19s. on the iron shipped by the pursuers. The captain and owner of the vessel having been unable to pay the amount of the contribution for the ship, the vessel was sold by order of the Court, and the price realised fell considerably short of the sum the ship ought to have contributed. In accordance with German commercial law this deficiency fell 'to be paid by all the parties interested in the cargo on the basis of the general average.' Accordingly a second general average statement was prepared and confirmed by the proper authority; and by this statement, which embraced or adopted the first, there was allocated on the pursuers' iron a sum in all of £720, 4s. This sum the pursuers were obliged to pay as general average, and they now sue the defenders, the underwriters, for indemnity. The iron, which was valued in the policy at £850, was valued for the purposes of the average statement at the higher sum of £1293, and this contributory valuation was the basis on which the pursuers' gross contribution of £720 was fixed. The defence is that the underwriters are liable only on a contributory value of £850, being the value fixed in the policy, and on which they are willing to pay; and that the pursuers must themselves bear so much of the average loss as effeirs to the difference be-

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The defenders reclaimed. An additional amended statement and plea were lodged for the pursuers as follows:—"The freight of the two parcels tween the policy value of £850 and the contributory value of £1293 of the iron as estimated by the average states.

"I think it may be assumed that in the absence of the special clause on the margin of the policy, providing that general average should be payable 'according to foreign statement, if so made up,' the defenders' contention must have received effect. The point does not appear to have been the subject of judicial decision in this country, or in England. In Arnould on Insurance (4th edition, by Mr M'Lachlan, p. 816), after referring to the rule that the value of the subject insured, as between the assured and the underwriter, is the value at the time and place of sailing in an open policy, and the fixed value in a valued policy, while the contributory value for general average is the net value as the subject reaches the port of destination or adjustment, the author adds,—'Whatever is paid in contribution in respect of the excess of the contributory value over the value in the policy is paid by the assured, but for whatever is paid on a contributory value not exceeding the value in the policy the insured is indemnified in the proportion insured.' Mr M'Lachlan explains that the chapter on general average from which this quotation is made has been re-written to a great extent by himself; but on referring to the second edition of 1857, edited by Mr Arnould himself, I find that the rule as between the underwriter and the assured is stated substantially to the same effect. The authorities referred to are in Magens on Insurance, page 245, case 19. The average statement there given had reference to a loss which occurred in 1744, and in reference to which the assured and the underwriters settled on the principle stated by Mr Arnould, not because of any decision on the question, but because the principle was admitted by the assured to be sound. In Benecke on Insurance (London, 1824), pp. 328, 329, the rule for settlement in the case of an average loss made up by contribution is stated in the same way. In Phillips on Insurance, sec. 1410, it is stated that the practice in Boston, and apparently generally throughout America, is in accordance with the rule as stated by Mr Arnould, who indeed refers to Mr Phillip's work as an authority on the point. Mr Phillips, however, states that the practice is different in New York, where under a valued policy 'the underwriters contribute the whole amount assessed upon the subject in general average, whether it contributes in a value greater or less than that at which it is fixed in the policy.' He adds,—'This is a very material difference in the practice of the two places as to the mode of adjustment. There is nothing in the policy that favours one of these modes of construction in preference to the other, each being equally consistent with the language of the instrument, and the preference of the one or the other being merely a matter of construction, and the application of the general principles of insurance.' The point does not appear to be referred to in the works either of Parsons or Marshall on Insurance. The result of the authorities, however, seems to be that, in the absence of a special clause, according to the usage between merchants and underwriters, where the contributory value in the case of an average loss is greater than the value at the time and place of shipment, the underwriter pays the proportion applicable to the latter value, and the merchant pays the surplus.

"The pursuers maintain that it was a leading object of the special clause now usual in policies, not only to avoid a class of questions which had frequently occurred and caused dispute, as to whether particular cases fell under the head of general average at all, by providing that the foreign statement should be conclusive, but also to avoid all questions of revaluation of the subject insured, and new calculations, in order to allocate the average loss partly on the underwriter and partly on the assured, where the contributory value should happen to exceed the shipping value. I am of opinion that the pursuers' view is well-founded, and that, according to a sound construction of the special clause, the underwriter, to the extent of his subscription, undertakes to pay the proportion of the amount imposed on the insured as the average loss payable for the subject of insurance, as that amount is ascertained and fixed by the foreign statement,

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of iron (which constituted the whole cargo) amounted to £80, 5s. 5d., two-thirds of which, according to German law, was liable to contribute to and not merely the proportion of that amount which by calculation may be found to effeir to the shipping value as distinguished from the contributory value of the subject.

"The question now raised as to the effect of the special clause does not appear to have been the subject of discussion in any previous case. The only writer by whom it has been noticed is Mr M'Lachlan, whose views on insurance and merchant shipping law I have always found worthy of consideration, and who, at p. 818 of his edition of Arnould, states an opinion favourable to the pursuers' contention thus,—'This rule' (that is, the ordinary rule above stated) 'may in effect be set aside in virtue of a stipulation in the policy to pay general average according to foreign adjustment, and by the assumption at the port of adjustment, in accordance with the law there prevailing of higher values than those in the policy.' The parties in the course of the discussion referred to the case of Harris v. Scaramanga, June 3d, 1872, Law Reports, 7 Common Pleas, 481, in which the effect of the special clause was considered with reference to the question whether, seeing the loss sustained would not have been held to fall within general average in England, the underwriter was nevertheless liable, because the loss had been treated as general average, in accordance with the foreign law, in the foreign statement. I find that the effect of the clause has been the subject of decision in two cases since that of Harris, viz., Hendrick v. The Australasian Insurance Company, 27th April 1874, Law Reports, 9 Common Pleas, p. 460, and Marro v. The Ocean Marine Insurance Company, 8th July 1874, Law Reports, 9 Common Pleas, p. 595, affirmed in the Exchequer Chamber 11th May 1875, Law Reports, 10 Common Pleas, p. 414. In each of these three cases the underwriters sought to give to the special clause, which is the subject of the present question, a more restricted meaning than the Court held that on a sound construction it ought to receive. The contention was substantially similar in all of them, although the circumstances were materially different, viz., that the foreign statement should be held conclusive merely as to the valuations and results brought out, subject, however, to the right of the underwriters to resist liability where the loss sustained would not have been a general average loss according to the law of England. But the Court held that the underwriters were bound by the foreign statement, and that, even assuming the circumstances would not have raised a case of general average according to the law of England, the underwriters were nevertheless liable, because they had undertaken to pay general average 'according to foreign statement, if so made up.' The defenders in the present case are in the same position as the underwriters in the case of Harris as regards the question raised in that case; for the defence there stated arose in precisely the same state of circumstances as in the present case so far as regards the second average statement here founded on. It was maintained in the case of Harris that the contribution levied on the cargo in consequence of the owner's inability to pay the proportion applicable to the ship was not a loss within the perils insured against, and therefore that the average statement, though accepted as correct as regards the valuations and the results which these brought out, could not affect the underwriters so as to render them liable for what was really not an average loss. The Court were of opinion that the loss was not one which, according to the English law, could be treated as falling under general average for the purpose of contribution, so as to affect the underwriters, but because it had been so treated in the foreign statement, and in accordance with the law of the country where the statement had been prepared the underwriters were liable under the special clause in the policy.

"The result of the three cases referred to, as stated in the opinions of the learned Judges in the Exchequer Chamber, appears to be that the effect of the special clause is that general average in the cases for which it provides means average 'according to foreign, not English, rules' (p. B. Pollock). These cases do not decide the present question; but the whole scope of the opinions there de-

general average; and this contribution was made accordingly. Of this sum of £80, 5s. 5d., £25 was paid to the owner of the ship before she left

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livered supports the general view that the intention of the special clause, to be gathered from the general terms in which it is expressed, is to make the foreign statement of general average conclusive (assuming, of course, that it had been made up with regularity, and in accordance with the law of the foreign country), as defining and specifying the sum which the underwriters have to pay, in proportion to the amounts subscribed by them, viz., the sum which the assured has himself lost. It is obvious that this result is desirable in the interests of commerce, for it avoids opening up the foreign average statement—(1) by inquiries as to shipping value; and (2) by calculations in the preparation of a new statement for an adjustment of the loss between the owner and the assured where the contributory value has exceeded the shipping value. The insurer will naturally and reasonably desire that the average statement which fixes his liability should at the same time thereby fix the measure of liability of the underwriter, and if in practice somewhat larger payments for average loss should thus occur at times where foreign average statements are made up this must be kept in view as an element in fixing the premium, just as the circumstance that under such statements cases of liability for general average which would not come under that head by the law of this country will arise, and must be kept in view in fixing the premium. And it is not to be thrown out of view that the contributory value may often be less than the shipping value, in which case the underwriter gets the benefit. The scope of the whole opinions in the English cases is in favour of the construction of the clause which gives effect to the view now expressed; and the opinion of Chief-Justice Bovill, concurred in by Justice Keating, expressly states the view of these learned Judges to that effect. They say (L. R. 7 C. P. 489),—'Under the terms of this policy the underwriters and the assured have both agreed to accept the adjustment and statement of the average stater in the foreign port, if and when made, as conclusive as between them both in the principle and in details as to the loss which the underwriters are to undertake in respect of general average.'

"The special clause is framed in most general terms, 'general average payable according to foreign statement.' It may be possible to read it in accordance with the view maintained by the underwriters, viz., that the foreign statement (regularly made up) is to be accepted without question as the basis only for a settlement in the same way as an English average statement would be accepted, leaving open for adjustment the amount for which the underwriters shall be liable should the contributory value exceed the shipping value of the subject assured. But it appears to me to be the more natural interpretation of the general terms used, and to be more in accordance with the presumed intention of the parties, that the foreign statement should be conclusive between the parties, as furnishing the precise sum for which the underwriters, according to their several subscriptions, are liable. The question, which is the best arrangement, viz., whether the average statement should be conclusive in the sense now stated, or should, in the particular case in which the contributory values exceed the shipping values, merely form the basis for the preparation of another statement, is one on which mercantile opinion and usage are divided, as appears from the conflicting practice in Boston and New York. In the present case the parties, by the policy, have fixed the shipping value of the goods, but the question would be the same in the frequent case of open policies, and the contention of the defenders involves in that case the obtaining of a valuation of the ship or cargo as at the port of shipment after the loss occurs, not for the purpose of the average statement, but for the settlement with the underwriter. It appears to me that according to the fair reading of the clause it was not contemplated or intended that such revaluations and new adjustments should take place. 'General average' is to be 'payable according to foreign statement, if so made up,' that is, I think, the general average paid by the assured, according to the foreign statement, is to be payable to him by the underwriter. The term 'general average' thus directly refers to what the insured has paid as such. If the more limited

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Grangemouth, and £55, 5s. 5d. was paid to Robert Kleyenstueber and Company, the ship's brokers at Königsberg. After paying the contribution according to the first average statement, and before the date of the second average statement, the balance of the freight was exhausted in paying wages of crew, harbour dues, ship's expenses, and other charges, which, according to German law, the value of ship being exhausted, form a charge against freight preferable to general average. Both ship and freight being exhausted, and having proved insufficient to pay the loss, the same fell, according to German law, to be paid by the cargo, and the amount ultimately allocated upon and paid by the cargo was unaffected by the contributory value put upon it. The ultimate loss would have been the same, and the amount to be paid by each lot of the iron constituting cargo would have been the same, if each lot had throughout been valued, the one at £610, and the other at £215, or if the whole cargo had been valued at £850 instead of £1293."

Plea in law;—(2) "The loss sued for having been paid in respect of the iron insured as general average, according to the foreign average statements produced, and the amount of the said loss not having been affected by the value put upon the iron in the said average statements, the pursuers are entitled to decree as concluded for.

The defenders answered—"Admitted that the freight of the two parcels of iron, constituting the whole cargo, amounted to £80, 5s. 5d.; that two-thirds of the sum was liable, according to German law, to contribute to general average, and that this rule of liability was given effect to in the first average statement. Admitted that, of said sum, £25 were paid to the owners of the ship before she left Grangemouth, and £55, 5s. 5d. to Messrs Kleyenstueber, at Königsberg. Admitted that, according to German law, the wages of ship's crew, harbour dues, and various other ship's expenses, form a charge against freight, preferable to general average, after the value of the ship has been exhausted; and that the balance of the freight has been exhausted in paying the said ship's expenses. Admitted that where the value of ship and freight prove insufficient to pay the amount of a bottomry bond, in the circumstances set forth in article 734 of the German commercial code, the deficiency falls to be made up, according to German law, by contributions from all the

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meaning for which the defenders contend had been the true agreement of parties, words of limitation would, I think, have been introduced, shewing that the foreign statement was to be taken, not as the fixed general average, but as forming the basis only for preparing another statement, according to which the general average should be payable. In this view the clause would have been expressed in terms not unlimited, but such as these, viz., 'General average on a sum not exceeding the shipping value,' payable 'according to foreign statement, if so made up.' The defenders' argument substantially involves the introduction of restraining or limiting words, by implication, into the clause, with the result that the general average is not payable according to the foreign statement, as it has been actually paid by the assured, which is the natural meaning of the language, but may vary according to a separate valuation to be obtained in many cases, and to be used with the foreign statement as a basis for ascertaining the general average payable. I am of opinion that this is not the true meaning of the language used, but that, having regard to the fact that the valuations of ship and cargo in foreign ports throughout the world proceed on rules and principles extremely various, and to the extreme desirability of having a simple and ready means of fixing the precise amount of the underwriter's liability, the clause in question has in effect provided that the general average payable by the underwriter shall be the sum which the assured has paid in the foreign port, that is, shall be 'according to foreign statement, if so made up.'"

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parties interested in the cargo, on the principles of general average. Admitted that this deficiency must be so made up, whatever the amount of the contributory value of the cargo may be. *Quoad ultra* denied."

The defenders argued;—The German law provides that this second so-called average burden shall be apportioned among the proprietors of cargo according to the principles of general average. The rule of general average is that the three parties liable—ship, freight, and cargo—are liable in the proportion of their contributory values. As between the insurers and the underwriters the value in the policy is conclusive. As there was here a real contributory value of £1293, the owners of cargo were really self-insurers for the difference between that and £850. Consequently, they are now only entitled to recover the proportion effeiring to £850, as the second general average statement embodies the first, which was calculated on a contributory value for the cargo of £1293.[1]

The pursuers argued;—The contributory value of the cargo had no influence in bringing out the amount which it had ultimately to pay, as it simply had to pay the whole balance.

At advising,—

LORD PRESIDENT.—The pursuers of this action are the owners of a cargo of iron carried by the ship "Warrior" from Grangemouth to Königsberg. Unfortunately in the course of the voyage the vessel was injured, and ran to Gottenburg in Sweden for repairs; and at that port the master granted a bond of bottomry and *respondentia*, hypothecating the ship and cargo.

When the vessel arrived at Königsberg the cargo was delivered to the consignees, and the question arose how the bottomry bond was to be met. By the German law it seems to be provided that if the ship and freight are unable to meet the bond then the parties interested in the cargo are bound to provide payment, on the basis of general average, as it is called. But by "general average" is meant, as it seems to me, no more than this,—that the cargo shall pay the balance of the bond still remaining unpaid after the ship and freight have been exhausted.

The owners of the cargo had insured it by means of a policy which valued it at £850, which also had the clause "general average payable according to foreign statement, if so made up."

There was a general average statement, called here the first average statement, and as regards it there is no difficulty. It seems to be substantially the same as an average statement in this country. It begins by ascertaining the amount of loss incurred, then it calculates the contributory values of the different parties, and then it allocates the payments accordingly.

If we had been dealing with that average statement alone the question decided by the Lord Ordinary would have arisen. The question would then have been whether the underwriters were liable to pay the loss allocated on the cargo calculated as being of a contributory value of £1293, or whether they were liable for only so much of the loss as would have been allocated if the contributory value had been £850. But what happened afterwards altered the position of parties altogether, for the ship and freight became unable to meet the claims upon them—in fact they became, so to speak, bankrupt—and the freight was thus swallowed up and the ship had to be sold, and realised 2000 Prussian dollars. Now, in that

[1] Harris v. Scaramanga, June 3, 1872, Law Rep. 7 C. P. 481; North of England Insurance Association v. Armstrong, Law Rep. 5 Q. B. 244; Lowndes on Gen. Average, p. 298.

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state of matters the German law made the cargo bear the whole loss, getting, however, the value of the proceeds of the sale. That being so, the second average statement was made up.

This was not what we call general average here, but it is so dealt with by German law, and so the clause in the policy is obligatory on the underwriters to the effect of making them liable to the owners of the cargo for this loss.

Now, what is this second average statement? It is simply an account bringing out the amount of loss the cargo must meet. That is done simply by taking the amount of the bottomry bond and expenses, and setting against it the proceeds of the sale of the ship, and then the cargo pays the balance.

Now, the value of the cargo is a matter of indifference in bringing out that result. The result would have been precisely the same whatever the value of the cargo; and accordingly the sum which the pursuers claim is just the balance brought out against them after deducting the value of the ship, and which they are made to pay.

No doubt the second average statement adopts and incorporates the first average statement, but that is only to shew what had already been laid on the cargo; but still the loss they have to meet is what they would have to pay whatever the contributory value. It comes to just the same thing as if the bankruptcy of the ship and freight had happened at once, and the cargo had had to meet what still remained due.

It appears to me that the question decided by the Lord Ordinary does not occur here, and that the pursuers are bound to bear the loss according to the foreign statement of general average; and so I concur with the Lord Ordinary in his judgment although upon different grounds.

LORD DEAS and LORD MURE concurred.

LORD ARDMILLAN was absent.

THIS interlocutor was pronounced:—"Recall the said interlocutor in so far as it finds the pursuers entitled to expenses: *Quoad ultra* adhere: Find the pursuers entitled to one-half of the taxed amount of the expenses incurred by them in the Outer-House, and find them entitled to full expenses in the Inner-House," &c.

MACARA & CLARK, W.S.—DEWAR & DEAS, W.S.—Agents.

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ROBERT ALISON AND OTHERS (Renton's Trustees), Pursuers and Real Raisers.

ROBERT ALISON AND OTHERS, Claimants and Reclaimers.—*D.-F. Watson—Low.*

WILLIAM ALISON AND OTHERS, Claimants and Respondents.—*Balfour—J. A. Reid.*

Succession—Mutual Deed—Implied Revocation, terms of—Investment—Process—Parole Proof.—Two sisters executed a mutual deed and settlement, giving their whole property each to the other in liferent, and to certain beneficiaries in fee, but reserving power to each to alter during their respective lives. Thereafter their whole funds were reinvested under the superintendence of two friends, and the new investments were taken in terms such as to confer an absolute title of property on the survivor. The surviving sister having left a new settlement,

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conveying her whole means to trustees, in a competition between the beneficiaries under the mutual settlement and those under the later settlement, as to the property of the predeceasing sister, *held* (1) that it was competent to prove by parole evidence that the sisters had given no authority to change the terms of the investments; and (2) upon proof that no such authority had been given, that the predeceasing sister's property still remained under the operation of the mutual settlement.

1st Division. Lord Young. B.

On 19th May 1857 Mrs Margaret Alison or Renton and Miss Christina Alison, two sisters, residing together at Lasswade, executed a mutual disposition and settlement, whereby they disponed their whole estate, heritable and moveable, each to the other in liferent, and to Robert Alison and David Renton in fee, under burden of certain legacies. They further nominated the survivor of themselves to be sole executor of the predeceaser, and reserved to each of themselves power to alter or revoke "during their respective lives." At the date of this mutual settlement Mrs Renton was possessed of funds amounting to £1200 and the furniture of the house where they lived. Miss Alison was possessed of funds amounting to £4165. The funds were invested partly in the respective names of the sisters, and were partly in the hands of Mr George Murray, as trustee of Mr Renton, deceased, who had become embarrassed, and had executed a trust-deed for behoof of his creditors, among whom were his wife and sister-in-law, from both of whom he had borrowed money.

Subsequent to the date of the mutual settlement the whole of the investments were changed. This was managed under the direction of Mr Robert Alison and Mr George Murray, who acted as confidential advisers to the ladies, and managed their business transactions. The new investments consisted of (1) a heritable subject, the villa of Oakmount; and (2) various stocks and shares. These stocks and shares were invariably taken in the joint names of the ladies and the survivor, and the disposition of the villa was taken with a similar destination.

Thereafter, on 24th May 1862 Miss Alison died, and in September 1874 Mrs Renton died leaving a trust-disposition and settlement whereby she conveyed her whole property, heritable and moveable, to trustees, for purposes inconsistent with the terms of the mutual settlement.

In an action of multiplepoinding raised by the trustees under Mrs Renton's settlement a competition arose between Robert Alison and others, the beneficiaries under Mrs Renton and Miss Alison's mutual settlement, on the one hand, and William Alison and others, the beneficiaries under Mrs Renton's trust-settlement, on the other hand.

The beneficiaries under the mutual settlement claimed on the footing that the funds which had formed Miss Alison's separate estate at the date of the mutual settlement fell to be separated and distributed under the mutual settlement, and pleaded;—(1) The joint investment of the estates of the said Mrs Renton and Miss Alison did not operate a revocation of the said mutual disposition and settlement, which is still a valid and existing deed *quoad* the succession of Miss Alison. (2) The estate of the said Miss Alison falling to be distributed in terms of the said mutual disposition and settlement is such a portion of the fund *in medio* as may be found to correspond to the amount of the original estate conveyed by her in the said mutual disposition and settlement.

They averred, and offered to prove by the parole testimony of Messrs R. Alison and G. Murray that the new investments were taken by Messrs Alison and Murray as being in accordance, as they believed, with the terms of the mutual settlement; that the ladies gave them no authority to change the terms of the investments, but that it was the belief of both the ladies and themselves that no change had been made. They therefore

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argued that the mutual settlement was still operative as regarded Miss Alison's property.

The beneficiaries under Mrs Renton's settlement claimed the whole estate as falling to be distributed under that deed.

They pleaded;—(2) The fund *in medio* having been the sole and absolute property of the late Mrs Renton at the time of her death, the succession thereto falls to be regulated and dealt with under the deed of settlement and codicil left by her.

The Lord Ordinary pronounced the following interlocutor:—"Finds that the fund *in medio* was the sole and absolute property of the late Mrs Renton at the time of her death, and that the succession thereto falls to be regulated and dealt with in terms of the trust-disposition and settlement, and relative codicil No. 11 of process: Therefore ranks and prefers the claimants," &c.*

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* "OPINION.—The leading question in this case regards the operation and effect of the mutual settlement at the death of Miss Alison, the predeceaser of the two testators, on 24th May 1862. It was contended that the terms of the subsequent investments of her money, and of the title taken to the Villa of Oakmount, implied a revocation by her, which she had undoubted power to make. I think this an erroneous contention; for the settlement, being testamentary, must be regarded as her last will, and as speaking in the last moments of her existence. What property she left for her will to carry, or whether she left any, is another question, which the terms of the investments and the title to Oakmount may materially affect; but there is, I think, no question of revocation.

"It is alleged, and I assume truly, that the fortunes of the two sisters were unequal, and that Miss Alison was the richer of the two. I also assume that at the date of the will their fortunes, which consisted of money, were separately invested, and therefore then distinguishable. But having only £5365 between them, and resolving to live together, it is not surprising that they should have made a common purse of it, as they did, and out of it paid for the villa which they bought to live in, and the cost of their establishment. The common purse was made by investing the money which they were respectively able to contribute upon securities, taken in their joint names, with destination to the survivor. The title to the villa was taken to them in conjunct fee and liferent, and to the longest liver of them, and to the heirs and assignees of the longest liver. They lived together in this villa on the produce of the joint purse till Miss Alison died in May 1862. This was quite consistent with the mutual will, as it would have been had they spent all they had, which they were at perfect liberty to do.

"With respect to the price paid for the villa, I think it clear that it was so much money spent by the testators in the lifetime of both, and that the villa itself, in the purchase of which the money was spent, was not, at Miss Alison's death, subject to her disposition or will as expressed in the mutual settlement, but passed in absolute property to Mrs Renton, according to the destination of the title. It is, I think, plain that Miss Alison could not, by a settlement subsequent to the title, have disposed of the villa in whole or in part to her sister's prejudice, for her sister's right was absolute and irrevocable by the terms of the title if she survived, and, as I have already observed, the mutual settlement being testamentary, speaks for each testator as at the time of her death without reference to its date. I am, therefore, of opinion that the villa does not to any extent pass under the mutual settlement, but is wholly carried by that of Mrs Renton, whose exclusive property it became by her survivance, as completely as if the disposition had been to herself alone.

"With respect to the money, of which the sisters made common purse by the terms of the investments, and the manner in which they used it for five years, it is clear that, on Miss Alison's death, it belonged *prima facie* to Mrs Renton, who survived. But it is proposed to subject part of it to the operation of Miss

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The beneficiaries under the mutual settlement reclaimed, but intimated that they did not press their claim so far as the villa of Oakmount was concerned.

Alison's disposition by the mutual will, by making a separation according to the proportions in which the sisters contributed to its formation, and regarding the larger part as the estate of Miss Alison, who contributed the larger share. In aid of this view it is alleged, and offered to be proved, that Miss Alison had £4165, and Mrs Renton only £1200, and, farther, that the investments were taken in their joint names, with right of survivorship, by the claimants Alison and Murray, 'as being in conformity with the terms of the said mutual disposition and settlement, of which they had been made aware,' but without specially consulting the ladies.

"It would obviously be a difficult and uncertain process to effect a separation of money which had been so amalgamated and used by two sisters as a common fund for five years. I must assume that the sisters knew that the money had been amalgamated, and that all their joint expenditure was met out of it. There is nothing to shew that they intended an ultimate separation, and no accounts to enable the Court to make a separation. It does not appear whether their house and personal expenses were wholly paid out of income, or trenched to any extent on capital. The price of the villa must have been paid out of the capital. How is this to be apportioned? To hold either that the sisters contributed equally, or in proportion to the original fortune of each, or that either of them paid the whole of it, would be mere assumption without evidence. But a division of the remainder could not be effected without determining this question, which the sisters have left no means of determining. I assume that the fortunes of the sisters were originally unequal to the extent stated, because, though this is not admitted, the fact is alleged to be so, and proof of it offered. But, as five years before the death of the predeceaser they joined them together on securities *ex facie* of which they were their joint property, in equal shares, with benefit of survivorship, and allowed matters to stand so during the remainder of their joint lives, I think this must be taken to be according to their intention, and that the operation and effect of the mutual will must be judged of accordingly. The will did not restrain them from dealing with their money as they pleased while they both lived, and with regard to all or any of it which they so dealt with as to become their joint property while they both lived, and on the death of either the exclusive property of the survivor, I think it clear that the will of the predeceaser, as expressed in the settlement, has no operation. It is not a question of revocation, for the will at Miss Alison's death stood with respect to any money or property subject to its operation, that is, with respect to all money and property of hers which, had she died intestate, would have passed to her legal heirs. It is clear that had Miss Alison died intestate the whole invested money, as well as the villa of Oakmount, would have passed, not to her legal heirs, but to her surviving sister, and this as the necessary, and I must assume intended, consequence of her own acts. The result is that there is nothing left for her will to take effect upon; but this is an accident, for she might have left other property. It is to be observed that the settlement is not only testamentary but quite general, so that there is here no such question as might arise with respect to a particular estate or property standing on a prior special destination.

"I am therefore of opinion that, on the death of Miss Alison, Mrs Renton became proprietor of the money as well as the villa, with absolute power to dispose of both; and I arrive at this conclusion with the more satisfaction, because I think it is not only the legal result of what was done, but is in accordance with what was intended. Mrs Renton's subsequent will was her own affair, and her sister probably could not, or did not, anticipate what she might do, but I think it was intended that she might do as she pleased.

"The result is that the whole fund *in medio* being, in my opinion, the property of Mrs Renton at the time of her death, is carried by her settlement, for there is no question of her power to revoke and alter the prior mutual settlement with respect to her own property."

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They argued;—The terms of an investment could not revoke a probative deed. This had been repeatedly decided in the case of deposit-receipts, &c.[1] Taking all the money out of the operation of the settlement was practical revocation. The investments were not made with any view of change, and the claimants were entitled to prove that *prout de jure*.

The beneficiaries under Mrs Renton's will argued;—The investors were the mandataries of the ladies. The effect of the terms of the investments was not to revoke the mutual settlement, but simply to take these monies out of its operation.

The Court allowed a proof. The import of it, which was not seriously disputed, was that Messrs R. Alison and G. Murray had managed the whole affairs of the ladies, and that they had taken the new investments in the terms they did, not owing to any direction to that effect, but at their own hands, supposing that they were in accordance with the terms of the mutual settlement, which they had seen.

At advising,—

LORD PRESIDENT.—The question raised in this multiplepoinding is the effect to be given to a mutual disposition and settlement executed by two sisters, Mrs Renton and Miss Alison, on the 19th of May 1857. They were possessed of considerable means, although not equally wealthy, Miss Alison having more than Mrs Renton. They resolved to settle their estates by this deed in favour of certain parties. The deed provides first a liferent to each other, and a fee equally between Robert Alison and David Renton, and then after certain legacies, it further nominates the survivor of the two ladies to be the sole executor of the predeceaser, and it also contains a power of revocation.

Miss Alison died first, and Mrs Renton availed herself of the reserved power of revocation, and there can be no doubt that her deed is an effectual revocation so far as her estate is concerned, but the question is whether, in respect of certain changes made in investment, the great bulk of the estate is so destined as to be the property of the survivor, in which case Mrs Renton had right to dispose of it; and then there is the further question, whether she did so by her deed, which is a general one, and carries all she is entitled to dispose of.

The first alteration that occurred after the mutual settlement was the purchase of a heritable subject, and the disposition taken from the seller was granted to "Mrs Renton and Miss Alison in conjunct fee and liferent, and to the longest liver of the said Mrs Renton and Miss Alison, and to the heirs and assignees of the longest liver, heritably and irredeemably."

There can be no doubt at all that the effect of that disposition was to take the villa of Oakmount out of the mutual disposition and settlement. It was a re-settlement of that property, and destined it to the longest liver of the two. That has not been seriously disputed. But as regards the rest of the estate, the question is one of a different kind. It appears that their moveable property was invested in stocks and other property of that kind, and the two claimants, Mr George Murray and Mr Robert Alison, were the confidential friends and advisers of the ladies in making these investments. It is said that these invest-

[1] Keddie v. Christie, Nov. 24, 1848, 11 D. 145, 21 Scot. Jur. 26; Cuthill v. Burns, March 20, 1862, 24 D. 849, 34 Scot. Jur. 426; Watt's Trustees, July 1, 1869, 7 Macph. 930, 41 Scot. Jur. 626; Dingwell v. Askew, Feb. 5, 1788, 1 Cox (Equity Cases), 427; Taylor v. Taylor, Feb. 16, 1853, 10 Hare, 475; North British Railway Co. v. Tunnock, Nov. 1, 1864, 3 Macph. 1, 37 Scot. Jur. 1; M'Laren on Wills, i. 262.

ments were made not for the purpose of making a change, but for a different purpose altogether; but undoubtedly their terms, if they received effect as a destination, would have the effect of altering, or rather of taking out of the mutual settlement this property and giving it to the survivor, and the question is, is that the legitimate effect of the terms in which these investments were made? It is a question of some delicacy, and a proof has been led. At first sight there seems a little danger in admitting parole evidence, but when the point is fairly considered the difficulty, I think, disappears. It appears that the investments were taken in these terms by Mr Murray, and he is responsible for them. But it is said he did so without authority, and the ladies were not aware of any change, or, at least, of there being such a change as could affect the mutual settlement. It is a question of fact whether Mr Murray acted with or without authority. If he acted without, I cannot think that the terms of the investments can be allowed to affect the succession of these ladies; and if he acted with, then comes the question whether the terms of the investments really operated as destinations. But, in my opinion, the result of the evidence is that Mr Murray acted without authority, and that the ladies were unaware of the change. If they had been acquainted with business they might have known, but as it was, it was only to be expected that they should not. Mr Murray having done this at his own hand, it cannot affect the succession of the ladies. Indeed, if we are to believe Mr Murray, and I see no reason to suspect his entire sincerity, he was under the impression that the terms of the investments were such as to facilitate the execution of the mutual settlement. He took them in the joint names of Mrs Renton and Miss Alison, and the survivor, and he had in view that by the mutual settlement the survivor was executrix of the predeceaser, and he not unnaturally thought that the survivor would thus more easily step into possession of the property. This is a very probable explanation; but whether this was his object or not, what he did cannot affect the succession of the ladies, and so this property will still fall under the operation of the mutual settlement, and, consequently, Mrs Renton could only convey what originally belonged to herself. It may be difficult to separate the two estates after all that has happened, but that difficulty can hardly affect the rights of parties. The disturbing element is Mrs Renton's new settlement. If there had been no new settlement there would have been no difficulty. But the fact of her exercising her power of revocation cannot prejudice other parties from claiming under the original deed.

I am therefore for recalling the interlocutor of the Lord Ordinary, and remitting to his Lordship to fix the fund *in medio*, and in doing so it will be necessary to separate the two estates, however difficult a matter that may be.

LORD DEAS.—It was not contended in this case, as it has been in some cases, that the mutual settlement could not be revoked after the death of one of the makers. That might have been a difficult proposition to have maintained here, looking to the terms of the settlement as to the survivor. But as it has not been maintained, it does not fall to be considered. Laying that, therefore, aside, I am disposed to come to the same conclusion with your Lordship; but I do not rest so much as I understand your Lordship to do on the parole testimony. We have not the terms of the investments fully before us, nor the particulars connected with each of them. For example, as to the debenture bond for £3000.

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I do not see it alleged that the ladies signed any document connected with that debenture bond; but they did sign in connection with other investments. That being so, I should be chary of allowing parole testimony to contradict the inference which would otherwise be drawn from the writings. But to this extent the parole testimony is admissible,—that these two gentlemen—especially Mr Alison—had a general authority to invest in such way as they thought best to produce the annual income on which these two ladies were to live. I do not think that these writings infer any authority to make destinations. The whole object—except as regards the heritable property, as to which I agree with your Lordship—seems to have been to make temporary investments in order to augment the income. The parole testimony goes to shew that, and is so far good. But apart from the parole testimony, the circumstances are very strong in favour of the result at which your Lordship arrives. These two ladies were living together, and to the full extent of their joint income. The object of investing was to increase that joint income, and that was the object of the authority. I do not think it was intended by the ladies or any one else to change the destinations by the terms of these temporary investments, more especially as by the mutual settlement itself the survivor was to be executor of the predeceaser, and the investments were probably taken to the survivor just because she was to be executor. On the whole, I agree with your Lordship.

Lord Mure.—I concur. There is a great deal to be said in favour of the view just taken by Lord Deas. Looking to the terms of the mutual settlement, without reference to parole evidence, I am disposed to think it might be held that when the investments were taken to the two sisters jointly and the survivor it was meant to refer to the mutual settlement, and that would be enough for the disposal of the present case.

On the other view of the case I have not much difficulty. I am aware of the delicacy there is in allowing parole evidence to any extent as modifying writing. I believe it is not, in the ordinary case, competent to admit it to prove intention in the broad sense of that expression. But I concur with your Lordship in the chair that it may be admitted to the limited extent here proposed. These two gentlemen, Mr Murray and Mr Alison, managed the property and made the investments; and these investments give rise to the question whether they can be allowed to affect the terms of the mutual settlement. That settlement could not, I conceive, be altered by one of the parties only. But the question here is, whether anything was done by them jointly during their lives which can be held to have operated a change. Now, what was averred was that these investments were ordinary acts of administration on the part of Mr Murray and Mr Alison, made at their own hand, in the belief that they were in conformity with the terms of the settlement, but without instructions from the ladies, who knew nothing of their terms. Of that I think it was competent to admit parole proof. The result of that proof is, that I have no doubt this change was made without authority, and so cannot be allowed to affect their mutual settlement.

Lord Ardmillan was absent.

This interlocutor was pronounced:—"Having resumed consideration of the cause, with the proof for the claimants, Robert Alison and others, and heard counsel further on the reclaiming note for them against Lord Young's interlocutor of 10th July 1875, recall the

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said interlocutor: Find that the villa of Oakmount, being part of the estate *in medio*, was, by the operation of the conveyance thereof to the now deceased Miss Christina Alison and Mrs Margaret Renton, effectually settled on them in conjunct fee and liferent, and to the longest liver, and to the heirs and assignees of the longest liver, and that the said Mrs Margaret Renton, having survived the said Miss Christina Alison, became the absolute fiar of the whole of the said heritable subjects: Find that the investment of the funds of the said Christina Alison and Mrs Margaret Renton in the terms mentioned in the record had not the effect of altering the mutual settlement made by these ladies in 1857, or of taking these funds out of the operation of the said mutual settlement, or of affecting the succession to the means and estate of the said Christina Alison as regulated by the said mutual settlement: Therefore find that the trust-disposition and settlement of Mrs Renton, dated 9th December 1868, and codicil thereto, dated 15th April 1874, can receive effect only as a settlement of the villa of Oakmount, and of so much of the said invested funds as originally belonged to the said Mrs Margaret Renton, and cannot receive effect as a settlement of that part of the said invested funds which originally belonged to Miss Christina Alison: With these findings, remit to the Lord Ordinary to ascertain and determine the amount of the fund *in medio*, and to proceed further as shall be just; reserving all questions of expenses."

J. & J. TURNBULL, W.S.—LEBURN & HENDERSON, S.S.C.—Agents.

No. 173.
July 20, 1876.
Forgie v. Stewart and M'Donald.

JOHN FORGIE, Suspender.—*Mair.*
STEWART AND M'DONALD, Respondents.—*R. V. Campbell.*

Suspension and Liberation—Reincarceration.—Held that reincarceration of a debtor on the same diligence is legal, and that it lies upon the debtor to shew an oppressive use of such diligence to entitle him to the equitable interference of the Court.

Bill-Chamber. 1ST DIVISION. Lord Rutherfurd Clark. B.

JOHN FORGIE, draper in Newcastle, was arrested on a *meditatione fugæ* warrant at the instance of Messrs Stewart and M'Donald, Glasgow, at Ayr, on 12th May 1875. He found caution, and Stewart and M'Donald raised an action against him in the Court of Session, and on 2d July 1875 they obtained decree against him for £225, 16s. 4d., with interest and expenses.

In his note the Lord Ordinary expressed his opinion that the evidence given by Forgie had been "a tissue of falsehoods."

Stewart and M'Donald charged Forgie upon the said decree, and on 18th November 1875 they incarcerated him.

Forgie applied for aliment, and Stewart and M'Donald lodged the sum of £10, and were given to understand that notice would be sent to them on that sum becoming exhausted.

On 28th March 1876 Forgie raised a summons of *cessio*, but after hearing parties the Court refused the *cessio*.

On 20th June 1876 the aliment became exhausted unknown to Stewart and M'Donald. The pursuer applied to the magistrates, and was liberated.

On 23d June Stewart and M'Donald reincarcerated Forgie, and lodged a further sum for aliment.

Forgie presented this note of suspension and liberation, and pleaded;—(1) The complainer having been incarcerated at the instance

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of the respondents, and detained for a period of seven months in prison upon the warrant of imprisonment dated 18th November 1875, and liberated on 20th June 1876, it was illegal and *ultra vires* to reincarcerate him without a new charge being given to the complainer, and a new warrant of imprisonment being obtained against him. (2) The complainer having been detained in prison at the instance of the respondents till 20th June 1876, for a period of seven months, it was illegal and oppressive to reincarcerate the complainer on the 23d June 1876, three days after his liberation, there being no change in the meantime in the complainer's circumstances, and the complainer ought therefore to have liberation granted as prayed for.

The respondents pleaded;—(2) The liberation of the complainer under the Act of Grace has no effect on the chargers' diligence, and they were entitled to put the same in force without a new charge and new warrant of imprisonment. (3) The chargers not having made any oppressive use of their diligence, the imprisonment of the complainer is legal, and there are no grounds for the equitable interference of the Court therewith. (5) The alleged exhaustion of the aliment lodged by the chargers having arisen from no wilful refusal or delay on their part to provide aliment, but solely from their agent's reliance upon receiving notice as promised, the complainer's imprisonment is valid.

The Lord Ordinary refused the note, with expenses.

The complainer reclaimed, and argued;—He only insisted on the second plea. To warrant reincarceration on the same diligence the onus lay on the incarcerating creditor to shew a change of circumstances in the debtor.[1] It was through the negligence of the respondents that the aliment was exhausted.

Argued for the respondents;—The doctrine laid down by Lord Balgray in Mackenzie v. Maclean had been overruled. It was now settled that reincarceration was always legal, but that the Court would interfere if the power was oppressively used.[2] There were no circumstances here to justify the Court in interfering. There was no negligence on the part of the respondents, as they ought to have been informed when the aliment was exhausted.

Lord President.—A decree was pronounced in favour of the respondents against the complainer on the 2d of July 1875, in the Court of Session, for the sum of £225, 16s. 4d., with interest, and upon that decree the complainer was charged, and a fiat of imprisonment granted, and he was incarcerated.

Then he applied for aliment, and that aliment continued to be paid till the 20th of June 1876. The sum provided for aliment was then exhausted, and on the same day a certificate to that effect was granted by the governor of the prison, upon which the bailies of the city of Edinburgh granted warrant for his liberation, and he was liberated accordingly.

It is not said that the fact of the aliment having been exhausted was intimated to the chargers or their agent, and in point of fact it was not. They allege, on the other hand, and in the absence of any contrary statement it may be

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[1] Mackenzie v. Maclean, Jan. 14, 1830, 8 S. 306, 2 Scot. Jur. 145; Crawford v. Dawson, March 11, 1836, 14 S. 688, 8 Scot. Jur. 306.

[2] Denovan v. Cairns, Feb. 1, 1845, 7 D. 378, 17 Scot. Jur. 182; Pender v. Macarthur, Jan. 28, 1846, 8 D. 408, 18 Scot. Jur. 186; White v. Robertson, Nov. 24, 1858, 21 D. 28, 31 Scot. Jur. 12; Inglis v. Taylor, July 10, 1833, 11 S. 955, 5 Scot. Jur. 548; Erskine, 4, 3, 28; Abercromby, 1759, M. 11,811; Pollock, 1769, M. 11,815; Boyd v. Ponton, Dec. 21, 1811, F. C.

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fairly assumed as the fact, that they had lodged a sum of £10 to meet the aliment, and had been informed that notice would be given when the sum was nearly exhausted, which notice they had never received.

In these circumstances the complainer was reincarcerated by the chargers three days after his liberation, and he now complains of that as an illegal proceeding. If by that is meant that reincarceration cannot take place on the same diligence I know of no authority for the proposition. Such reincarceration is perfectly legal, but on the other hand it depends on circumstances whether it is to be allowed, and it is in the power of the debtor to come to the Court if there is anything oppressive in the proceeding.

I see no cause here to justify the Court in interfering with this diligence. It is plain that this man absconded, that he was found in the county of Ayr, and was arrested upon a *meditatione fugæ* warrant. He found caution, and thereupon an action was raised. He resisted on discreditable grounds, as appears from the judgment of the Lord Ordinary. Therefore the position of this person and his conduct is just as unfavourable as anything could be.

But he maintains as a proposition that it must always be shewn that there has been "a change of circumstances" to warrant reincarceration. I am not able to agree to this. There is some ground for this in the opinions of some eminent Judges, but the doctrine is repudiated by other Judges equally eminent, and I prefer the opinion of the latter. I think it lies on the party incarcerated to shew something oppressive, and here there is no appearance of any such thing.

I also observe that in those cases where reincarceration was not allowed it was always upon the ground of negligence on the part of the incarcerating creditor. That is not the case here.

The fact of the aliment having been exhausted was not known to them, and though, if vigilant, they might have found it out, still that does not amount to such negligence as in other cases where intimation had been made.

I have no hesitation in adhering to the judgment of the Lord Ordinary.

LORD DEAS and LORD MURE concurred.

LORD ARDMILLAN was absent.

THE COURT adhered.

A. NIVISON, S.S.C.—MACNAUGHTON & FINLAY, W.S.—Agents.

No. 174.

July 20, 1876.
M'Laren, &c. v. Menzies.

JOHN M'LAREN AND OTHERS (Hon. C. E. C. Norton's Executors and Disponees), Petitioners.—*D.-F. Watson—Crawford.*
DAME GRACE CHARLOTTE NORTON OR MENZIES, Respondent.—*Balfour—Hunter.*

Writ—Authentication—Conveyancing and Land Transfer (Scotland) Act, 1874, *sec.* 39.—*Held*, by a majority of seven Judges, that a writing in the form of a deed, consisting of more than one sheet, and bearing the name of the alleged granter by way of subscription on the last page only, along with the names, also by way of subscription, of two attesting witnesses, may be proved by evidence *prout de jure* to be a "deed, instrument, or writing subscribed by the granter or maker" within the meaning of the 39th section of the Conveyancing Act, 1874, (*diss.* Lord Neaves, Lord Ormidale, and Lord Curriehill, who held that, in order to render the enactment applicable, each separate or separable sheet of the writing must be authenticated by the subscription of the granter).

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2D DIVISION.
R.

THIS was a petition, under the Conveyancing and Land Transfer Act, 1874, sec. 39,* presented in November 1875 by Mr John M'Laren and others, who stated that they were the executors and disponees under the last will of the late Honourable Caroline Elizabeth Conyers Norton aftermentioned.

The petition set forth that Miss Norton died in the island of Madeira on 20th July 1875, that she was a British subject, and that her domicile of origin was Scotch; that she left a last will, produced with the petition, dated 13th July 1875, by which she disposed of the greater part of her means and estate, consisting of heritable and moveable property in Scotland and elsewhere; that the will was in ordinary form, according to the practice of conveyancers in Scotland, with the exception of the testing-clause; that it was written on two sheets of paper, and consisted of five pages exclusive of an attestation, which was written partly on the sixth page; that it bore the subscription of the testatrix, together with her seal on the fifth page only; and that the subscription bore to be attested by three witnesses subscribing, but not designed.

The deed produced consisted of two sheets, one stitched within the other, the outer sheet forming the first, second, seventh, and eighth pages, and the inner sheet the third, fourth, fifth, and sixth pages. The last part was as follows:—

"Lastly: I consent to registration of these presents for preservation.—In witness whereof I have signed and sealed these presents at my residence, the Quinta das Maravilhas, in the island Madeira, this thirteenth day of July one thousand eight hundred and seventy-five.

"(L. S.) "C. E. C. NORTON.
CAROLINE ELIZABETH CONYERS NORTON.

"Signed and sealed by the testatrix, the above named Caroline Elizabeth Conyers Norton, and acknowledged by her to be her last will and testament, in presence of us, present at the same time, who at her request, in her presence, and in the presence of each other, have hereunto subscribed our names as witnesses. Quinta das Maravilhas, in the island of Madeira, this thirteenth day of July one thousand eight hundred and seventy-five.

"JNO. HOLLAND PAYNE.
"FRANCIS GORBELL TABB.
"FRANK BURRIDGE FOY."

The will was written on the first five pages, and bore Miss Norton's name by way of subscription upon the fifth page, followed by the docquet which finished on the sixth page with the names of the three attesting witnesses also by way of subscription. The seventh and eighth pages were blank. The deed contained no subscription of Miss Norton except that at the end of the deed. The ends of the thread by which the two sheets were stitched together were sealed under wax, bearing Miss Norton's seal, beside her subscriptions on the fifth page.

* "No deed, instrument, or writing subscribed by the granter or maker thereof, and bearing to be attested by two witnesses subscribing, and whether relating to land or not, shall be deemed invalid, or denied effect, according to its legal import, because of any informality of execution, but the burden of proving that such deed, instrument, or writing so attested was subscribed by the granter or maker thereof, and by the witnesses by whom such deed, instrument, or writing bears to be attested, shall lie upon the party using or upholding the same, and such proof may be led in any action or proceeding in which such deed, instrument, or writing is founded on, or objected to, or in a special application to the Court of Session, or to the Sheriff within whose jurisdiction the defender in any such application resides, to have it declared that such deed, instrument, or writing was subscribed by such granter or maker, and witnesses."

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The petitioners averred;—"The said last will was subscribed on the date which it bears by the said Caroline Elizabeth Conyers Norton as maker thereof, and by John Holland Payne, wine merchant, Madeira, and Francis Gorbell Tabb, and Frank Burridge Foy, both clerks to the Brazilian Telegraph Company, Funchal, Madeira, as witnesses attesting her subscription. At the time of subscribing the will Miss Norton also sealed it with her signet ring, the seal being placed upon the thread by which the two sheets are stitched together."

The petitioners prayed the Court to appoint intimation on the walls and in the minute-book, and service on Miss Norton's heir and personal representatives, "and to allow answers in eight days; and on resuming consideration hereof, to allow the petitioners a proof of the averments contained in this petition, and thereafter to find and declare that the last will above mentioned was subscribed by the said Caroline Elizabeth Conyers Norton, as maker thereof, and by the said John Holland Payne, Francis Gorbell Tabb, and Frank Burridge Foy, as witnesses attesting the subscription of the said Caroline Elizabeth Conyers Norton; and to find the petitioners entitled to the expenses of the present proceedings out of the estate of the said Caroline Elizabeth Conyers Norton; or to do otherwise in the premises as your Lordships may think fit."

The petition having been intimated and served, and no one appearing to object, the Court, by interlocutor, dated 14th December 1875, before answer, allowed the petitioners a proof of their averments.

The proof, which was taken on commission in Madeira, conclusively established that the document produced to the Court had been prepared according to Miss Norton's direct instructions; that it had been carefully read over by her; that it was subscribed by her at the place and on the day mentioned in it in presence of the witnesses whose names it bore; and that at the same time the ends of the thread, by which the sheets were attached, were brought together by Miss Norton and sealed by her with her seal; that the docquet was immediately thereafter written by the witness Payne, and signed by all the witnesses; and finally the deed was handed back to Miss Norton, who said that it was all right.

On 6th January 1876 the Court allowed answers to the petition to be lodged for the Honourable Dame Grace Charlotte Norton or Menzies, sister and one of the next of kin of Miss Norton, in which she submitted "that the prayer of the petition ought to be refused, in respect that at the dates of the last will mentioned in the petition and of her death, viz., 13th and 20th July 1875, Miss Norton, although then resident in Madeira, retained her Scottish domicile, which was her domicile of origin; and that the said last will is invalid, and is incapable of being validated, not being executed according to the requirements of the law in force either in Madeira or in Scotland. In particular, and with reference to the law of Scotland, it is not subscribed by Miss Norton in the sense of 'The Conveyancing (Scotland) Act, 1874,' sec. 39. It consists of two separate sheets of paper, on one of which there is no subscription or other writing by Miss Norton."

The case having been heard before the Second Division, the Court being equally divided, appointed the case to be heard before themselves and three Judges of the First Division.

Argued for the petitioners;—The word "subscribing," both in popular language and in the law of Scotland, meant signing one's name at the end of a document. The same word "subscribed" was used in the 39th section with regard to the granter and with regard to the witnesses who never signed anything but the last page. Signing each

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page was not called subscribing in the statute which introduced it.* It was a formality of an entirely different character from the operative signature at the end of the deed, required by the statute 1540, c. 117, and not introduced till a hundred and fifty years after. It came in place of side-scribing the joinings in deeds written roll-ways, which rested on custom merely, until the Act 1696 made it imperative in deeds after that date written in that form.[1] So long as the deed was sufficiently identified the statute 1696, c. 15, was not strictly construed.[2] But the question was not whether this was a probative deed, for admittedly it was not. The statute of 1874 said that probative deeds (including deeds raised to that rank by the 38th section) should enjoy their former privileges, but that there should be a new rule in regard to improbative deeds. The law now allowed the validity of a deed, if it could be proved that it was subscribed by the granter and witnesses. "Subscribed" could not mean formally executed, for the section was dealing with deeds in which there was such informality of execution as to render them invalid had it not been for the provisions of the section. Indeed, it was not easy to give any meaning to the 39th section if it did not apply to the omission to sign each page, for the other formalities previously required were dispensed with by the 38th section. The petitioners did not found upon the seal and thread further than as part of the evidence which established the identity of the deed now produced with the will signed by Miss Norton. That evidence left no room for doubt.

Argued for Lady Menzies;—In the absence of any enactment to the contrary the words "subscribed by the granter" must mean subscribed according to the existing law. Subscribing a deed was to adopt the deed as one's own, the whole deed, and not merely the last page, which might contain nothing but a few unimportant words. How could a signature on what was said to be the last page of a deed shew that the granter had adopted other sheets? This was not a deed informally executed. It was not executed at all. Indeed, it was not a "deed, instrument, or writing" of any one. It was merely two pieces of paper with writing upon them, one of which contained nothing to shew that Miss Norton had ever adopted it or even seen it. The case must be decided precisely in the same way as if the two sheets produced to the Court had been found one lying loose within the other; for to attach any importance to the seal and thread as a mode of authentication was to go back to that state of matters which the Legislature had found it necessary to put an end to upwards of three centuries ago by the Act 1540, c. 117. To allow a deed to be set up by parole evidence would be a revolution in the law of Scotland which was not to be presumed without very express language in the statute. If such a change had been intended it would have been easy to say that no deed subscribed by the granter on the last page should be denied effect.

At advising,—

Lord Deas.—This is an application, presented under section 39 of the statute

* The Act 1696, c. 15, allows parties to choose whether they will have their deeds "written in sheets battered together as formerly, or to have them written by way of book, in leafs of paper, either in folio or quarto, providing that if they be written bookways every page be marked by the number, First, Second, &c., and signed as the margins were before, and that the end of the last page make mention how many pages are therein contained, in which page only witnesses are to sign in writs and securities where witnesses are required by law."

[1] M'Donald v. M'Donald, Dec. 18, 1714, M. 16,808.

[2] Smith v. Bank of Scotland, July 4, 1816, F. C.

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37 and 38 Vict. c. 94, to have it declared that a deed bearing to be the last will and testament of the late Honourable Caroline Elizabeth Conyers Norton, then residing in the island of Madeira, and to have been signed and sealed by her there on 13th July 1875, and to dispose of certain personal estate belonging to her, as well as of her heritable estate in Scotland, was subscribed by her and the witnesses whose names are attached thereto.

The enactment relied on bears that "no deed, instrument, or writing subscribed by the granter or maker thereof, and bearing to be attested by two witnesses subscribing, and whether relating to land or not, shall be deemed invalid or denied effect according to its legal import because of any informality of execution, but the burden of proving that such deed, instrument, or writing so attested was subscribed by the granter or maker thereof, and by the witnesses by whom such deed, instrument, or writing bears to be attested, shall be upon the party using or upholding the same."

The deed now in question consists of two sheets of paper, the one stitched within the other. The name of the granter is written, by way of subscription, on the fifth page, followed by a docquet which finishes on the sixth page with the names, also by way of subscription, of the three attesting witnesses, but without their designations.

The informality of execution which is said to render the present application competent and necessary is that the granter has not subscribed all or any of the first four pages.

The principal Scotch statutes bearing upon the subscription and authentication of deeds (other than sasines, which are not necessary here to be considered) are 1579, c. 80; 1593, c. 179; 1681, c. 5; and 1696, c. 15.

The solemnities required by these statutes have been greatly lessened by recent legislation. Sealing has been long dispensed with. As Lord Ordinary in the case of Thomson v. M'Crummen's Trustees, 1st Feb. 1856, 18 D. 470, 28 Scot. Jur. 205, I came to the conclusion that pagination was essential in deeds written upon more than one sheet, and indeed that all the requirements of the Act 1696, c. 15, were necessary solemnities in deeds written bookways; and in that opinion I was confirmed by the unanimous judgment of the Inner-House affirmed by the House of Lords. It was, however, soon afterwards enacted by statute that the want of pagination should no longer be a nullity. The statute under which we are now asked to proceed goes much farther. It provides, in section 38, that it shall be no objection to the probative character of a deed, instrument, or writing, whether relating to land or not,—1st, that the writer or printer is not named or designed; 2d, that the number of pages is not specified—that is to say, not specified in the deed, instrument, or writing itself; 3d, that the witnesses are not named or designed in the body of the deed, instrument, or writing, or in the testing-clause thereof, provided that where the witnesses are not so named and designed their designations shall be appended to or follow their subscriptions, to which they may be added at any time before the document is registered for preservation or founded on in Court,—it being farther provided that the designations so added need not be written by the witnesses themselves. Prior to the statute of 1874 each or any of these three objections would have been fatal to the deed, and not suppliable in any way. But if I read the modern statute law rightly, including section 38 of this statute of 1874, a deed is now probative, on the face of it, if three requisites are complied with—1st, if there are subscribing witnesses; 2d, if

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these witnesses are either designed in the deed or testing-clause, or their designations are added to their subscriptions before the deed is recorded for preservation, or is founded on in Court, it being provided, as I have already said, that the designations "need not be written by the witnesses themselves"; 3d, if the deed be subscribed by the granter on the last page in the case of a deed on one sheet only, or subscribed by him on each of the sheets or pages in the case of a deed written on more than one sheet.

If the first of these requisites be omitted—that is to say, if the deed does not bear to be attested by at least two witnesses—no remedy is provided. The objection is necessarily fatal to the deed.

If the second of these requisites be omitted at the time of completing the deed the remedy is in the hands of the parties themselves; the designations of the witnesses may be appended to their subscriptions so long as the deed is not recorded or founded on in Court, and these designations "need not be written by the witnesses themselves." If this easy remedy be not timeously adopted the parties interested have themselves to blame. The deed will not be an effectual deed.

If the third of these requisites be omitted to the extent of having no subscription of the granter on the last page, the deed will, of course, be ineffectual as never having been completed by the granter. But if the deed bears to be subscribed by the granter and two witnesses on the last page, then, although it consists of more than one sheet, and is not subscribed on the previous sheets or pages as well as on the last page, so that it would be, *prima facie*, improbative, there is a remedy provided by the statute of 1874, and that remedy is that the party using or upholding the deed shall take the burden of proving that the subscriptions of the granter and witnesses at the end of the deed were truly and intelligently adhibited to the deed. If the deed had been *ex facie* probative as it stood, the verity of the subscriptions and the binding nature of the deed would, of course, have been taken for granted, and could only have been disproved by an objecting party in a reduction.

I do not at all depreciate the serious nature of the omission to subscribe the previous sheets or pages of a deed written bookways upon more than one sheet. I think it is the omission of a solemnity required by the Act 1696, c. 15. Prior to that Act, if more than one sheet was used, the sheets required to be battered together, so as to admit of being rolled up, and sidescribing, as it was called, was required only so far as necessary to shew the connection of the sheets, and not as matter of solemnity. But the effect of the Act 1696, c. 15, was to recognise and set up sidescribing as a necessary solemnity in deeds written in the old fashion. It was so decided in the case of M'Donald, 18th Dec. 1714, M. 16,808. In that case a disposition, dated subsequent to the Act of 1696, was objected to as null, because written on two sheets battered together and not sidescribed at the joining. The report bears—"The Lords sustained the nullity that the disposition produced by the pursuer as his title in this process was not sidescribed, the writ being granted after the Act of Parliament establishing the custom of sidescribing the joinings,"—that is to say, after the Act 1696, c. 15. The soundness of that decision, so far as I know, has never been questioned. The legitimate inference to be drawn from it is that if a deed written on more than one sheet be subscribed only on the last sheet it is a nullity. There can be no doubt, therefore, that if section 39 of the Act of 1874 provides, as I think it does, a remedy for the omission of subscribing each of the sheets

or pages of a deed consisting of more than one sheet the remedy is one for the omission of a solemnity.

But, then, I am of opinion that it was the omission of a solemnity—and, indeed, of this very solemnity,—for which section 39 of the statute of 1874 was intended to provide, and has provided a remedy.

It would have been superfluous to have provided a remedy against trifling informalities which could not affect the validity of the deed. The statute distinctly specifies the nature of the informality to be remedied, viz., "any informality of execution;" and not contented with this, it describes this informality of execution as one in consequence of which the deed would be "deemed invalid or denied effect according to its legal import."

There is nothing startling, therefore, in the fact that the effect of the proof allowed by the statute may be to remedy the omission of a statutory solemnity. That was what the statute intended.

Not only so, but I think it must be clear, from what I have already said, that it was the omission of this very solemnity, and no other omission, which the statute contemplated might be remedied by a proof. At the date of the Act of 1874 there were only three things necessary as matter of solemnity—1st, subscribing witnesses; 2d, their designations in the deed or testing clause; 3d, the granter's subscription on each page where the deed consisted of more than one sheet. The statute does not make the omission of the first, viz., the want of subscribing witnesses, suppliable by proof. It does not make the omission of the second, viz., the designations of the witnesses in the deed or testing-clause, suppliable by proof, or, at least, not by proof merely, but by adding the designations to the signatures or subscriptions before the deed is registered or founded on in Court. The omission of the third requisite, viz., the subscription by the granter on all the sheets or pages of a deed written on more than one sheet, remains as the omission, and, in fact, the only omission or informality in the execution of the deed which the statute has said may be remedied or supplied by proof. Had it not been for that omission in this deed the present application would have been both unnecessary and incompetent. If section 39 of the statute of 1874 does not authorise the remedying of that omission by a proof, it does not, so far as I can discover, give that remedy for any omission at all.

As regards the deed now under consideration, in particular, if the first four pages had been subscribed by the granter as well as the last, it would have required no judicial application or aid from the Court to make it in all respects a probative deed. The petitioners might themselves have added, or caused to be added, the designations of the witnesses, and this application would, as I have said, have been both unnecessary and incompetent.

I do not differ from the observation which has been made that, although subscription by the granter of all the sheets or pages of a deed consisting of more than one sheet be a solemnity, the term subscription, in the language of our old statutes, has generally a peculiar application to the subscription at the end of the deed. I do not think it necessary, however, to go into that inquiry, or to rely upon the result of it. The thing to be proved is that the deed was "subscribed by the granter or maker thereof and by the witnesses." These words are, I think, used in the section in their plain and natural sense. No distinction is made in using them between the granter and the witnesses who subscribe only at the end. The section does not say or imply that the granter must sign in the full manner required by the Act 1696. It implies the reverse.

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If the subscriptions to this deed be genuine, the deed is unquestionably subscribed by the granter and witnesses, and that is enough to satisfy the words of the enactment as to subscription.

I may explain that I do not think the proof competent and requisite under the statute was intended to be limited to the bare fact that the subscriptions are genuine. On the contrary, I think that the surrounding facts and circumstances attending the subscriptions both of the granter and witnesses,—everything, in short, tending to satisfy the mind of the Court that the deed was intelligently and deliberately subscribed when in the state in which it appears when submitted to the Court, may be and ought to be elicited in the proof.

And this leads me to observe that I think the petitioners acted quite rightly in not appending the designations of the witnesses to their subscriptions before presenting this application, because it was very desirable that the Court should see the deed, untouched, in the state in which it was left by the testatrix. Whether it would have been equally safe to have produced and founded on it in an action, properly so called, before adding the designations, is a different matter, on which I do not enter. But I do not look upon the production of the deed along with and for the purposes of this petition as a founding upon it in Court in the sense of section 38 of the statute; and if your Lordships grant the prayer of the petition I presume it will be open to the petitioners to add or cause to be added the designations of the witnesses in the same way as they could have done before this petition was presented.

As regards the proof now before us relative to the deed in question I have only to say that, to my mind, nothing could be more satisfactory; and I am therefore, upon the whole, of opinion that the prayer of the petition ought to be granted.

Lord Neaves—I regret that I am unable to concur in the opinion that has been delivered. I regret it because I think it desirable that a case of this kind, involving important interests, and making an undoubted change in the law, should be decided unanimously. I have, however, a different opinion on the case, and although I necessarily feel a certain distrust of my own judgment, from the fact that the judgment is not to be unanimous, I consider it to be due to the parties and to the law, as well as to myself, to state the opinion which I have arrived at.

I am of opinion that under the terms of this Act, and clause 39 in particular, it is not competent for the Court to interfere in the manner they are asked to do. I do not think it will be necessary to take up much time in stating the grounds of my opinion, which are simple, and will be, I hope, easily understood, whatever view may be taken of their validity. No doubt a great deal has been done to smooth away the difficulties, and the snares, as they have been sometimes thought, that surrounded the conveyancer's path in getting deeds executed, but at the same time I think this is one of the strongest things that has yet been done; for, as I understand it, it comes to this, as explained by my brother who has preceded me, that if there be a sheet of paper or a scrap of paper containing a man's signature, with nothing above it but a word or a line, and unprincipled persons be got to prefix to it, and allege that he prefixed to it, any number of sheets or pages containing a disposition or conveyance or disposal of his whole estate, of whatever extent or amount, both heritable and moveable, to the prejudice of all other claims upon it, while the line or portion of writing subscribed has no bearing or character of any kind at all to indicate what the intention of

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the party was, that shall be supplied by parole testimony—by the evidence of two witnesses that this last page, consisting of a single line, however informal or unimportant, is the concluding page of one or two or twenty preceding pages, which they will prove by parole to have been the deed which the party meant to frame or meant to authenticate by his signature upon the last piece of paper. That is a startling result, and a great change from the original law. I do not dispute that the Legislature is entitled to make changes. The Legislature is entitled to do much—it has almost unlimited powers. It has even the power to do what is wrong, and we are bound to obey it; but it is a great change to say that the will of a testator as to heritage or as to moveables may be set up entirely by parole testimony, for it comes to that. It is the next thing to making a nuncupative will. There may be no writing that the party ever saw that contains his will, provided two unprincipled or stupid men can be got to say that it preceded a piece of paper on which his name stands.

Now, what are the grounds on which this is said to be effected? It is based on the 39th section of the Act of Parliament, for I do not find anything in the 38th section that has much bearing on this matter. The 39th section is a peculiar clause, and is not very happily framed, I think, nor very harmonious in all respects. It is a negative clause. It provides that "no deed, instrument, or writing, subscribed by the granter or maker thereof, and bearing to be attested by two witnesses subscribing, and whether relating to land or not, shall be deemed invalid or denied effect according to its legal import because of any informality of execution, but the burden of proving that such deed, instrument, or writing so attested was subscribed by the granter or maker thereof, and by the witnesses by whom such deed, instrument, or writing bears to be attested, shall lie upon the party using or upholding the same; and such proof may be led in any action or proceeding in which such deed, instrument, or writing is founded on or objected to, or in a special application to the Court of Session, or to the Sheriff within whose jurisdiction the defender in any such application resides, to have it declared that such deed, instrument, or writing was subscribed by such granter or maker and witnesses." The clause has rather a peculiar commencement—"No deed, instrument, or writing subscribed by the granter or maker." That seems to be the condition of the enactment being applicable at all, —that is to say, the deed must be subscribed by the granter or maker before we know anything about it. Why that expression is used as contrasted with the next expression about the witnesses I do not quite understand; but it requires, as a condition precedent of dealing with the thing at all, that it shall be subscribed by the granter or maker thereof; and when we come to the witnesses, which are all-essential, it says—"And bearing to be attested by two witnesses." It is not to bear merely that it is subscribed by the granter. It must bear to be attested by two witnesses. But it must be subscribed by the granter. I do not understand the meaning of that difference of expression, or whether it has any meaning.

But the main point that appears to me to be involved in this question is this —there having been no previous enactment in this section that I have heard founded upon with regard to subscription, is it or is it not to be held in this important and serious question that the words "no deed, instrument, or writing subscribed by the granter or maker thereof" mean subscribed in the manner in which they are subscribed at present? No new manner of subscription is prescribed. No change as to that is indicated that I can see; but this clause

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is to deal with deeds that are subscribed by the maker or granter thereof, and without that you cannot proceed to apply the clause at all. Does that mean subscribing in some new way, or does it mean subscribing as at present? That raises the question, on which I do not mean to say there is not room for difference of opinion, whether the word "subscribed" means simply subscribed—written on the last page of the deed. Now, I can scarcely think that without further explanation the subscribing of a deed by a granter is not the subscribing of it in the way which the law at the time when you speak of it requires it to be done. There is no change of subscription made here. The subscription is the known form of subscription that exists at this time as recognised by law. It is said that subscription only applies to the last page. In its strict etymological meaning, no doubt, subscribing means writing under something else; but it does not mean only that. When you speak of the subscription of the granter of a deed you legitimately mean the whole of his subscriptions that are required by law, and that constitute the total expression of his consent. It is said it can only mean the subscription on the last page, because the witnesses subscribe, and they only subscribe the last page. But if my view is right, that this clause assumes subscription of the deed under consideration as at present, that explains the whole thing. The party is to subscribe as at present, and the witnesses are to subscribe as at present. It happens that the established custom is that witnesses subscribe on the last page, because few witnesses know or ought to know the contents of the deed. Their business is merely to see and attest the subscription. But if you speak of subscription by parties according to the law or practice at present used, that implies a subscription not of every page, but of every independent portion of the deed, which, being separable from the rest, requires separate authentication. The purpose of this Act is said to be to do away with all that, and that one signature at the end of the deed upon a sheet of letter paper may be held to authenticate ever so many pages before, without a scrap to shew the writer's cognisance or knowledge of them, or that they have even passed through his hands, or have existed before the time they are brought into Court. That is the result of trusting everything to parole testimony. No doubt if we were living in the Golden Age, when people may not require to make their wills, or if our Courts of justice were held in that fabled mansion which was called the Palace of Truth, where every one who entered was compelled, *nolens volens*, to speak the truth, we might be sure that we would get at the truth. No doubt the powers of cross-examination are very great, and on the other side of the island they have been accustomed to use them. I am far from saying one word against this will on the proof which has been led about it, but the case must be decided on general grounds, and there are parts of Europe and of the world where truth may not be much valued. There is a well known case of a man who was sued by a Neapolitan for a money debt, and his defence was that he had never got the loan, and that he had never seen the money; but he was obliged to leave the place and to trust his defence to a friend. He came back and found that he had gained his case, and he asked his friend how it had been gained, saying, "Of course you shewed that I never borrowed the money?" "Oh no," said the friend, "The plaintiff got two men who swore that you received the money, and I brought other two to say that they saw you pay it back." Now, where truth of this kind is for sale, it becomes dangerous to place much reliance upon parole testimony. Considerations of that kind make one alive to the importance and the risk of such things. Of course if it

is the wish of the Legislature, it must be obeyed. But if such a change in the law and practice had been meant, how very easy it would have been to say "no deed, instrument, or writing, subscribed by the granter or maker thereof on the last page thereof." The change would then have been more on the face of the Act, and one would have seen precisely what was meant. But the word "subscribed" is used, and that gives rise to the doubt whether it means that the granter is to subscribe as at present, just as the witnesses are to subscribe as at present, the difference between the two being that the granter subscribes on every page or separable sheet in order to prove his consent to the whole deed, whereas the witnesses subscribe on the last page only to shew that they attest the deed.

These are the grounds upon which I proceed. I do not say that there may not be ambiguities in regard to the use of the word signing or subscribing; I merely say that it would not be straining the words of the Act to hold that subscribing the deed without further qualification means subscribing as at present. The change is introduced of providing that the attestation may be dispensed with so far, provided that the fact can be proved, but the fact to be proved is, in my opinion, the fact of subscription by the several parties who are to subscribe according to their different functions as the law now requires. If so, this seems to me to be fatal to the application of the statute which is now proposed, and which would operate an entire change in the law by making it possible to get a couple of witnesses to prove anything whatever that can be prefixed to a man's signature on a single piece of paper.

LORD ORMIDALE.—I concur with both your Lordships who have given your opinions that the question in this case is a very important one, relating as it does to the execution of deeds, and the true interpretation of the 39th section of the recent Act, the 37th and 38th Vict. cap. 93, entituled an Act "to amend the law relating to land rights and conveyancing, and to facilitate the transfer of land in Scotland."

The petitioners have presented the present application to the Court in order to allow them a proof of their averments, and thereafter to find and declare that the paper or writing referred to by them as the last will of Miss Norton was subscribed by that lady as maker thereof, and by three other persons as attesting her subscription.

But, while such is the prayer of the petition, it is at the same time stated and admitted by the petitioners that the alleged will, although written on two sheets of paper, and consisting of five pages, exclusive of the attestation, which is written partly on the fifth and following page, bears the subscription of the testator on the fifth page only. And it is also stated, and is the fact, that although the subscription bears to be attested by three witnesses subscribing, they are not designed.

A proof having been allowed to the petitioners before answer, it has been adduced, and is now before the Court. I do not understand it to be denied that the proof is sufficient, provided that the Act referred to is applicable to such a case as the present, or, in other words, provided the defects to which the alleged will is, as it stands, undoubtedly subject, are capable of being remedied under the Act referred to.

On the one hand it was contended for the petitioners that it is enough to entitle them to the benefit of the Act that the alleged will was subscribed by

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the testatrix at the end of it, on the fifth page, although not subscribed at all by her on the preceding pages; while, on the other hand, it was contended by the respondents that in consequence of the non-subscription of the testatrix on the first four pages of the will it could not be said to be "a deed, instrument, or writing subscribed by the granter or maker thereof," and was therefore incapable of being validated under the Act.

By the 39th section of the Act it is provided that "no deed, instrument, or writing subscribed by the granter or maker thereof, and bearing to be attested by two witnesses subscribing, and whether relating to land or not, shall be deemed invalid or denied effect according to its legal effect because of any informality of execution." The Act also provides that the burden of proving certain particulars shall lie upon the party using or upholding the deed.

Having regard to the Act as so expressed, the primary question is whether we have in the alleged will under consideration a deed, instrument, or writing bearing to be subscribed by the granter or maker thereof. It is very clear, and neither was nor could be disputed, that two sheets of paper with writing on the first five pages, but not bearing the subscription or signature of the maker at all, could not be held to be a deed, instrument, or writing subscribed by the granter or maker thereof. But it was argued that the will here in dispute must be held to come under the operation of the Act, because, although partly written on two sheets of paper, and not containing the signature or subscription of the maker on the first sheet, it was subscribed by the granter or maker at the end, on the second sheet or fifth page. The Act, however, does not so limit, at least expressly, the requisite subscription. It is quite general, to the effect that the writ must be subscribed by the maker or granter thereof. But can a deed, instrument, or writing be said to be subscribed unless it is so in the way required by law, independently of the Act, and before it was passed? The attestation of the subscription is another and different thing altogether, which will be afterwards spoken to. I am only at present dealing with the subscription of the maker; and I think it plain that it is indispensable that there should be a deed, instrument, or writing, which could be said, before the Act was passed, to be subscribed by the granter or maker thereof. The petitioners, however, maintained that let the deed, instrument, or writing consist of one or two or any greater number of sheets of paper, it was enough to admit of the application of the statute that it had the subscription of the granter or maker at the end, whether that was on the second or any subsequent sheet; while, on the other hand, it was contended by the respondents that no deed, instrument, or writing, consisting of more than one sheet, as the alleged will does, could be held to be subscribed by the granter or maker thereof unless the subscription appeared on every page of it. That the respondents are right in this contention, according to the law as it existed before the passing of the Act in question, applicable to the subscription of deeds, cannot, as it appears to me, be successfully disputed. The statute 1696, cap. 15, removes, I think, all serious doubt on the point, for, while it validates deeds written bookways, as the will here in question is, it does so only provided that "every page be marked by the number, First, Second, &c., and signed as the margins were before." And that the Act 1696 is in this respect imperative was decided by this Court, and also by the House of Lords, in the case of Thomson v. M'Crummen's Trustees (18 D. p. 470, and 31 Scot. Jur. p. 425), where it was held, without any dissent, that the omission to mark every page of a deed written by way of book upon more than

one sheet was fatal to it; and in coming to that decision all the learned Judges proceeded on the assumption that an omission to sign any of the pages of a deed written upon more than one sheet of paper would be equally fatal to it as an omission to mark every page by its number. Nor does it affect the matter that it has been decided to be unnecessary to subscribe a deed written on a single sheet of paper except on the last page, because, as shewn in the report of the case of Thomson v. M'Crummen's Trustees, as disposed of in this Court (18 D. 470) it was so decided on the ground that, on a correct construction of the Act 1696, cap. 15, it did not apply to deeds written on a single sheet, but only to deeds written on more than one sheet, as the present deed is. And just as little do I think it of any importance that the word "signed" in place of the word "subscribed" is employed in the Act of 1696, seeing that the same word is used alike in reference to the signature of the maker of the deed on the last as well as the other pages. Accordingly all the writers on the subject since the Act 1696 was passed down to the present time have referred to what that Act requires, as the subscription, not the signature, of the maker on every page where there is more than one sheet, and the practice of conveyancers has also, I believe, been to give effect to the Act in that sense.

Without therefore going into the various collateral points and speculations which were adverted to at the debate, it appears to me that a "deed, instrument, or writing," as referred to in the recent statute, must be held to be such, and such only, as can be said to have been subscribed by the granter or maker thereof according to the law as it stood prior to its passing. And that this must be so is further very strongly enforced by the circumstance that while, by the 39th section of the statute it is made incumbent on the party using or upholding a deed subject to informality in its execution, to prove that it was subscribed by the granter or maker thereof, nothing is said about the necessity of proving that the pages of a deed written on more than one sheet of paper, did truly contain the will of the granter or maker, although not subscribed by him at all. In short, the terms of the 39th section of the Act, whether in the earlier or later part of it, appear to me to require,—let the informalities otherwise of the execution of a deed be what they may,—that the subscription of it by the granter or maker must be legally complete and unobjectionable.

It seemed to be argued, however, that the expression, the formalities of execution of a deed, must necessarily cover and include the subscription of it by the maker on every page except the last. I cannot entertain this view. The language of the Act may not be in all respects very distinct or precise, but I have been unable after full consideration to see how the subscription of a deed by the granter or maker thereof can be treated as anything but the all-important, substantial, and indispensable part of the execution of a deed, while the testing-clause, and the particulars usually stated therein, may be called the formalities of execution. To the latter, therefore, and not to the subscription of the deed, do I think the statute refers in speaking of the "informality of execution." Nor is it a sufficient answer to this to say that if a deed written on more than one sheet requires to be subscribed not only on the last, but every page, there would be no defect or informality left for the remedial application of sec. 39 of the statute, as every other formality is dispensed with by section 38. It appears to me that this is an entire fallacy, for, as I read section 38, and after making allowance for its dispensing power, a deed would still be invalid if the designa-

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tion of the witnesses were not added before the deed was recorded or founded on in Court. Besides, proof in support of the subscription of the maker and witnesses is requisite by section 39 of the Act, where the deed has not been formally completed so as to be otherwise probative.

The attachment of the two sheets of paper on which the alleged will is written, by seal and string, is, I think, of no consequence, for it could not be, and was not said to form, by the law of Scotland, as it existed at the passing of the Act in question, any part of the execution either in substance or form of a deed, instrument, or writing. And neither do I think it of any consequence that the Act uses the same expression subscribed or subscribing in reference to witnesses as to the granter or maker, seeing that it does not alter, but leaves exactly as it had been before, the place or places where the granter and the witnesses require to adhibit their subscriptions, viz., on each page by the former, and at the end of the attestation by the latter.

On these grounds, and for the reasons now stated, I am of opinion that the petitioners have failed to establish their case, and, therefore, that the prayer of the petition ought to be refused.

Lord Mure.—I concur with your Lordships who have preceded me in looking upon this as a very important case, and as such I have approached the consideration of it. For it relates to a will very deliberately prepared and executed in a foreign country, but which, as it is defective according to the rules of the law of Scotland in certain of the formalities of execution, must be denied effect, unless it can be supported under the provisions of the Act of Parliament on which this application is rested. The petition is founded upon the 39th section of that Act, and seeks to have it declared, after proof has been adduced of the facts relative to the execution of the will, that it was subscribed by Miss Norton, the testatrix, as maker thereof, and by the witnesses by whom it bears to be attested.

Upon the case coming into Court a proof before answer was allowed of the petitioners' averments in the above respect; and as regards the import of the proof I do not understand that there is any difference of opinion. It is proved by the party who wrote the deed that it was prepared by him according to the instructions he received from Miss Norton, that it was read over and approved of by her, and subscribed in his presence and that of the other witnesses who attest the subscription. This evidence as to the execution of the will is corroborated by that of the other attesting witnesses, and it is further proved that the document is now in the exact same condition as it was at the date of its execution. It consists of two sheets of paper, placed one within the other, and stitched together by a thread, the ends of which are fastened down upon the paper by a seal; and it is proved that this seal was impressed over the ends of the thread by Miss Norton at the time of execution. The will bears to be written on the first four, and part of the fifth pages; and it is subscribed on the fifth or last page. The words at the foot of each page distinctly connect with those on the top of the next of the pages, and there are no deletions or alterations, or marginal additions on any part of the document.

In these circumstances there can, I think, be no doubt whatever that this will is proved to be the document which Miss Norton executed in Madeira, according to the best advice she could there obtain, and in the most solemn and deliberate manner; with the intention and in the belief that her succession would

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be regulated by it. But it is only subscribed by her upon the fifth or last page, and as it consists of more than one sheet, and is not signed on every page, it is defective in a formality of execution, and therefore invalid, in respect of the provisions of the Act 1696, sec. 15. The substantial question, therefore, which we have now to dispose of is whether the effect of this informality is taken off, in respect of the provisions of the 39th section of the Land Transfer Act, by the proof which has been led relative to the subscription of the will?

In dealing with this question it is of importance to keep in view that the statute founded on is a remedial Act. It must, therefore, I apprehend, receive a broad and liberal construction, in order to carry out its apparent object, which seems to be to prevent deeds from being deemed invalid, and having effect denied to them because of "informality of execution;" provided it is proved that the particular deed which is in question was executed and subscribed by the granter thereof, and by the witnesses by whom it bears to be attested. Upon the general policy of this part of the statute I do not mean to offer any opinion, beyond saying that I cannot look upon it as being in any respect an unreasonable thing that the Legislature should endeavour to make provisions under which a deed, executed as this will was, should receive effect, if proved to be the deliberate act of the party by whom it was executed.

Now, the 39th section of the statute enacts, but subject to certain conditions as to proof, and the burden of the proof, that "no deed, instrument, or writing subscribed by the granter thereof, and bearing to be attested by two witnesses subscribing, shall be deemed invalid because of any informality of execution." This is the broad leading provision of the section; and looking at the matter in a general point of view, and having regard to the plain ordinary meaning of the words used, it humbly appears to me to be clear that the will here in dispute falls within these descriptive words. It bears to be subscribed by the granter or maker thereof, and to be attested by two subscribing witnesses; but it is defective because of an "informality of execution," which consists in the omission to sign the four first pages as required by the Act 1696. The statute, however, proceeds in substance to enact that such a deed shall not be invalid, if it is proved that it was subscribed by the granter, and by the witnesses by whom it bears to be attested. Now, all this has here been very clearly proved, and there is no limitation in the statute as to the kinds of informality in execution which are to be obviated by proof of subscription. The words are very broad and comprehensive,—"any informality of execution;" and I am unable to see any grounds upon which, on fair construction of this section, the informality of omitting to sign each page in its order should not be cured by distinct evidence, such as that which has been here adduced, that this will, as it now stands, was subscribed, as it bears to be, on the last page, by the maker and the attesting witnesses.

It has, however, been argued that the word "subscribed," as used in this section of the Act, does not mean subscribed in the ordinary acceptation of the expression, viz., at the end or last page, which is the usual place of subscription in almost all documents, but subscribed on every page in terms of the Act 1696. I have not been able to adopt this view. The section is not in words so limited; and, as I read it, no such construction can be put upon its provisions without inserting words which are not contained in it. If it had been the intention of the Legislature to restrict its provisions in the manner contended for, they would, I think, have done so in express terms. This might very easily have

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been done by inserting after the word "subscribed," in the earlier part of the clause, the words "in terms of the Act 1696," or the words "on every page." But there are no such words, and in their absence we are not, I apprehend, entitled to construe the section as if some such words had been inserted.

On this broad and general ground I have come to the same conclusion as Lord Deas, in whose more detailed and very clear exposition of opinion I substantially concur; and I have only to add that I am not apprehensive that any evils are likely to arise from this construction of the statute. As the law has for long been administered, the Act 1696 has been construed not to extend to deeds written on one sheet, though not signed upon the three first pages. And by this further relaxation, all that is in this respect enacted is, that a deed which is not signed on every page, even when written on more than one sheet, shall not be invalid if it bears to be subscribed by the maker, and to be attested by two witnesses; provided it is proved to the satisfaction of a competent Court that the particular deed in dispute was actually subscribed on the last page by the granter, and by the witnesses who bear to attest it. The evidence must, of course, be clear and unequivocal to the above effect, and, in my opinion, it is so in the present case.

LORD GIFFORD.—In this case, which is one of great importance and of general interest, I concur in the opinions expressed by Lord Deas and Lord Mure, and, while fully sensible of the difficulties which attend any view which may be taken of the case, I cannot say that ultimately I have felt much hesitation in coming to the conclusion that the deed in question must be held a valid and effectual deed, the whole provisions of the statute of 1874 having been fully complied with.

The statute of 1874, 37 and 38 Vict. cap. 94, is a statute of a remedial nature. Its object is to "amend the law relating to land rights and conveyancing, and to facilitate the transfer of land in Scotland," and its whole purview is to simplify the rules of conveyancing, and to dispense with the necessity of certain deeds, and with certain formalities which were previously essential in all deeds and in titles to land. In particular, the two sections of the Act which directly bear upon the present case (sections 38 and 39) are intended to give validity and effect to deeds which, under the pre-existing state of the law, would have been absolutely null and void, and the special enactment of section 39 is that no deed or writing subscribed by the granter and bearing to be attested by two witnesses subscribing shall be deemed invalid or denied effect "because of any informality of execution." I shall immediately advert to the conditions which this clause imposes, but the general object of the clause is apparent, to remove all objections founded on mere matters of formality, and to give effect to what is really the deed of the granter according to its true legal import. I think this provision is one which ought to be liberally interpreted according to the obvious spirit of the enactment, and I cannot help thinking that it would be a great misfortune if we were compelled to hold that while many of the old formalities formerly essential to deeds are dispensed with, other formalities not more important in character or in themselves are still essential, although in the fair sense of the words they are "mere formalities of execution."

It appears to me that the fair meaning of the enactment is that a deed which is in the sense of this statute subscribed by the granter, and attested by two subscribing witnesses, shall be effectual notwithstanding that in all other respects

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it shall have been irregularly and informally executed. In short, the subscription of the party, whatever that may truly mean, and the subsription of two attesting witnesses, are now the only formalities essential to the validity of a deed.

It appears to me, then, that the real and the only question in the present case is whether the alleged last will and settlement of the Honourable Miss Norton now before us is, in the sense of the statute of 1874, "subscribed by the granter or maker thereof." If this question is answered in the affirmative it is admitted that all other requisites of the statute have been complied with. It is duly and sufficiently subscribed by two attesting witnesses, and the proof which has been adduced makes it absolutely indisputable that whether Miss Norton's signature on the fifth page of the deed is or is not to be held her subscription in law to the whole writing, consisting of two sheets, she certainly intended it as her subscription to the will as a whole written on both sheets, and she intended thereby to execute as her last will and settlement the whole writing now before us.

The deed consists of two sheets or pieces of paper, and the sheets are folded so that the one is placed within the other, the first two pages of the deed being thus written upon the first sheet, and the last three pages on the second or enfolded sheet. Miss Norton, the granter, signs her name or affixes her signature only upon the fifth page, that is, on the third leaf of the enfolded sheet, and thus the outer sheet and the two pages which are written thereon does not contain any signature of the granter. The two sheets, however, at the time Miss Norton signed on the fifth page, were stitched together, and the ends of the thread by which the two sheets were fastened together were brought to the fifth page and sealed on that page under the wax bearing Miss Norton's seal, and affixed by herself at the time, and thus it is said the two sheets were made physically one deed.

Now, I am not disposed to attach very much importance to the circumstance that the deed was so stitched and the ends of the thread sealed by Miss Norton. I should be sorry to raise this circumstance or some equivalent therefor into an essential requisite for the validity of such a deed. The circumstance is important, but it is only important as part of the parole proof,—that the deed, when Miss Norton put her signature on the fifth page, consisted not of one sheet, but of these two sheets which we now have, and of nothing else, but then I think this fact might have been proved without the sealed thread in any other way, provided only that it was made perfectly clear what really was the deed or writing which the granter executed, and this leaves, in my view, as the only question in the case, this question,—is Miss Norton's signature on the fifth page of the deed her subscription of the deed, that is, of the whole deed as it is now before us, in the sense of the Act of 1874?

I am of opinion that it is, and that it is not necessary under the statute of 1874 that each page of a deed shall be signed by the granter, or even that each sheet of the deed shall be so signed,—that it is enough if the granter signs at the end of the deed, provided it be made perfectly and indisputably plain by any kind of evidence, parole or written, that he intended his subscription to be the subscription of the whole deed tendered in judgment.

There is no statutory definition of the word subscription, either in the Act of 1874 or in any other statute. The word means etymologically and originally a signature, or other writing equivalent to a signature, at the foot or end of a

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writing, as opposed to superscription, where the signature or sign-manual was put at the beginning or top of a writing, and I do not think the word subscription has in strictness and in Scotland any other meaning than this original one.

Previous to the Act 1696, c. 15, deeds in Scotland were never written bookways, that is, on successive pages, like the pages of a book. They were always written on the face of a sheet or sheets of parchment or paper, the sheets being pasted together if there were more than one, and the whole deed was only subscribed at the foot or end thereof. Originally the signature or mark made by the granter was the sign of the cross, then the granter affixed his seal, and ultimately under the statute 1540 the subscription or writing of his name by the granter was required, but even then only at the foot or end of the deed where the cross or seal had formerly been in use to be affixed. The seal which subscription superseded was never affixed anywhere else than at the end of the deed. If the party could not write, the subscription of a notary or notaries for him was substituted.

If the deed consisted of more than one sheet the several sheets were pasted together, and custom introduced the practice of the granter signing across the joinings of the sheets, part of the name being written on the one sheet and part on the other. But this was not subscription, and was never called so. It was called "sidescriving," and was merely intended to authenticate the various sheets, all of which the granter subscribed by his one subscription at the end, and so subscription was always used in the singular, and, indeed, is so still, at least in strictness, and when accuracy of language is observed. It is the one act by which the granter makes the whole deed his.

The Act 1696 allowed (that is, made lawful, without prescribing) deeds to be written bookways, but it imposed as a condition of this permission that "every page be marked by the number, and signed as the margins were before," but it is remarkable that this signing of each page is not called subscription any more than the old sidescriving was called subscription. The signing of each page is put upon the same footing as the old sidescriving at the joining of each sheet—that is a mere method of attesting and of vouching that the sidescrived sheets or the signed pages are parts of the deed which the granter executes as his deed by his one and single subscription at the foot or end thereof.

It is quite true that the conditions which the Act 1696 imposed as requisites of the permission to execute deeds written bookways, have been strictly exacted as absolutely essential to the validity of a deed written bookways. Thus, in the very remarkable case of Thomson v. M'Crummen's Trustees, 1st February 1856, 18 D. 470 (H.L.), 24th March 1859, 31 Scot. Jur. 425, it was held, both by this Court and by the House of Lords that a bond written bookways was absolutely null, merely because the pages were not marked by their numbers. It is undoubted that under the law prior to 1874 a deed written bookways must, under the Act 1696, have each page or at least each sheet (for this is an open point) signed by the granter, for this is the condition imposed by that statute; but then I am of opinion that such signature was not in strict technical language the "subscription" of the granter, but the mere attestation of the separate sheets, avouching that these separate sheets really were parts of the entire deed which the maker subscribed at the end thereof, and therefore the new statute of 1874, which dispenses with all formalities of execution, dispenses with this also as an essential,—provided it be clearly proved that the whole

deed was really subscribed by the granter affixing his signature as his subscription at the foot or end of the deed.

Indeed, I am of opinion that even according to the old law of Scotland, and in the strictest sense of the word, it was only the signature of the granter at the foot or end of the deed which was properly and really his subscription. All other signatures, however essential, were not subscriptions, but something else. Sometimes they were sidescribings attesting the separate sheets,—sometimes they were marginal signings attesting a marginal note or an interlineation, or, it may be, an erasure; but none of these were "subscription." And even where the signing of each page was made statutory the statute might have been complied with otherwise than by subscribing, that is, by signing, at the foot or end of each page, provided there was signing somewhere on each page, as by signing the pagination at the top of the page, or by signing a marginal note on each page bearing "this is the first page of my will," "this is the second," and so on. Surely that would have been each page signed in the very strictest reading of the Act 1696. The true subscription of the granter is his signature at the end of the deed, where in old times the granter put his cross or his seal, and without which it is not his completed deed. Other signatures were, no doubt, under our law, as it stood prior to 1874, required as "essential formalities of execution," but all these are now dispensed with by the statute of 1874, provided only it be proved that the deed as a whole was subscribed by the granter and by two attesting witnesses.

Confining attention, therefore, in the first instance, to the older statutes, that is, to the statutes prior to the Act of 1874, I think they fairly raise the distinction between signature or signing, and "subscription" strictly so called. "Subscription" is properly and in strictness the writing of his name by the granter at the foot or end of the deed as an obligatory act, making it his deed and obligation. Signature or signing, on the contrary, is the mere writing of the granter's name, anywhere, not as the act binding the granter or making the deed his, but merely for authenticating as part of the deed some separate sheet, or some marginal note, or even, it may be, some separate word which may be erased or superinduced or otherwise made doubtful or open to question.

But then comes the Act of 1874, and while it is most important to see what is the strict and proper meaning of subscription, in the sense of the older statutes, the true question is, what does "subscribed" mean in the Act of 1874, in what sense does that statute (for really that is the only statute we have directly to do with) use the word "subscribed." What is a "subscribed" deed in the sense of the statute of 1874?

It may be noticed that the statute of 1874 speaks of the subscription of the maker and the subscription of the instrumentary witnesses in the very same words, and in the same sentence. The instrumentary witnesses only sign on the last page, that is, their subscription to the deed, and it does not seem very difficult to hold that when the statute speaks of a deed subscribed by maker and by witnesses it means their subscriptions at the only place where they all subscribed, that is, at the foot or end of the deed. But still farther, the word "subscribed" has a popular and common meaning as well as a strict and technical one, and in a remedial statute like this of 1874, which is meant to give validity to deeds otherwise null, I think it not unreasonable to ask what is the popular and common meaning of "subscribed." Now, in popular language, a deed or paper or petition or memorial is subscribed by a person when it is under his

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hand, when he has put his name at the end of it, though it may consist of many pages or of many pieces of paper. The question really is, has the subscriber made the deed his by subscribing it, though he has only signed the last page? Did he so sign with the *animus* to make the whole deed his deed and evident? If so, he might quite rightly be said to have subscribed the deed, although he did not sign and authenticate every page. I think this is the sense in which the statute of 1874 uses the word "subscribed." I am not compelled to hold that the Act of 1874 uses the word "subscribed" in any technical and narrow sense, even if it could be shewn (which I think it cannot) that subscribed means, technically, signed on every page. I prefer holding that the Act of 1874 uses the word "subscribed" in a broader and more popular sense, as meaning "under the hand of the granter," signed at the end only, it may be, but provided always that such signature was intended as the signature of the whole deed. I am humbly of opinion that wherever a deed has been signed, although at the end only, before attesting witnesses, and it is offered to be proved that that signature was affixed, and was intended to be the subscription of the whole deed, that is a case to which the provision of the Act of 1874 directly applies.

I feel the weight of the argument that when a deed consists of many sheets, all unmarked and unsigned, and where there is only one signature at the end, there may be room for fraud in inserting one or more sheets which were not part of the deed intended to be executed by the granter, but then this is a matter on which the Court must be satisfied by the most explicit proof. Wherever there is room for suspicion or doubt as to what really was the deed or the sheets which the testator really intended to subscribe, the Court will refuse to sustain the deed. The Court will always, and rightly, exact the clearest proof upon this point, and this seems to be an ample and sufficient guarantee. It is really the only guarantee against fraud in this and in all cases. For those who would fraudulently substitute or prefix to the signed sheet any number of spurious previous sheets which the testator never saw, and never intended to form part of his will, parties who could commit that fraud might just as well forge the testator's signature or any number of signatures, and, of course, against such frauds as these the only safeguard can be the full and sifting inquiry of a Court of law. I need hardly say that in the present case there is not the shadow of a doubt that the deed exactly as it now lies before us,—I mean both the sheets of paper on which it is written,—was as a whole executed as and intended by Miss Norton to be her latter will.

On the whole, therefore, I am of opinion that this deed is, in the sense of the Act of 1874, subscribed by the granter, that sufficient proof in terms of that statute has been adduced, and that the prayer of the petition should be granted.

Lord Curriehill.—Lord Neaves has so well stated the grave importance of the present question, and the serious consequences which may flow from the decision now to be pronounced, that I shall add nothing on that point beyond expressing my entire concurrence in his remarks.

On the merits of the question I have, after most anxious consideration, arrived at the same result as Lord Neaves and Lord Ormidale. I shall shortly state the grounds of my opinion. But for the provisions of the Conveyancing (Scotland) Act, 1874, the will of Miss Norton, which consists of separate sheets of paper written bookways, would beyond all doubt according to the law of Scotland have been null and void, in consequence of non-compliance with the

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requirements of the last three statutes which regulate the authentication of deeds. The defects—any one of which would under the law as it stood before 1874 have been fatal to the validity of the will—are the following, viz.—(1) The designation of the writer is not set forth as is required by the Act 1593, c. 179; (2) the subscribing witnesses are not named and designed in the body of the deed as is required by the Act 1681, c. 5; and (3) the granter has not signed the will on each page, and the number of pages is not specified, as is required by the Act 1696, c. 15.

Even if the document had been signed by Miss Norton on every page the other defects enumerated are such as could not have been supplied by proof. The will, therefore, would not have been probative; it could not have been allowed to make faith in judgment in its existing condition; and its authenticity could not have been established by any extrinsic proof.

The Act of 1874, however, has, by section 38, declared that the omission to design the writer or to specify the number of pages of any writing shall no longer be valid objections to its probative character, and a similar declaration is made as to the omission to name and design the witnesses in the body of the writing, or in the testing-clause, provided their designations are appended to or follow their subscriptions; and such designations may be so appended or added at any time before the writ is recorded in any register for presentation, or is founded on in any Court, and need not be written by the witnesses themselves. In the present case the will has been produced and founded on in this Court, but the designations of the witnesses have not been appended to their subscriptions and are not set forth in the deed itself or in the testing-clause, so that, although the probative character of the will cannot now be objected to in respect of the omission to name and design the writer or to specify the number of pages, it is still open to objection in respect of the omission to design the witnesses, and but for the 39th section of the Act of 1874 the prohibition in the Act 1681, c. 5, must have prevented that omission from being supplied by proof or otherwise.

But by section 39 of the recent Act it is provided—[reads]. This section of the Act is not very happily expressed, but it must be read in connection with the previous section (38), and when so read its true construction appears to me to be, that where from the omission to design the witnesses, or from failure to comply with any of the statutory solemnities of deeds not specially repealed by section 38 or by any previous statute, a writing subscribed by the granter and bearing to be attested by two witnesses subscribing, is not formally executed, the informality of the execution may be obviated by the party upholding the deed proving that the writing so bearing to be attested was in point of fact subscribed by the granter and by the witnesses. The only informality of execution which the framer of the Act appears to have had specially in view was the failure to design the witnesses, and the clause has been expressed in general terms, apparently in order to meet the case of any similar informality which, though not then present to the mind of the framer, might arise in practice. But unless the writing is subscribed by the maker, *i.e.*, duly subscribed by him in the manner required by law at the date of the statute, I do not think that section 39 can at all avail the party upholding the writing. In short, the failure of the granter duly to subscribe the writing is not in my opinion an "informality of execution" within the sense and meaning of the section.

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It is unnecessary to refer at length to the various statutes which make the subscription of the granter essential to the authenticity of an important writ. It is enough to say that by the Act 1540, c. 117, subscription by the maker of a deed, or by notaries for a maker who cannot write, became (except in the case of crown-charters, which are authenticated by seal without subscription), and have ever since continued to be, essential for the purpose of establishing the authenticity of the deed, *i.e.*, that it is truly the deed of the maker. Before 1696 deeds were generally written on the face of one sheet of paper or parchment, or of two or more sheets battered together at the edge. In the case of a single sheet there could be no difficulty, as the subscription of the maker was necessarily made below at the end of the writing, and where two or more sheets battered together were employed the last sheet was subscribed and the margins were sidescribed at the joinings. This was the custom before the Act 1696, c. 15. The decisions which have been referred to as shewing that sidescribing was not before that date universal or necessary are all cases in which either the material parts of the deed were contained in the sheet which was actually subscribed, or the margins were sidescribed at the joinings by one or more of the granters, sidescription by the other granters being dispensed with either because they were cautioners and the part of the deed affecting them was on the sheet subscribed, or because they were too numerous to sidescribe. In the latter case the whole of the parties in the last sheet of the deed which contained these subscriptions authorised one or more of their number to sidescribe the margins. The identity and authenticity of the whole deed was thus in all such cases ascertained and secured by each sheet of which it consisted proving the signature of one or more of the granters.

In order to obviate the inconvenience of deeds being written in the form of a roll with such battered junctions, writs were allowed to be written bookways on separate sheets stitched together. The first statute on the subject was the Act of 1672, c. 7, which dealt only with crown-charters, which were authenticated not by subscription but by seal. The recipient of the charter was allowed to take it either on one broad sheet of parchment or on several sheets written bookways, but in the latter case it was enacted that the seals should "be appended on a tie or band which is to go thorow all the leaves in the margin." As such writs were prepared and sealed by responsible public officials the prescribed mode of appending the seal effectually authenticated each sheet secured by the tie as being part of the charter, and prevented the interpolation of any spurious sheet. The next statute on the subject, 1686, c. 17, allowed sasines to be written bookways, provided the notary attested in his docquet the number of leaves, and signed each leaf along with the witnesses. And by the Act 1696, c. 15, all other writs were authorised to be written bookways, provided that every page was marked by the number First, Second, &c., "and signed as the margins were before," and that the end of the last page made mention of the number of pages, and was signed by the witnesses where witnesses were required by law. I am of opinion that this statute—although abrogated as to the pagination and mention of the number of pages by the Act 19 and 20 Vict. c. 89, and by the 38th section of the Act of 1874—remains in full force as regards the signature of the granter on each page, and of the witnesses on the last page. I think it is not a sound construction of the statute to hold that the word "sign" is here used as meaning something different from "subscribe." It certainly means "subscribing" so far as the signatures of the maker of the

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deed and of the witnesses on the last page are concerned, and I think that it means "subscribing" the other pages by the granter as the margins were signed before. It does not mean that the other pages are to be signed on the margins, but that each page is to be subscribed in every case in which, and to the same extent as, the deed, if it had been written rollways, would have been signed on the margins.

It appears to me that such full subscription is necessary to entitle a party upholding a writing to claim the benefit of the 39th section of the Act of 1874. Without the subscription or signature of the granter on every page of the deed, when it consists of more than one sheet, it cannot be said to be a deed subscribed by the granter—he has not authenticated it or adopted it as his deed. A deed in that condition is not, in my opinion, "informally executed"—it is not executed at all. And in a case like the present, where the material part of the deed, viz., the conveyance or bequest of the heritable estate, is all contained in the first or unsigned sheet, it is a deed which, if written rollways, must have had the margin sidescribed, and which, as it has been written bookways, I must hold has not been in point of fact subscribed by the granter in its most material parts.

Were the argument for the petitioners to be sustained a wide door would be opened for fraud. Take the case of a deed consisting of a dozen separate sheets —an occurrence by no means rare: Such a deed, not being a crown-charter, could not be authenticated by sealing a band passing through all the sheets. And unless each page or each sheet is authenticated by the subscription of the granter, there is no safeguard against the interpolation or substitution of spurious sheets. To allow a parole proof that the unsigned sheets were in their present condition, all stitched together and laid before and read over to or by the granter before he subscribed the last page, would, in my opinion, instead of being a safeguard, be a source of danger. Subscription of the deed and subscription alone can secure its authentication as being the deed of the maker, and subscription to be effectual must be on every page, that being, as I read the statute 1696, c. 15, a condition precedent to the validity of every deed written bookways.

How, again, are marginal additions, interlineations, and superinductions or erasures to be authenticated? Deeds containing these irregularities are, if the petitioners are right, informally executed, and it would be competent to prove by parole testimony that the writing when the testator signed the last page contained all these irregularities though none of them were mentioned in the testing-clause. Nay, more, such proof would be competent even if every page were signed by the granter, leaving the marginal notes unsigned and the interlineations and superinductions unacknowledged.

To allow such proof in any of the cases referred to would, in my opinion, be fatal to the security not only of our land rights but of all transactions requiring the interposition of formal writing for their completion. I cannot bring myself to believe that such was the intention of the Legislature in enacting section 39 of the Act of 1874, and unless the language of the statute is so clear as to compel me to do so I cannot give it a construction which must lead to such serious consequences. But as I think the construction contended for by the petitioners is not the sound or natural construction of the 39th section, I am of opinion, on the whole matter, that the will of Miss Norton has not been subscribed by her within the sense and meaning of the 39th section of the statute;

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that the provisions of that section therefore do not apply to the present case; and that the prayer of the petition should be refused.

LORD JUSTICE-CLERK.—I concur with Lord Deas and those of your Lordships who have arrived at the same result. I so completely agree with what has been already said in that sense, and have so little to suggest in addition, that I should gladly have been relieved from doing more than intimating my concurrence; but in the balance of opinion on the bench it is perhaps right that I should shortly state the grounds of my opinion.

On the policy of the statute I have nothing to say, for if we construe its provisions rightly we are bound to assume that the construction we adopt must be beneficial to the public. I foresee none of the dangers in the future which some of your Lordships seem to anticipate. It is at least consolatory to reflect that in the case in hand the operation of the statute will give effect to the unquestionable intention of Miss Norton as to the way in which her property should be disposed of after her death, which, but for the statute, would have been unquestionably and inequitably frustrated.

There can be no question, on the proof, that Miss Norton subscribed this deed, consisting of five pages, and that the subscribing witnesses did truly attest the act of subscription. These things, as matters of fact, are established with absolute certainty. But when we are asked to find that such was the fact, the respondent, Lady Menzies, objects that this petition should be refused, because the demand is not sanctioned by the clause of the statute under which the petition is presented.

There are two objections taken to the petitioners' claim, both founded on the terms of the 39th section of the statute—First, that it does not appear on the face of this writing that the subscription of the granter covers the first and second pages of the document, seeing that this can only appear by the signature of the granter on each page, in terms of the Act 1696; and, secondly, that the deed does not appear to be subscribed at all, because under the Act 1696 no deed can be said in legal language to be subscribed which, if it be written in a roll, does not bear the signature of the granter across the joining of the sheets, or, if it be written bookways, does not bear the signature of the granter at the foot of each page.

The first of these objections is certainly formidable, namely, that which relates to the identity of the writing which appears to be subscribed. It is said that the only part of this document which appears to be subscribed is that sheet on which the granter's signature appears, and that it does not appear that the first two pages formed any part of the deed, seeing that the requisites of the statute 1696 have not been complied with. This objection is of course technical, but I have found it attended with difficulty. It is not solved by holding, as I am inclined to hold, that the signature of each page, although a solemnity, is a formality of execution in the sense of the clause, for if the view be sound, the clause is limited to informalities in the execution of deeds which appear to be subscribed, which this, it is said, does not. But, looking to the general character and object of the enactments contained in this clause and in the preceding, I think this construction much too narrow, and that mainly on the ground so clearly elucidated by Lord Deas. It seems to me that these two clauses together were intended to cover the whole of the formalities previously required in the execution of writs. Some of them are enumerated and dispensed

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with by the 38th section, leaving the deeds probative under conditions therein expressed. I think the 39th section is intended to exhaust the rest. Two of these, namely, the subscription of the deed by the granter, and the attestation by the witnesses, still remain as essential solemnities; but all the rest (and I think the provisions of the Act 1696 seem nearly, if not entirely, to comprise all the rest), while not repealed or abolished, admit of being supplied by satisfactory testimony. There is nothing unreasonable in this, or inconsistent with the general spirit of these sections, which seems to be to reduce to the narrowest limits the formalities which are to remain *de solennitate*, and I agree with Lord Deas in thinking that the provisions of the Act 1696, whether as regards deeds written rollways or those written bookways, are, while they are solemnities, yet, in the sense of this clause, formalities of execution capable of being supplied by proof, and almost the only defects to which the clause can apply.

On the second objection, I have much less difficulty; indeed I am prepared, without hesitation, to reject it. The contention is that the word "subscription" as used in this section comprehends the signing of the pages and the sidescribing of the sheets provided for by the statute 1696. I think that proposition is quite untenable. If the statement were merely that any deed destitute of these formalities was before this Act not duly executed, and therefore null, it would be entirely accurate. These were solemnities without doubt. But the word "subscribe" as used here—and as used in every statute and decision as applicable to the execution of writs in our law, as far as I know—means subscription as required by the Act 1540—one signature adhibited at the end, close on the termination of the deed, in token of the foregoing writ being the expression of the intention of the granter. A man subscribes a deed when he writes his name at the end of it, just as he subscribes a page when he writes his name at the end of it. But nothing is the subscription of the granter to the deed under the Act 1540 excepting one signature at the foot or end of the writ. "Subscribed" does not and cannot mean "duly executed," as it is placed in this very clause in contrast with "due execution." The Act 1696 deals with matter entirely different, and neither in words nor in the subject of it regulates the subscription of the granter to the completed deed. It regulates only his signature of the different pages, which, when signed, constitute the writ which is to be validated by the granter's subscription. I set little store on the mere expression "signature" as contrasted with that of "subscription," although the framers of these statutes knew what they were dealing with, and used accurate and precise instead of inaccurate and popular language, as some text writers seem to have done. Accordingly, there is not a word about subscription to be found in any of its provisions, whether as regards deeds written rollways or those written bookways, and nothing which can be construed to indicate on what part of the page the signature to the pages of the bookways deed is to be placed. I should be unwilling to invent a statutory solemnity of which neither statute nor decision has said a word.

But really this is wholly immaterial to the question in hand. For even supposing that the Act 1696 had required each page to be subscribed, that is, signed at the foot or end of it, which it certainly does not provide, these signatures, although subscriptions of the different pages, would be in no sense subscriptions of the deed, and neither singly nor collectively would amount to subscription of any of the things contained in it. Until the deed is subscribed at the end it is wholly without subscription. The signatures on each page only

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serve another but very important object which the statute so clearly sets out in its terms as to admit of no doubt whatever—[reads Act 1696, c. 15]. Its object was to enable the lieges with safety to adopt the mode of writing deeds bookways, and at the same time to provide for the safeguards in regard to deeds written rollways. These provisions were entirely directed to ensuring that the different sheets on which the deeds were written were those to which the granter's subscription applied. The statute had no other object. Accordingly, sidescribing is made matter of solemnity in deeds written in rolls, and signature of each page "as the margins were before" when the deed is written bookways. Both are on precisely the same footing; they had the same object, and are subject to the same rules. Now, no one pretends that sidescribing had any effect as subscription under the Act 1540, or could with any propriety be so called. It was a signature in a particular place specified, which not only was not, but from its nature never could be, a subscription; for one-half of the name had to be written at the bottom of one leaf, and the other half at the top of the other.

The only other remark I shall make is, that in every case in which the Act 1696 has come in question, as far as I know, its specific object, as I have described it, has been recognised. Accordingly, it was early held, and ultimately finally settled in the case of Smith v. The Bank of Scotland, July 4, 1816, F. C., that a deed written on one sheet was good although only subscribed at the end,—a result which never could have been arrived at under the words of the statute, excepting on the footing that the signature of each page was only necessary to indicate the separate parts of the writing to which the subscription applied.

Something has been said as to how far this deed or settlement has been already founded on in the sense of the 38th section of the statute, so as to make it incompetent now to add the designations of the witnesses to their subscriptions. No such matter is raised under this petition, nor has been argued before us. I wish to express no opinion on the question. I am certainly not to be understood as assenting to the proposition that this settlement has been already founded on in judgment.

THIS interlocutor was pronounced:—"In conformity with the opinion of the majority of the seven Judges, find and declare that the said last will and testament was duly subscribed by the granter thereof, the Honourable Caroline Elizabeth Conyers Norton, and by the witnesses by whom the same bears to be attested, viz. John Holland Payne, wine merchant in Madeira, and Francis Gorbell Tabb, clerk to the Brazilian Telegraph Company at Funchal, Madeira, and Frank Burridge Foy, also clerk there to the said company: Find the petitioners entitled to expenses since the reporting of the proof, and remit," &c.

MORTON, NEILSON, & SMART, W.S.—T. & R. B. RANKEN, W.S.—Agents.

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J. PULLAR AND SONS, Pursuers.—*Balfour—J. P. B. Robertson.*
PERTH POLICE COMMISSIONERS, Defenders.—*Fraser—Scott.*

Police and Improvement (Scotland) Act, 1862, 25 *and* 26 *Vict. cap.* 101, sec. 132.—The Police and Improvement (Scotland) Act, 1862, sec. 132, enacts that, in burghs adopting the Act, "the dust," "ashes," "rubbish," &c., "within the burgh shall be and hereby are vested in the police commissioners," and that they shall cause the same to be collected from the "streets, houses, and

premises" in the burgh. *Held* that the enactment did not apply to ashes produced in the furnaces of a manufactory. No. 175.

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2D DIVISION. Lord Young. I.

MESSRS J. PULLAR AND SONS, proprietors and occupants of the North British Dye-Works, Perth, raised an action on 15th November 1875 against the police commissioners of the town of Perth, appointed under the "Police and Improvement (Scotland) Act, 1862:" * They concluded (1) for declarator "that the said commissioners are bound, in terms of the 'Police and Improvement (Scotland) Act, 1862,' to collect from the pursuers' said works the whole dust, dung, ashes, rubbish, and filth (excepting always stable and byre dung) produced in the pursuers' said works, called the North British Dye-Works, in the city of Perth, including the ashes of the coal or other fuel consumed in the furnaces of said works, and to remove the same from the said works at such convenient hours and times as the said commissioners shall think proper;" (2) for a decerniture on the defenders to remove the ashes from their works; and (3) for a decerniture on the defenders to make payment of the various sums of money, amounting in all to £144, 3s. 4d., expended by them, the pursuers, in themselves removing the ashes, &c., from their works from November 1872 when the defenders ceased to remove them. The 132d section, under part iv. of the Act, entitled "Cleansing Streets," provides—"The dust, dung, ashes, rubbish, and filth (excepting always stable and byre dung) within the burgh shall be and the same are hereby vested in the commissioners, who shall have power to sell and dispose of the same as they think proper, and the money arising therefrom shall be applied to the police purposes of this Act; and the commissioners shall cause all the streets, public or private, together with the foot pavements, from time to time to be properly swept and cleansed, and all the dust, dung, ashes, rubbish, and filth to be collected from such streets, privies, sewers, cesspools, houses, or premises, and to be removed at such convenient hours and times as they shall consider proper."

The pursuers averred that up to November 1872 the defenders had collected and removed the ashes, &c., from their works, but had since refused to do so. It was further stated that the defenders collected and carried away similar ashes, &c., from other manufactories and works in the burgh, including those produced in the furnace attached to certain mechanical works belonging to the pursuers situated opposite to their dye-works.

The police commissioners lodged defences, in which they set forth sections 134, 137, and 142 of the Act, which conferred on them discretionary powers as to the mode in which they might cause proprietors to collect and deposit dust, ashes, &c., in specified places, and to clean their own premises. They also averred that the pursuers had greatly extended their works of late years, and instead of using one or two furnaces now used as many as twenty.

They also averred—"The substances which the pursuers call 'the ashes of the fuel consumed in the furnaces in operation in their works' are not manurial, and are of no saleable value, and are worthless to the defenders. Farther, they are truly not ashes at all. The principle on which the pursuers' furnaces are constructed is such that the fuel used (coal) is so completely exhausted and used up as to leave nothing but a hard flinty substance, called "clinkers" or danders, perfectly worthless for any purpose, except the bottoming of roads or the like. The pursuers themselves invariably used said clinkers for these purposes, and allowed them so to

* 25 and 26 Vict. cap. 101.

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be used by others. On a proper construction of said statute, the defenders are not thereby bound to remove worthless articles, produced in the course of the operations necessary in carrying on dye-works, tan-works, stone-yards, and works of a similar character, for the interest of private individuals, and thus to relieve these individuals of a considerable expense connected with the carrying on of their private business, in order to lay the same upon the public."

The pursuers pleaded;—(1) The police commissioners of Perth are bound under the foresaid statute to collect and remove ashes and other rubbish from the pursuers' said works; and the pursuers are entitled to have decree declaring the said duty, and ordering its performance. (2) The pursuers are entitled to recover from the said commissioners the monies expended by them in consequence of the commissioners' failure to perform the said duty.

The defenders pleaded;—(1) The statements of the pursuers are not relevant. (2) On a true construction of the Act founded on, the defenders are not bound to collect and remove ashes or other refuse from within private premises. (3) The defenders are not bound under the Act to collect and remove from private premises substances not manurial and without saleable value. (4) The substance produced by the pursuers' furnaces not being ashes, within the sense of the statute, the defenders should be assoilzied. (5) Under said Act, and particularly having reference to section 137, the defenders are not entitled, at the public cost, to employ scavengers to collect ashes from private premises. (6) By said Act, and particularly by section 142, private courts and other places must be kept clean by the occupiers at their own cost.

The Lord Ordinary allowed a proof, from which it appeared that the pursuers then had from twenty-five to twenty-six furnaces in constant operation, and that from thirty to thirty-five tons of ashes per week required to be removed. Evidence was led to the effect that the commissioners still continued to remove ashes from the furnaces of brewers, flax-spinners, &c., within the burgh, but in no case did the amount of rubbish exceed three or four cart-loads a-week. The assessment paid by the pursuers for police purposes amounted to £141 in 1875-6.

On 9th March 1876 the Lord Ordinary assoilzied the defenders from the conclusions of the summons.*

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* "OPINION.—I have had considerable difficulty in arriving at a satisfactory conclusion in this case, as I have been unable to find any precedent or principle or rule of law to guide me. On the whole matter I have come to be of opinion that, subject to the qualifications which I shall state, the defenders' second plea in law is well founded. It is, 'that on a true construction of the Act founded on they are not bound to collect and remove ashes or other refuse from within private premises.' That plea, however, must be read as meaning from within the premises now in question, or others of substantially the same character, for I mean my decision to apply to these premises only, and not to lay down any rule larger than this, that in such a manufactory as the present, having regard to its character and size, the police commissioners are not, under the Act of Parliament, bound to lift and remove the refuse clinkers and ashes produced by the furnaces of the engine-houses. I do not mean to lay down any such proposition as this, that they are not bound to remove the cinders from any manufactory whatsoever. There may be manufactories of such a domestic character that the fires therein, and the ashes and cinders falling therefrom, are not, for the purposes of such a question as the present, and so far as regards the duties of the commissioners, distinguishable from the fires and ashes of ordinary dwelling-houses. But here there is an extensive dye-work, carried on in premises erected for the purpose, and there are no less than twenty-six engine furnaces now going

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The pursuers reclaimed, and argued;—All the ashes in burgh being vested in the defenders by the 132d section of the "Police and Improvement Act, 1862," they were bound to remove them. These ashes were ashes of the nature contemplated in the statute, and such had been the view of the commissioners until recently with regard to the pursuers' ashes, and they still held that view with respect to the ashes of all the other factories in burgh. By the statute the commissioners were bound to collect and remove "ashes, rubbish, and filth" from, *inter alia*, "premises" in the burgh. The interpretation of the clause defined "premises" as including manufactories.* If these were, then, ashes in the sense of the statute, the mere fact of their being in large quantities could not affect the question—*majus et minus non variant speciem.*

Argued for the defenders;—The ashes contemplated in the statute were domestic ashes—the result of human life—not of manufactories. The clause was enacted for the purpose of "cleansing streets," and not to enable manufacturers to get rid of their refuse at the expense of the rates. As regards the definition of premises in the interpretation clause, it was evident that that definition had reference to assessments only. In England a somewhat similar question had arisen, when it had been held that "tenements" did not include manufactories.[1] Moreover, the interpretation clause also provided that the meanings there assigned to words were only to be so understood "unless there be something in the subject or context repugnant to such construction."

At advising,—

LORD JUSTICE-CLERK.—The question raised in this case is one of very general importance. The action is raised by Messrs Pullar, who are dyers in the town of Perth, against the police commissioners of that burgh, to have it found that the commissioners are bound to carry away the calcined ashes produced by the furnaces maintained by the pursuers for the purposes of their trade. It is contended that the commissioners are bound to do this under section 132 of the Police Act of 1861, which section occurs in that part of the Act which relates to the cleansing of streets. That section puts on the police commissioners the duty of properly sweeping and cleansing the streets, and collecting and removing "all the dust, dung, ashes, rubbish, and filth" from "streets, privies, sewers, cesspools, houses, or premises." That dust, &c., is declared by a previous part of the section to be the property of and vested in the commissioners. The defence is simply that the section relates to ashes and rubbish which are the result

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there. My opinion is, that such a manufactory, looking to its character and size, is not, for the purposes of collecting and removing the clinkers and ashes falling from these numerous furnaces, within the operation of clause 132 of the Act of Parliament. I cannot in terms sustain the second plea in law as it stands, and it need hardly be altered, for I can simply pronounce absolvitor from the conclusions of the action, without any particular findings, explaining, as I have done sufficiently, that I mean only to decide the particular case, without laying down any larger principle than I have announced as necessary to cover it. Of course, as the defenders are to have absolvitor, that will carry expenses."

* Sec. 3. . . .—"The word 'lands' and the word 'premises' shall include all lands, springs, rights of servitude, dwelling-houses, shops, warehouses, vaults, cellars, stables, breweries, manufactories, mills, fixed or attached machinery therein, yards, places, and other heritages specified or included in the Act of the 17 and 18 Vict. chap. 91, intituled 'an Act for the Valuation of Lands and Heritages in Scotland.'"

[1] Lyndon v. Standbridge, April 27, 1857, 26 L. J., Com. Law, 386.

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of the ordinary domestic habits of the population, and was never intended to apply to the products of a manufacturing process. Accordingly, the defenders, when called upon to remove these ashes, say that they are not the result of domestic life but the products of an extensive manufacturing process. It is not said that they are detrimental to any one except the pursuers themselves, or likely to become so if left. The true object of the action is to get the police commissioners to remove what the pursuers would otherwise need to remove themselves at considerable expense,—in short, to obtain a sort of subsidy which other ratepayers do not get. I am of opinion that there is no good ground for the conclusions of the summons, and I have no doubt that the defence is a good one.

The contention of the pursuers is that ashes, wherever found in "premises," belong to the police commissioners, and they are bound to remove them, and that, as in the interpretation clause of the statute, "premises" are said to include manufactories, these ashes fall under the provisions of the statute.

It is, in my opinion, extending the application of the statute too far to say that the term "ashes" is to apply to everything which is left over after the process of combustion. We all know of processes, whereby wood, or sea-weed, or other materials are subjected to combustion for the purpose of producing a valuable result, and it would be vain to contend that where such a process is conducted within burgh the result of it is vested in and belongs to the commissioners. An ingenious attempt was made in the course of the argument to draw a distinction between the case where the combustion was the object of the process, and the case where, as here, the object was only to obtain heat for some other and ulterior purpose. I do not think that, if the statute is to be held to have the meaning put upon it by the pursuers, there is room for such a distinction. The value of the article can have nothing to do with the question.

The real meaning of the word "ashes" in this statute is manifestly such ashes as according to the nature of the population in the burgh would become deleterious and offensive if left unremoved.

I do not go farther into a comparison of the clauses than to say that the clause vesting in the commissioners the property of the ashes which they are bound to remove is conclusive as regards the products of a manufacturing process. Moreover, a discretionary power is given to the police commissioners to cause proprietors to clean out areas and spaces, and if the proprietors or occupiers fail to clean them out then they are empowered to clean them out at the expense of the proprietors.

With regard to the meaning of the word "premises" in the Act I will only remark that in the interpretation-clause it is provided that certain words shall have the meanings there assigned to them, "unless there be something in the subject or context repugnant to such construction." It is then stated that "premises" shall include, *inter alia*, "manufactories." And most rightly, because the nuisances which it was the object of the statute to prevent may be produced in manufactories as well as elsewhere. But to apply the provision to such products as these would be repugnant to the subject and context.

In regard to the case quoted from the English Courts, I think the Judges there took the ground which I have now taken, that domestic ashes alone were intended to be affected by the Act, and not those produced in a manufacturing process. I do not go at all on the meaning of the word "premises" or "tenement." In the view I take, these are premises in the sense of the Act. But

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the calcined products of these furnaces are not such "ashes" as the statute contemplates. On the whole matter I am clear this action cannot be sustained.

LORD NEAVES.—I am of the same opinion. The case should be decided upon the general purport and object of the statute. In the case of a dwelling-house, it is plain that the police commissioners are bound to take away the usual ashes and refuse. Each inhabitant thus gets the benefit of the removal. But it is different when we have to deal with an extraordinary and exceptional case, where there is produced in great quantity in the course of a manufacture for the purposes of profit refuse which the manufacturer for his own convenience, and in order that he may make still more profit, or be saved from additional outlay, wishes taken away at the expense of his neighbours. These ashes do not seem a nuisance to any one except himself. It was not intended by this statute to lay a burden upon the general inhabitants, so as to compel them to remove an extraordinary accumulation of refuse of this kind. They are ashes in one sense, for the same name is applicable to things that result in various ways. The distinction lies between a product which is useful and one which is not, and between usual domestic ashes and those which are desired to be removed merely for the convenience of the manufacturer.

With regard to the interpretation-clause I am clear that the meaning of the words depends upon the context, and if the word here were read as the pursuers desire it would be contrary to the spirit of the statute.

LORD ORMIDALE.—I entirely concur with the Lord Ordinary in thinking it very difficult to arrive at a satisfactory conclusion in this case. The difficulty arises from the uncertain and ambiguous terms in which the statutory provisions affecting the disputed question are expressed.

The Lord Ordinary says that he has been influenced by the size and character of the work or manufactory in question, and after adding that for that reason he thinks the commissioners are not bound to remove the ashes, he remarks—"I do not mean to lay down any such proposition as this, that they are not bound to remove the cinders from any manufactory whatsoever. There may be manufactories of such a domestic character that the fires therein, and the ashes and cinders falling therefrom, are not, for the purposes of such a question as the present, and, so far as regards the duties of the commissioners, distinguishable from the fires and ashes of ordinary dwelling-houses." I rather think the true ground of judgment is to be found in that explanation of the Lord Ordinary. But even if this be so, I have still considerable difficulty in construing the Act of Parliament in conformity with it. The 132d section commences by vesting all the ashes and rubbish in burgh in the commissioners; and if the clause had stopped there nothing could be clearer than that they could be compelled to remove all the ashes belonging to them. But, then, the section goes on to specify the ashes which are to be removed, viz., "the dust, dung, ashes, rubbish, and filth to be collected from such streets, privies, sewers, cesspools, houses, or premises." Now, although the clause, like many more in the Act, is expressed in very loose and uncertain terms, I am inclined to think that it must be limited to premises of the nature of inhabited houses, and not large manufactories or works such as that here in question. I rather think that to some extent houses and premises are, in this clause of the Act, meant to be convertible terms. The interpretation clause, it is true, says "premises" is to include manufactories; still, when you

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find the word in the particular clause under consideration in juxtaposition with houses, something of the same kind must, I think, have been meant. It might, indeed, be questionable whether dye-works are a manufactory at all. Although not suggested in argument, I doubt whether washing, scouring, and dyeing-works are properly a manufactory. They are certainly not so called popularly, and they are not even so denominated in the present record. But, at any rate, I think we are entitled to construe the expression "manufactory" with reference to the context of the clause in which it is used.

With considerable difficulty therefore, and not without hesitation, I am inclined to concur in the opinion of the Lord Ordinary as he has expressed it.

LORD GIFFORD.—I entirely concur in the judgment proposed to be pronounced.

In construing the section of the Act under consideration it is necessary to look to the object of the statute. It is a police statute, intended to regulate the cleansing, lighting, and watching of burghs and populous places. The purpose of the whole statute is to secure the health, comfort, and safety of the inhabitants and residents by proper police regulations. In particular, the clauses relating to the removal of refuse or rubbish were not intended to assist or encourage manufactories, but to relieve the population of the dust, refuse, and rubbish which necessarily accumulates in a burgh.

There is a broad distinction between domestic dust, filth, and ashes, and the ashes or refuse produced by a manufacturer in the course of his trade. That makes the difference between police ashes and manufacturing ashes. The existence of this distinction seems to me to be enough for the disposal of this case, for I think that the statute provides for the removal at the public expense, that is, at the expense of the ratepayers, of what may be called domestic refuse, such as ashes from domestic fires and the ordinary residential refuse of an ordinary dwelling-house. But I think it quite clear that these provisions do not apply to the artificial refuse of whatever kind produced in the course of a manufacture. Such refuse may be very great in amount, or very noxious and injurious in its nature, and in all cases the burden and cost of the removal of such refuse must lie on the manufacturer himself. The general public are not to pay what is really part of the cost of a private manufactory.

There may be cases where it would be impossible to say whether the ashes were domestic or manufacturing; but the ashes in question in the present case, at all events, are clearly in the category of manufacturing ashes, and so out of all dispute.

THE COURT adhered.

ROBERT A. BROWN, L.A.—HILL & FERGUSSON, W.S.—Agents.

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JOHN M'CULLOCH AND OTHERS, Pursuers.—*Fraser—Rhind.*
THE KIRK-SESSION AND HERITORS OF THE PARISH OF DALRY, Defenders.—*D.-F. Watson—M'Kie.*
THE SCHOOL BOARD OF THE PARISH OF DALRY, Defenders.—*Burnet.*

School—Education Act, 1872, *secs.* 37 *and* 38—*Transfer of School to School Board—Endowed School.*—*Held* that the provisions of the Education Act, 1872, which prevent a school board acquiring by purchase or lease a school "erected or acquired, and maintained, or partly maintained, with funds derived from contributions or donations (whether by the members of a particular church or

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religious body or not) for the purpose, or authorised by the contributors or donors to be applied for the purpose of promoting education," apply only to "subscription" schools, and did not render illegal the lease to a school board of a school erected and maintained by an ancient endowment.

School—Trust—Higher Education.—A testator, in the 17th century, bequeathed funds "for the erection of a free grammar school, and maintenance of poor scholars, with a sufficient learned able schoolmaster that can fit them for the several universities and colleges," the school to be in or near D.

The trust-funds proved inadequate to maintain a school of the character contemplated, and there being no other school in the neighbourhood of D, the income of the trust was for time immemorial prior to the passing of the Education Act, 1872, applied to the maintenance of a school at D, which was attended by the children of the labouring classes in the district, and at which no fees were exacted.

After the passing of the Education Act, 1872, the trustees of the endowed school did not consider it advisable to maintain a separate school in competition with the school board of D, who had appointed a schoolmaster of their own; and they entered into an arrangement with the board by which the school and schoolmaster's house belonging to the trust were leased to the board for a term of years; and the trustees bound themselves during the lease to contribute to the salary of the board's schoolmaster a sum nearly equal to the income of the endowment, subject to the condition that, in addition to the elementary instruction, the higher branches of education should be taught to fit such of the scholars as might desire it for entering a university, and that poor children, or those whom the parochial board of D might recommend, should be taught without school fees. Except in the case of children whose parents were considered unable to pay fees the school board exacted the ordinary fees.

An action was raised against the trustees, in which the school board were sisted as defenders, at the instance of certain inhabitants of D, who maintained that the new arrangement was illegal, and claimed that the trustees should revert to the old system, so that they might have their children educated free of charge.

Held that in the circumstances, it being impossible to carry out the testator's intentions literally, the new arrangement was lawful and within the discretion of the trustees, subject, however, to this qualification, that the trustees were not entitled to delegate to the parochial board their right to nominate children who were to have the benefit of the endowment, which right must remain with the trustees; and that on such nomination the school board were bound, while the agreement existed, to have the children so nominated instructed in the higher as well as in the elementary branches of education, so as to fit them for one or other of the universities.

Expenses.—Both parties allowed modified expenses out of the trust-funds.

2D DIVISION. Lord Shand. R.

BY his last will and testament, and codicil thereto, both dated in the year 1639, Robert Johnston of London bequeathed the sum of £3000 sterling of lawful money of England, to be bestowed and employed upon some good godly and pious works within the realm of Scotland, in such way and manner as the Right Honourable the Lord Johnston, and Sir David Cunningham, of London, Knight and Baronet, supervisers of the said last will and testament, should in their wisdom think good.

Lord Johnston having died, the disposal of the fund devolved upon Sir David Cunningham as sole surviving "superviser," who, upon 28th October 1658, executed a "deed of declaration anent the latter will and testament of the deceased Mr Robert Johnston."

Upon the narrative given above, and upon the further narrative that the sum of £3000 could not be got in from the persons owing money to the estate of the deceased, and after appointing £500 for the maintenance of a free grammar school at Kilmaurs, in Ayrshire, the deed of declaration proceeded:—"Whereas the remainder of the said £3000 sterling, being

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£2500 sterling, some part of it may prove desperate debt, and can never be obtained, in discharge of that trust reposed in me to the glory of Almighty God, the memory of the worthy testator, and the good of posterity, I appoint, dedicate, ordain, and think good that the said remaining sum, or so much of the said £2500 sterling as can be recovered, shall be employed upon lands or annualrent, upon good security, for erection of a free grammar school, and maintenance of poor scholars, with a sufficient learned able schoolmaster that can fit them for the several universities or colleges, and the said school to be in or near the place anciently called Saint John's Claughan, within the parish of Dalry and stewartry of Kirkcudbright, in Galloway."

Administrators were nominated by Sir David Cunningham to recover the funds, and to make "orders, constitutions, laws, and foundations" for the management thereof. It appeared, however, that these persons never acted, and the kirk-session and heritors of the parish of Dalry took upon themselves the duty of recovering and administering the mortified fund. After much litigation with the debtors to Mr Johnston's estate and their representatives a portion of the funds were recovered, and a school was established at Dalry towards the close of the seventeenth century.

The way in which the trust was administered, and the circumstances which led to the present action, are thus stated in the note to the Lord Ordinary's interlocutor in the present action, dated 16th February 1876:—

"The trust-property and estate consist of a schoolhouse and schoolmaster's house and garden, and adjoining property of about 12 acres in extent, and a sum of upwards of £1100, invested in three per cent consols, and which produces about £34 a-year. The ground adjoining the school subjects has been let as an agricultural subject for ten years at an annual rent of £22. The income of the trust is thus a sum of £55; and that sum, or somewhat less, if allowance be made for annual expenses of management, and repairs on the school buildings, in addition to a free house and garden, is the whole amount available to the trustees as the means of remuneration of any schoolmaster they might appoint. The trust-estate has been derived almost entirely from the fund bequeathed by Mr Johnston in 1639; but small contributions have been made to the trustees from time to time for the purposes of the trust.

"Prior to the passing of the Education Act, it appears, as stated by the pursuers, that the school at Dalry established by the heritors and kirk-session, as trustees under Mr Johnston's settlement and relative instructions, was the only school available for the inhabitants of the village of Dalry, consisting of about 600 persons. The other schools, which supplied the wants of other parts of the parish were at a distance of five miles and seven miles respectively from the village. The trustees gave the schoolmaster the free income of the trust. This afforded a very limited remuneration; for, the school being free, the only return received from the children consisted of voluntary offerings at Candlemas, amounting to about £12 annually. The schoolmaster's income was generally enlarged by his obtaining the appointments of inspector of poor and collector of rates, and the like; but over these appointments the trustees had no control. So long as there was no other means of education in the immediate neighbourhood the trustees acted on the view that it was their duty to keep up the school according to the system which had lasted for many years, although it was kept up under considerable disadvantages, from the limited means at their disposal.

"After the passing of the Education Act of 1872 the school board of the parish appointed a schoolmaster at a salary of £120 a-year, who, besides giving instruction in the elementary branches of education, has

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taught also Latin, Greek, French, and mathematics. They also appointed a female teacher at a salary of £60 a-year. The defenders, the trustees under Mr Johnston's settlement, have, under these circumstances, thought it proper and expedient, in the discharge of their duty, to discontinue the occupation of their school buildings by a separate master in competition with the school board. They have arranged with the board that the school and schoolmaster's house should be given up to the board on a lease of four years, which expires on 6th February 1878, at a stipulated rent of £12; and they have agreed to contribute towards the salary of the board's schoolmaster a sum of £50 annually, subject to the condition that the teaching in the school shall not be simply of an elementary character, but shall embrace those higher branches which are necessary to fit such of the scholars as may desire it for entering a university."

The lease, which was submitted to the Board of Education, and approved by them, contained also this condition,—"That poor children, or those whom the parochial board of Dalry recommend, shall be taught without school fees being charged for them."

The school board accordingly entered into possession of the premises so let, and charged the ordinary fees, except in the case of children whose parents were considered too poor to pay fees.

In these circumstances the present action was raised against the kirk-session and heritors, as trustees of the mortified fund, by John M'Culloch and others, inhabitants of the village of Dalry, subsisting by manual labour, who had children attending the free school at the date when it was leased to the school board. The conclusions of the summons were for declarator that the defenders were bound, now and in all time coming, to employ the funds under their management in the upholding of a free grammar school, and maintenance of free scholars in or near the village of Dalry, and that the pursuers, as inhabitants of the said village, were entitled to have their children educated free of cost at the grammar school, which the defenders were bound to maintain. There was also a conclusion for accounting, and a conclusion that "in the event of it appearing that the said funds are not sufficient for the support of a free grammar school, it ought and should be found and declared, by decree foresaid, that the kirk-session and heritors of the said parish of Dalry are bound to apply the said funds in such way and manner as our said Lords may declare and appoint; and our said Lords ought and should, in the course of the present process, declare and appoint the way and manner in which the said funds are to be applied; and the way and manner in which the said funds are to be applied having been declared and appointed by our said Lords, the kirk-session and heritors of the said parish of Dalry ought and should be decerned and ordained, by decree of our said Lords, so to apply them."

The pursuers averred that they were in poor circumstances, and that their children were "poor scholars" in the meaning of the words as contained in Sir David Cunningham's deed of declaration.

They pleaded;—(1) The kirk-session and heritors of the parish of Dalry having taken possession and assumed the management of the funds destined by the settlement of Robert Johnston, and relative declaration or appointment of Sir David Cunningham, for the support of a free school in or near the village of Dalry, they are, in pursuance of the said deeds, bound to maintain such a school, and to apply to that purpose the funds under their control. (2) In respect of the terms of the said deeds, and of immemorial usage, the adult pursuers, as inhabitants of the parish of Dalry, are entitled to have their children educated gratuitously at the free school, which falls to be maintained by the kirk-session and heritors of

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Dalry, as trustees and managers of the foresaid funds. (3) Assuming, but denying, that the funds of the trust are insufficient for the support of a free grammar school, the pursuers are entitled to decree as in that event concluded for. (4) The lease to the school board, dated 15th December 1873, is illegal and invalid.

The kirk-session and heritors stated—"The annual income of the trust is, in itself, insufficient now-a-days to keep up a school such as the donor contemplated; and the arrangement with the school board was, and is, in the opinion of the trustees, the best and most judicious way of maintaining and upholding the Endowed Grammar School of Dalry, and of fulfilling the purposes of the trust. Should the Court, however, be of opinion that the trustees have acted wrongfully and illegally in entering into said arrangements with the school board of Dalry, the trustees would respectfully solicit the Court to indicate and declare the way and manner in which the trustees are to apply the funds of the trust, so as continue and carry on the Endowed School of Dalry according to the intentions of the donor."

They pleaded;—(1) All parties interested are not called. (2) The heritors and kirk-session not being an incorporation, the conclusions of the action are incompetent, in so far as directed against them. (3) The pursuers have not libelled, and do not possess, a legal title or interest sufficient to support the present action. (5) The arrangements condescended on, and entered into with the school board of Dalry and others, for the efficient carrying on of said endowed grammar school, rendered necessary by the altered circumstances of the times, having been within the powers and discretion of the trustees, in accordance with the intentions of the donor, and lawful and expedient, the same ought not to be set aside or disturbed.

Upon the suggestion of the Lord Ordinary the school board of Dalry sisted themselves as defenders. A conclusion was then added to the summons for declarator that the agreement with the school board was invalid and illegal.

The Lord Ordinary, on 16th February 1876, pronounced this interlocutor:—"Having resumed consideration of the cause, finds that the defenders' second and third pleas in law are not insisted in, and repels the same: Finds that having regard to the amount of the funds and estate now belonging to the trust administered by the defenders, the kirk-session and heritors of Dalry, as trustees and managers of the funds and estate destined for the erection of a free grammar school and maintenance of poor scholars, conform to the last will and testament of Robert Johnston of London, Esq., dated 30th September 1639, and codicil thereto, dated 12th October of the same year, and relative declaration of appointment by Sir David Cunningham, of London, Baronet, dated 28th October 1658, and also to the means of education now provided by the defenders, the school board of the parish of Dalry, under the 'Education (Scotland) Act,' 1872, the arrangement entered into between the kirk-session and heritors, as trustees foresaid and the school board in regard to the use of the school-house and schoolmaster's house and garden belonging to the said trust, and the application of the income of the trust-estate, as set forth on record, and embodied in the agreement and lease, No. 32 of process, are lawful, and within the powers and discretion of the said trustees; sustains the defenders' fifth plea in law, and assoilzies the whole defenders from the conclusion of the action, and decerns: And finds them entitled to expenses," &c.*

* "NOTE.— . . . I have come to the conclusion that the pursuers' claim and pleas are not well founded.

The pursuers reclaimed.

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Argued for the pursuers;—(1) The kirk-session and heritors could

"The settlement of the truster, Mr Johnston, did not define the particular purpose to which the fund bequeathed by him was to be applied, but directed the money 'to be bestowed and employed upon some good godly and pious works within the realm of Scotland,' in such way and manner as the Right Honourable Lord Johnston, and Sir David Cunningham of London, Knight and Baronet, and superviser of the said last will and testament, should in their wisdom think good. Sir David Cunningham, the survivor of these two persons, by a declaration or appointment dated 28th October 1658, directed that such reversion of the funds as might be recovered from the debtors by whom it was due should be employed 'upon lands or annualrent upon good security, for the erection of a free grammar school, and maintenance of poor scholars, with a sufficient learned able schoolmaster that can fit them for the several universities and colleges; and the said school to be in or near the place anciently called St John's Claughan, within the parish of Dalry and stewartry of Kirkcudbright, in Galloway.' It has been already stated how the fund really was employed. The primary intention of the instructions just quoted evidently was not the foundation of a school at which elementary education only should be given, and to which all the children of the immediate neighbourhood should have right to resort for education free of charge. The intention was that the school should be of a higher class—a grammar school; that there should be foundationers, or scholars, 'maintained' in connection with it, and that the schoolmaster should fit these scholars for the several universities or colleges in the country. It was probably because the funds proved to be of smaller amount than was anticipated that this purpose could not be literally carried out; and the trustees, in these circumstances, seem to have exercised a fair discretion in providing such a school as they did. It appears to me, however, to be clear that if at any time the funds of the trust had become so enlarged as to enable them to establish a different and higher class of school for the benefit of a limited number of poor scholars to be trained for admission to the universities, they would have been at least entitled if not bound to provide such a school, even although this should have involved the discontinuance of the free school for elementary education which had previously existed.

"Keeping in view the general nature of the trust as now explained, it has to be next considered whether the arrangement which the trustees actually made with the school board in the altered circumstances, resulting from the passing of the Education Act, was either a violation of the provisions of that Act, or the trust under which the defenders act.

"Immediately on the passing of the statute it became the duty of the board to provide a public school which should meet the wants of the parish and village, and at which they could compel the attendance of children whose education might otherwise be neglected. The trustees thus found that the Legislature had made provision out of the public funds and local rates for the establishment of a school, which would supply, for payment of small fees, that elementary education which they, in the absence of such a provision, had for a long time thought it right to provide. The existence of such a Government school entirely altered the circumstances. If the trustees had made no change, an unfortunate competition would have arisen between a Government school, at which fees were payable, and the school maintained by the trustees, with the probable result of injuring both. Moreover, it became apparent that the purpose which the trustees had hitherto designed to serve would be equally well, if not better, performed by the public school; and it could not be regarded as a hardship on such of the parents as could afford to pay for education that they should be required to pay the small fees of the public school; while children whose parents were unable to do so would be educated at the cost of the ratepayers contributing to the poor-rates. In these circumstances I think the trustees were right in regarding it as their duty to discontinue the school on the footing on which it had been hitherto carried on, and to endeavour, with the

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not delegate their powers. (2) The result of putting the nomination of children in the hands of the parochial board would obviously be that the funds at their disposal, to promote that higher education which it was the object of the trust to provide.

"The arrangement into which they entered with the school board had this end in view—for while, on the one hand, the trustees gave over the school and its pertinents at an apparently small rent, and contributed £50 a-year to the school funds, on the other they stipulated, in the words of the agreement, 'that besides elementary, higher branches shall be taught in said school, to fit scholars for a university in Scotland, if there shall be scholars whose parents or guardians wish them to receive instruction therein.' This arrangement is of a temporary character only, being subject to revision and alteration at the end of four years —that is, at February 1878.

"The arrangement is objected to, first, as a violation of the Education Act, and particularly of sections 37 and 38 of that statute. The former of these sections gives power to the school board to acquire heritable property, by purchase or lease, for the erection of schools and teachers' houses, and to take leases of now existing schools and teachers' houses, and land used in connection therewith, 'not being schools, houses, and land of the description to which the provisions of this Act in the two immediately succeeding sections regarding the transference of existing schools are applicable.' The pursuers maintain that the school and its pertinents belonging to the trustees are of the description to which these succeeding sections apply; and if this were so, the lease would be one which it was beyond the power of the parties to enter into. The succeeding section (38), 'with respect to schools now existing . . . . in any parish or burgh, erected or acquired, and maintained or partly maintained with funds derived from contributions or donations (whether by the members of a particular church or religious body or not) for the purpose, or authorised by the contributors or donors to be applied for the purpose of promoting education,' enacts 'that it shall be lawful for the person or persons vested with the title of any such school, with consent of the person or persons having the administration of the trusts upon which the same is held, to transfer such school, together with the site thereof, and any land or teacher's house held or used in connection therewith, to the school board of the parish or burgh in which it is situated, to the end and effect that such school shall thereafter be under the management of such board as a public school in the same manner as any public school under the Act.' The language here used is certainly of a very general and comprehensive nature. It may fairly be maintained that it is broad enough in its terms to cover such a case as the present, and I was formerly strongly disposed to hold that it included schools and teachers' houses, which, like the present, had been erected and maintained by means of a fund originally given as a donation *mortis causa*. If that view were sound it would follow that while such existing schools and teachers' houses might be given over absolutely to the school board, the board would not be entitled to take them on any other terms, and so could not acquire right to them by purchase or lease. I have, however, on further consideration, become satisfied that, on a sound construction of the statute, the section (38) has not this meaning—that it does not apply to what may shortly be described as mortified or endowed schools, and applies only to that class of schools, of which a very large number existed throughout the country when the statute passed, which may be described as subscription schools, whether maintained by the members of a particular church or religious body or not. When the statute passed there was a large number of schools throughout the country, mostly in connection with particular religious denominations, which had been erected and were maintained by donations and contributions from persons living in the parish or district in which the schools existed. The effect of the statute was to make those persons liable, for the first time, to a local rate for the maintenance of new schools and schoolhouses. The purpose for which the existing schools had been erected was about to be served in a great measure, if not entirely, in most cases by the new schools, which were to be partly sup-

board would nominate the children of paupers, whom they would have been otherwise bound to have educated free. This was a clear perversion ported by funds provided by Government. It was reasonable to suppose that the persons who had hitherto voluntarily maintained the existing schools would think it unnecessary longer to bear that burden, particularly as they had now become liable to pay a school rate. The schools and schoolhouses had, however, in the meantime, been dedicated to the purposes of education, and it seems to have been thought reasonable by the Legislature, that, on the one hand, this property should not be made the means of profit to the subscribers by being sold or leased to the different school boards throughout the country, but that, on the other, the subscribers should be relieved of further burdens in connection with the school property, if they were willing to give it over for the purposes of education, for which it had been previously used. Accordingly, if the subscribers to the schools, in consequence of the new arrangements of the Legislature, desired to discontinue the use of them, and so to be freed from the burden of maintenance which they had hitherto voluntarily undertaken, the statute authorised them, through the persons in the management, or a majority of not less than two-thirds of their number, to give over the property to the school board. The explanation of the prohibitive words of section 37 evidently is, that it was not thought proper that school buildings, of the nature referred to, dedicated to education, and maintained by subscriptions, and thus, so far a burden on their supporters, should become a source of profit to those who built or supported them; and it seems to have been assumed that sufficient inducement to give over many school buildings, as authorised by section 38, was to be found in the fact that another provision for education had been made, and that, generally speaking, the subscribers to voluntary schools would be obliged to contribute, as ratepayers, to the new system. It is very difficult, however, to suppose, comprehensive though the language of section 37 be, that the Legislature intended that trustees, in the administration of endowed schools throughout the country, should be entitled to divest themselves of their school buildings, with the result of defeating the trust under which these are held. If the pursuers' argument were sound, the schoolhouses and teachers' houses belonging to Heriot's trust, and similar mortifications, might be thus disposed of. Any reasonable interpretation of the statute which would avoid this result must, I think, be adopted. The schools which may lawfully be given over are those 'erected or acquired and maintained, or partly maintained, with funds derived from contributions or donations for the purpose of promoting education;' and this general description receives light from the farther expression, 'whether by the members of a particular church or other religious body.' There is no provision entitling trustees of a mortification to part with the funds or estate other than the school buildings to the board, which there would have been had the statute been intended to apply to such cases. The words used are not apt or fitting to describe properly endowed schools under the administration of trustees. The provision for the erection and maintenance of the schools referred to is stated to be 'funds derived from contributions or donations,' and these words apparently used in the plural, with design, appear properly to refer to subscription schools only, as distinguished from schools founded by a mortification. The apparent reason of the enactment, as already stated, the difficulty in supposing that it could be intended to give the trustees of proper endowed schools the power of transferring the school property, and the absence of any provision for transferring the school funds, are elements which appear to be decisive against the view maintained by the pursuers.

"Holding, therefore, that there is nothing in the Education Act to prevent the school board from taking a lease of the school under section 37 of the statute, the only other question is whether the arrangement is a violation of the defenders' trust. By section 47 of the Education Act the school board are entitled to receive property or funds for the promotion of higher education, and are bound to apply funds for that purpose if so given. For the reasons already stated, in dealing with the particular terms of the trust-deed, I am of opinion

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of the trust to save the ratepayers' pockets. "Poor scholar" did not mean pauper. It was a well-known expression applied to a scholar on an endowed foundation, whatever may be his social position.[1] (3) The agreement was in violation of sec. 38 of the Education Act.[2] The school board could accept as a gift, but could not purchase or lease the school. (4) If the fund was not large enough for the support of a free grammar school, it should be preserved as a nucleus which might attract future donations.

Argued for the defenders;—With so small a fund it was impossible to carry out literally the founder's intention, which was to maintain a higher class school in which scholars should be trained for the universities, not to provide elementary education gratis for the inhabitants of a particular locality. The present arrangement was much more in accordance with the founder's intention than that which preceded it. The trustees paid an annual sum to the school board to enable them to provide higher education, which the smallness of the fund prevented them doing directly. The arrangement had received the sanction of the Board of Education, and the Court would therefore be slow to interfere.[3]

At advising, the opinion of the Court was delivered by

LORD JUSTICE-CLERK.—In this case the summons, which is at the instance of certain inhabitants of Dalry against the kirk-session and heritors, contains this

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that the defenders, as trustees, are not bound, in the altered circumstances, to continue the maintenance of the school on the old system. They are thus left with property and funds of an extent which is not sufficient to enable them to found or maintain a separate institution to promote the higher education of poor scholars. They can only promote that general purpose by such an arrangement as they have made with the school board, and I think the general terms of that arrangement are not only within their powers and discretion, but are in accordance with the general purposes of the trust. It was maintained in the argument for the pursuers that, at all events, the arrangement made by the defenders is liable to objection, because there is no provision in favour of 'poor scholars' which would give them the advantage of such education, as it was the purpose of the trust to promote, on more favourable terms than others having ample means to pay. The agreement entered into provides 'that poor children, or those whom the parochial board of Dalry recommend, shall be taught without school fees being charged for them.' If this provision be read, as I think it fairly must be, as merely relieving the parochial board of the obligation imposed by the statute of paying for the education of children whose parents are unable to bear the expense and not even giving to the trustees themselves the power of nominating poor scholars to be educated free of charge, I think it is open to serious objection. It was not the intention of the truster to relieve the ratepayers of any obligation which might be imposed upon them by statute. At the same time, the purpose of this action, as its whole conclusions shew, was to have the free school again opened for the benefit of the whole neighbourhood, and not to state or enforce an objection to a point of detail of this nature in the agreement entered into. I do not, therefore, regard that objection as being here properly raised. At the same time the defenders will do well in considering whether now, or in any new arrangement to be made at the expiry of the existing agreement, the provision to which I have referred should not be altered to the effect of making the trustees the nominees of any poor scholars whose interests they desire to advance, so as to give them a higher education than they can otherwise obtain free of charge."

[1] Lewin on Trusts, ch. xxi. secs. 12, 13 (6th edn. pp. 466-7), and cases there cited.

[2] Quoted in the Lord Ordinary's note.

[3] National Society v. School Board of London, July 5, 1874, L. R. 18 Eq. 608.

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conclusion—"And our said Lords ought and should, in the course of the present process, declare and appoint the way and manner in which the said funds are to be applied; and the way and manner in which the said funds are to be applied having been declared and appointed by our said Lords, the kirk-session and heritors of the said parish of Dalry ought and should be decerned and ordained, by decree of our said Lords, so to apply them."

The defenders also, at the close of their statement, say—"Should the Court, however, be of opinion that the trustees have acted wrongfully and illegally in entering into said arrangements with the school board of Dalry, the trustees would respectfully solicit the Court to indicate and declare the way and manner in which the trustees are to apply the funds of the trust, so as to continue and carry on the endowed school of Dalry according to the intentions of the donor."

We have had an elaborate and able argument on the whole of the arrangement made by the trustees of the fund. The result at which we have arrived is that, with one exception, no substantial objection can be taken to that arrangement. We do not think that the terms of the 38th clause of the Education Act put any restriction on the school board in regard to the particular contract which they have made with the kirk-session and heritors. We do not think that an endowed school of this kind falls under the terms of that clause. Further, we do not think that there is any breach of trust in the way in which the kirk-session and heritors propose generally to carry out the founder's intention, viz., by a payment to the school board.

But there is one part of the arrangement which not only amounts to a delegation of their powers by the trustees beyond their competency, but a delegation to persons who have or may have an interest adverse to the intentions of the truster,—I refer to that clause of the agreement by which the children who are to have the benefit of gratuitous education in the higher branches are to be nominated by the parochial board. In the first place, I think that the trustees could not put this matter out of their own control; and, in the second place, the obvious result is that the parochial board, by nominating pauper children, would substantially relieve themselves, or rather the ratepayers, from the obligation to provide elementary education for such pauper children.

Both parties have asked us to indicate our opinion as to the proper course to be followed. We think that the agreement entered into by the kirk-session and heritors with the school board should be altered by retaining the nomination of children to the benefits of the endowment in the hands of the kirk-session and heritors.

The case having been again put out, it was stated that the parties had been unable to agree upon a joint minute, the chief point in dispute being whether the kirk-session and heritors should be allowed to nominate among others the children of paupers to be educated gratuitously upon Mr Johnston's foundation. The pursuers maintained that unless it was put beyond the power of the kirk-session and heritors to nominate pauper children there would be a danger of the trust being abused in the interests of the ratepayers.

Ultimately a joint minute was adjusted, by which the parties agreed that the Court should determine the matters in dispute.

THE COURT did not consider it advisable to restrict the discretion of

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the trustees in the way contended for by the pursuers, and pronounced this interlocutor:—"In respect of the joint minute, No. 60 of process, find that the heritors and kirk-session of Dalry, acting as trustees under the will of Mr Johnston, are not entitled to delegate to the parochial board the right to nominate poor children who are to have the benefit of the endowment: Find that the nomination of such poor children must remain with the heritors and kirk-session as trustees, and that on such nomination the school board, while the agreement libelled on exists, are bound to have the poor children so nominated instructed in the higher as well as in the elemenary branches of education, so far as to fit them for one or other of the universities, and to that effect alter the interlocutor of the Lord Ordinary: *Quoad ultra* adhere thereto; appoint the pursuers to lodge in process an account of the expenses incurred by them, and decern."

By a subsequent interlocutor, the pursuers were allowed a modified sum of £100 of expenses, and the kirk-session and heritors a similar sum of £70, out of the trust-funds, and the latter authorised to take credit for the same in their trust-accounts.*

RHIND & LINDSAY, W.S.—J. & J. MILLIGAN, W.S.—W. SCOTT STUART, S.S.C.—Agents.

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July 20, 1876.† Law v. Humphrey.

MARY LAW, Pursuer.—*Lorimer.*
ADAM HUMPHREY, Defender.—*Mair.*

Bill—Onerosity.—In an action by the drawer of a bill against the acceptor, the plea of non-onerosity is not *per se* a good defence.

Executor—Expenses.—Circumstances in which an executor defending an action was found personally liable in expenses, reserving his relief against the free executry estate, if any.

1ST DIVISION. Sheriff of Aberdeenshire. M.

THE pursuer in this case brought an action in the Sheriff Court of Aberdeenshire against the defender to recover from him, as executor of the late David Humphrey, payment of a bill for £50, granted by the latter to her, in consideration, as was alleged, of the services of her illegitimate daughter, deceased, who had acted for some years as his housekeeper. The pursuer did not aver that she herself gave any consideration for the bill, which was a regular and valid document.

The defender pleaded, *inter alia*;—(1) No value having been given by the pursuer for the bill libelled on, or for any part of the sum specified in it, she, as drawer and holder, is not entitled to recover payment thereof from the defender. (2) The deceased David Humphrey having been under no obligation to grant said bill, and his signature having been unduly impetrated from him to it while it was in an imperfect condition, by misrepresentations as to his liability, and under improper pretences, at a time when he was of weak and facile intellect, the pursuer is further debarred from insisting in the conclusions of the present action.

The Sheriff-substitute (Comrie Thomson) allowed both parties a proof and to the pursuer a conjunct probation, and after the proof pronounced this interlocutor:—"Find it proved that the deceased Mary M'Donald,

* It was stated to the Court that the expenses incurred by the pursuers and the kirk-session and heritors respectively were about £180 and £100 respectively, but the accounts had not been taxed.

† Decided Nov. 21, 1875.

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an illegitimate daughter of the pursuer, was for several years in the service of the late David Humphrey; that the defender is David Humphrey's executor-dative; that at the time of Mary M'Donald's death David Humphrey was due to her a considerable sum of arrears of wages; that on her deathbed she requested Humphrey to pay what was due to her to her mother, the pursuer; that David Humphrey undertook to do so; that after her death Humphrey granted to the pursuer the bill now sued for; that he did so in implement of his foresaid undertaking: Finds in point of law that the defence of 'no value' is unfounded: Finds that the defender has failed to prove that the deceased David Humphrey was facile, or that the bill in question was fraudulently impetrated from him: Therefore repels the defences: Decerns against the defender in terms of the conclusions of the summons: Finds the pursuer entitled to expenses of process; allows an account," &c.*

The defender appealed to the Sheriff (Guthrie Smith), who pronounced this interlocutor:—"In respect the defender has failed to prove that the bill in question was granted without consideration, dismisses the appeal, affirms the interlocutor appealed against, and decerns."

The defender appealed.

At advising,—

LORD PRESIDENT.—I have no doubt at all that the Sheriff and Sheriff-substitute are both right, but I do not agree with their grounds of judgment. According to the law of Scotland onerosity of a bill is to be assumed, and non-onerosity can only be proved by writ or oath; but it is not always a good defence. Suppose there had been no onerosity here, and David Humphrey had simply given the bill to the pursuer, her claim to it would have been just as good. The Sheriff-substitute was wrong in allowing the pursuer a proof. She required none. She was entitled to recover. And the same error runs through the whole of his interlocutor, namely, that she had to prove that she gave consideration for the bill. That is not the law of Scotland, and his reference to English cases shews how he was wrong. The law of England is quite different, and it is on this that the Sheriff-substitute founds his judgment. The Sheriff has fallen into the same mistake, because he puts his judgment on the ground

* "NOTE . . .—The genuineness of the bill, and the fact that it was truly the expression of the granter's mind, being thus established, the only other question falling to be disposed of is the defence of non-onerosity. It is true that no value was given to the acceptor of the bill by the drawer. That is to say, no services were rendered by the pursuer to the defender's author. But admittedly the pursuer's daughter was entitled to the sum in the bill, and on deathbed she desired Humphrey to pay that sum to her mother, the pursuer. He promised to do so. That promise could not be enforced in a Court of law, because the pursuer was not the representative of her deceased daughter, who was illegitimate, and died intestate. But Humphrey chose of his own free will to convert what was an imperfect obligation, binding upon him morally but not legally, into a perfect obligation, and this he did by granting the bill now in question. It seems to the Sheriff-substitute that there is here a sufficient answer to the plea of want of consideration. It has been held that value is established, although the bill was granted in implement merely of an obligation in honour, or of a debt barred by prescription, or of a natural duty, such as providing more liberally than the law requires for a wife or a child. (See Chief-Justice Mansfield's observations in Gibbs v. Merrhill, 3 Taunt. 307, and also the opinion of the Judges in Seton v. Seton, 2 Brown, Ch. Cas., 616).

"The present case seems to fall under the same category."

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"in respect the defender has failed to prove that the bill in question was granted without consideration." Even if the defender had proved the want of consideration which he alleges it would have been of no use to him. If the bill was validly the deed of Humphrey that was enough. Though I do not agree in the grounds of the Sheriffs' judgment, I do in the result at which they have arrived. As regards the question of expenses, when an executor conducts a litigation reasonably he ought not to be made liable if he fails, but here I think the defences are most unreasonable, the allegations as to fraud and facility being such as the defender must have known to be untrue.

LORD DEAS.—The bill itself was all the proof required from the pursuer,—in the first instance at all events. The mere allegation of non-onerosity was not enough to change the pursuer's position as holder of the bill. The result to which the Sheriff-substitute and the Sheriff have come is, however, quite right.

LORD ARDMILLAN and LORD MURE concurred.

THE COURT pronounced this interlocutor:—"Recall the interlocutors of the Sheriff-substitute and the Sheriff: Find that the deceased David Humphrey, of whom the defender (appellant) is executor-dative, accepted the bill sued on for £50, drawn on him by the pursuer (respondent): Find that it is not alleged that the said bill was ever retired by the said David Humphrey, or the said sum of £50 paid by him: Find that the defender has failed to prove that the said bill was obtained from the said deceased by fraud or misrepresentation or undue influence: Therefore repel the defences, and decern against the defender in terms of the conclusions of the summons: Find the defender liable personally in expenses to the pursuer, both in the inferior Court and this Court, reserving to him his relief against the free executry estate, if any: Allow accounts of these expenses to be given in," &c.

JOHN AULD, W.S.—WILLIAM OFFICER, S.S.C.—Agents.

No. 178. July 20, 1876.* Thomson, &c. v. Greenock Harbour Trustees.

ALEXANDER THOMSON AND OTHERS, Pursuers.—*D.-F. Watson—Trayner—Macdonald.*

GREENOCK HARBOUR TRUSTEES, Defenders.—*Lord-Adv. Gordon—Guthrie Smith—Wallace.*

Reparation—Culpa—Harbour Trustees—Ship.—After a vessel had left its moorings in a tidal harbour the keel and bottom were found to have sustained injuries. A stone was found fixed in the mud at the spot where the vessel had rested. *Held* that assuming the stone had caused the injuries the harbour trustees were not liable in damages, as they had taken all reasonable means to make the harbour safe, and no fault or negligence of themselves or their servants had been established.

1ST DIVISION. Ld. Craighill. M.

THIS action was brought by Alexander Thomson and others, owners of the vessel "Albatross," against the Greenock Harbour Trustees, to recover £841, 10s. 6d., being damage alleged to have been caused to the vessel by a stone having been allowed to lie in the harbour. The "Albatross" was removed by the orders of the harbour-master to a new berth in the harbour. She there took in 60 or 70 tons of coal, and was taken to the graving-dock of Messrs Caird, when it was discovered that her keel and bottom had been injured. A stone was found in the bed of the harbour

* Decided Dec. 10, 1875.

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at the spot where the vessel had been moored, and this was alleged to have caused the injuries.

The defenders denied that the injury had taken place in their harbour.

The defenders pleaded;—(2) The injury to the pursuers' vessel not having been sustained in the harbour of Greenock, the defenders are not liable. (3) The said injury not having been sustained through the fault or negligence of the defenders, they are entitled to absolvitor, with expenses.

A proof was led, the result of which sufficiently appears from the following interlocutor pronounced by the Lord Ordinary:—"Find as matter of fact that the pursuers have failed to prove that the injuries to their ship, the 'Albatross,' damages for which are sued for in the present action, were received in the East India Harbour at Greenock, the *locus* libelled in the record; in the second place, finds, *separatim*, as matters of fact (1) that the East India Harbour of Greenock is, and has always been, a tidal harbour; (2) that the wharf in that harbour to which the 'Albatross' was moored in July 1874, when, as the pursuers allege, the said injuries were received, was formed in the spring of 1873; (3) that after the said wharf was completed—that is to say, between the spring of 1873 and the end of August 1873—the bottom of the said harbour, to the extent of 150 feet outward and southward from the front of the said wharf, was deepened by dredging to the depth of four feet below the eight feet which previously had been the depth of water in that part of the harbour at low water of ordinary spring tides; (4) that in the course of and immediately after the close of these dredging operations the said portion of the harbour thus deepened was examined by a diver, that stones or other hard substances, if such there were, not lifted in the process of dredging, by which injury might be caused to vessels taking the ground at low water, might be discovered and removed; (5) that these dredging operations, and the subsequent examination and clearing of the bottom, were performed by experienced and efficient workmen, under the supervision of the harbour-engineer and harbour-master, who also were persons fully qualified, by reason of their shill and experience, for discharging the duties with which respectively they were entrusted, and nothing occurred in the course of the execution of the said work, or between its completion and the time when the injury to the 'Albatross' is said by the pursuers to have been received, which suggested, or was calculated to suggest, that the said work had not been properly performed, or that the said portion of the harbour in front of the said wharf was, in consequence of a stone or stones having been left upon the bottom, unsafe for the berthage of ships, or that the time had come when a renewed examination of the bottom of this part of the harbour ought, as a measure of reasonable precaution, to be ordered by the defenders; (6) that the stone by contact with and pressure upon which the said injuries to the 'Albatross' are alleged by the pursuers to have been produced is a mooring-stone, artificially prepared, and there is nothing in the proof shewing or any way indicating the time when it was lowered or thrown into the said harbour; and (7) that the presence of the said stone in the harbour was neither known to nor suspected by the defenders prior to the time when they were informed by the pursuers that the injuries, reparation of which is now sued for, had been received by the 'Albatross': Finds as matter of law that the facts being as set forth in the seven foregoing findings, the defenders, even on the assumption that the injuries received by the said ship were caused by contact with and pressure upon the said stone in the East India Harbour of Greenock, are not liable in damages, nothing constituting fault or negligence on their part having been established: Therefore sustains the defences, assoilzies the defenders from the conclusions of the summons,

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* "NOTE.— . . . . . 1. On the question whether the 'Albatross' was injured in the harbour of Greenock, the Lord Ordinary has experienced great difficulty in coming to a conclusion. He all along has had doubts upon the point, and he has doubts still; and it is only because these doubts remain unremoved that judgment upon this part of the case has been given against the pursuers. . . . . 2. A judgment to this effect upon the facts, so far as hitherto considered, entitles the defenders to be assoilzied, and consequently another ground was not required for the decision of the cause. But in the circumstances the Lord Ordinary has thought it due to the parties that the other defence should also be disposed of by his interlocutor. This defence is to the effect that, even were it proved that the 'Albatross' was injured when in Greenock harbour, the defenders could not be made answerable for the consequences, inasmuch as fault or negligence upon their part has not been established As to the law, there is no controversy between the parties. The pursuers cited at the debate the cases of the Mersey Docks Trustees v. Gibbs and v. Penhallow, Law Rep., 1 Eng. & Ir. App., p. 93, and the defenders admitted that the rules of liability sanctioned by these decisions were applicable to the Greenock Harbour Trust. The only question in dispute, therefore, is a question of fact—has fault or negligence been proved? The Lord Ordinary's opinion is that fault or negligence has not been proved. He thinks the defenders have shewn, in the first place, that the part of the East India Harbour at Greenock within which the 'Albatross' was berthed was dredged, examined, and cleared between February 1873 and the end of August in that year; in the second place, that the interval between the close of these operations and the time when, according to the allegations of the pursuers, the 'Albatross' was injured, was not such as, either by custom or in consequence of anything brought to the knowledge of the defenders, ought to have suggested a renewed examination of the bottom of the harbour as a reasonable precaution; and, in the third place, that the defenders neither knew, nor ought to have known, or even suspected, that a cause of danger such as the stone by which the injuries to the 'Albatross' are said to have been produced, or any other thing by which the safety of vessels using the harbour was imperilled, lay out of sight under water in the dock. Unquestionably the presence of the stone, assuming that while the 'Albatross' lay berthed it was where subsequently discovered, could have been ascertained by the defenders had men been employed to prosecute the search; but this consideration, the Lord Ordinary thinks, falls short of proof of fault or negligence on the part of the defenders. It would be an unreasonable reading of the rule sanctioned by the House of Lords to hold that to counteract possibilities there must be kept up a constant examination of the bottom of a harbour; and, failing this, should injury be caused by the presence of an unsuspected stone, the trustees, who are the administrators of its affairs and funds, shall be dealt with as guilty of fault or negligence, and as a consequence be subjected to liability for reparation of the loss which has been sustained. And yet, unless the rule shall be thus read, fault or negligence cannot on the present occasion be brought home to the defenders. Had the interval been such as, according to the usage, suggested a renewed examination as a reasonable precaution, or had anything occurred which ought to have led the defenders to suspect that there lay buried in the mud under water that which was a source of danger to shipping, their omission to do what was thus pointed out as requisite in the circumstances would have been a culpable neglect; but neither of these alternatives has been established. It is perfectly possible, and the circumstance would not be inconsistent with anything which has been proved, that the stone in question was thrown or was lowered into the water the week before, or even the day before, the 'Albatross' was berthed; and the argument for the pursuers on this part of the case involves the conclusion that though the occurrence was neither known nor suspected by the defenders the non-removal of the stone would of itself be sufficient to render the defenders liable as for fault or neglect. The Lord Ordinary is unable to accept as *sound*

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The pursuers reclaimed, and argued;—The harbour trustees were bound to make and keep the harbour safe for vessels. The owner of a vessel had no option as to the part of the harbour where he placed his vessel, but was bound to go where the harbour-master ordered. Therefore there could not be any negligence on the owners' part.[1]

The defenders argued;—It was not proved that the injuries were caused by the stone. But, assuming that the stone caused the injuries, they were not responsible, because no fault had been proved, either in the original construction of the harbour, in failure to provide proper appliances for securing the safety of vessels, or on the part of the servants of the harbour trustees.[2]

At advising,—

LORD ARDMILLAN.—One question of law is involved in this case; but the case has been treated, and I think rightly treated, in argument, as chiefly depending on questions of fact, and these questions are, I think, three in number. The first is, Was the pursuers' vessel, the "Albatross," injured in the manner alleged by the stone which was found at the bottom of the dock or berthage in the harbour of Greenock, where she lay in July 1874? The second is, Was that stone left in the dock when it was formed or extended in 1873? The third is, If not so left in the dock in 1873, have the defenders, the harbour trustees, been guilty of any carelessness or negligence after that date?

On the first of these questions I have felt the very greatest difficulty. (After going minutely into the evidence, his Lordship came to the conclusion that the preponderance of evidence was in favour of the pursuers' theory that the injury to the keel of the "Albatross" was caused by the stone; that the stone was not in the dock when it was opened in 1873, but might have been placed in the berth only a few days before the vessel came.) But then there remains, or arises, the question of law applicable to this state of the facts.

Must fault or negligence on the part of the harbour trustees be proved? and if so, has it been proved?

I have no doubt that fault or negligence on the part of the trustees or of their servants must be proved. There is no guarantee or assurance of absolute safety. It is not expressed, and it is not implied. The defenders can only be liable if fault or negligence by them or their servants has been proved. Then I think it has not been proved.

On this point, which is sufficient for judgment, my opinion is in favour of the defenders. The stone was latent—discoverable only by dredging or by divers. When it came there, or how it came there, we know not. It may have been thrown in, or carried in by the tide; and that may have been a few weeks, or a few days, or a few hours before the "Albatross" entered. No one can say. Therefore I cannot find any safe or sufficient ground for attributing fault or negligence to the defenders, either on their own part or on the part of their servants;

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a view of the law by which such a result would be sanctioned. There is, he thinks, nothing hitherto laid down or recognised in any of the decisions which necessitates, or rather which would warrant, the adoption of such a principle, and accordingly his judgment upon this point also is against the pursuers, and in favour of the defenders."

[1] Gibbs v. Liverpool Dock Trustees, Feb. 23, 1858, 27 L. J. (Exch.) 321.

[2] Winch v. Conservators of the Thames, May 13, 1874, 9 L. R. (Q. B.) 378; Parnaby v. Lancashire Canal Company, 1839, 11 Adolph. and Ellis' Reports (old series) (Q. B.) 223.

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and in the absence of proved fault or negligence there is no guarantee, and therefore no liability.

LORD DEAS.—This is a case of importance, and requiring all the attention it has received. There are two grounds of defence stated, and which have been given effect to by the Lord Ordinary. One is, that the injury to the vessel is not proved to have been got in this East India Harbour at Greenock; and the other is, that assuming the injury to have been got there, there was in the circumstances no liability on the harbour trustees for the damage sustained. I am of opinion with the Lord Ordinary that this second ground of defence is well founded—that is to say, that assuming the injury to have been got in that harbour, no liability in the circumstances attaches to the trustees. I hold the trustees to be liable for the fault or negligence of their servants; but the question is, whether we can say that the stone was there by the fault or negligence of the servants of the trustees? The Lord Ordinary in his interlocutor has seven findings in point of fact, which lead him to find, "as matter of law, that, the facts being as set forth in the seven foregoing findings, the defenders, even on the assumption that the injuries received by the said ship were caused by contact with and pressure upon the said stone in the East India Harbour of Greenock, are not liable in damages, nothing constituting fault or negligence on their part having been established." Now, I agree in all these seven findings, and likewise in that conclusion in point of law which the Lord Ordinary has drawn from them. It would be quite superfluous, therefore, for me to go over all the particulars which are comprehended in these findings, because I do not differ from—on the contrary, I agree with, them all—and I think the result the Lord Ordinary has come to is rightly drawn from these findings in point of fact. Everything seems to have been done that was proper to be done at the time when the *solum* of the harbour was lowered, and the period that elapsed from that date to the date of this injury was not so long as to have led to the necessity or propriety of overhauling the whole of it again. But the strong ground stated by the Lord Ordinary, and which I particularly concur in, for coming to that result, is that we have no proof whatever, and no presumption, as to the time when that stone got into the place in which it is said to have been, and into the position in which it is said to have caused that injury. It may have been a week or two before; it may have been a day before; it may even have got there after the ship had left the harbour and gone to the graving-dock of Mr Caird. It was not a boulder stone—not a stone that could be naturally there, and which ought therefore to have been removed. It was said that it had probably been used as a sort of mooring-stone, and very likely, from the shape of it and the ring in it, it may have been so. At all events it was an artificial stone, which may have dropped in there accidentally. It is not likely that it was put there purposely; but it may have been dropped there either immediately before the vessel arrived or immediately after the vessel left the harbour. Now, I do not see that there is any presumption in point of fact on that matter which you can apply against the trustees. It is rather for the party claiming these damages to make out his case, and if that stone was dropped in there accidentally a week or two or a day or two before the injury happened, and consequently caused that injury, I think that, assuming the trustees to be responsible for the negligence of their servants, it would be stretching the liability of the trustees to a very unreasonable length to hold that they were liable in such circumstances. That would be holding

that they were liable for a thing which was nothing else than an accident. Something was said about the way in which the accident happened, but it is not necessary to say more about that than the Lord Ordinary has very well said in the note to his interlocutor. If I am right in the view I have now stated, it is not necessary to go further, for it is sufficient for the decision of the case, and so the Lord Ordinary holds it to be.

He says, however, further, that upon the whole matter he is inclined to think it not proved that the ship sustained the injury in the harbour in consequence of coming in contact with this stone, and I am disposed to agree with the Lord Ordinary in that view likewise. I think it is not satisfactorily proved. One strong ground for holding that the injury was sustained in the harbour is stated to be the fact, which appears from the evidence, that in the St Lawrence and on the voyage home there was no such material leakage observed as to lead those on board to suspect that the ship had sustained an injury. That is the main element in the evidence leading to the inference that the injury must have been got in the harbour. If there had been such a leakage when the ship was in the harbour, and before she went into the graving-dock, as to attract attention, and to cause her to be taken to the graving-dock in order to be repaired in consequence of that leakage, then the presumption would have been very strong that the injury had been got after she came into the harbour; but no such leakage was observed after she was in the harbour any more than before. On the contrary, it is distinctly proved that the vessel was taken to the graving-dock in order to be overhauled, without the slightest suspicion that she had sustained any injury in the harbour at all. That seems to me to take away a great deal of the force which otherwise would have attached to the fact that in the St Lawrence and on the voyage home there was no leakage to attract attention. Moreover, I must say I have had very great difficulty in understanding how that injury could have been caused by the stone in the position in which it is said to have been. The theory seems to be that the stone was standing upon its edge, as we see it now in Court, and it is very material to see the stone itself. Although we are not persons of skill, like the engineers who have been examined, still we are able to form some sort of opinion, like a jury, upon questions of this kind, and it is material to see the stone and what it is like. If the stone was lying flat with the ring uppermost, and if the ship was resting upon it, then it would only be a very small part of the ship that was resting on the stone. But the theory rather seems to be that the stone was standing upon its edge. The edge, however, is very narrow. It does not look like more than six or seven inches. It is not nearly so broad as the keel of the vessel, and yet, notwithstanding, it was the opinion of the engineers that if the bottom on which the stone lay was very hard, the pressure of the ship on that stone might have caused the injury. Looking to the nature of the injury, it is very difficult to comprehend how that could occur. I shall not go into particulars as to that difficulty, but I should have liked to have had opportunity of asking some questions at the engineers who say such a thing was possible before being satisfied with their conclusion. I doubt if it is much of a question of engineering skill; and coupling its improbability with the fact that there was no leakage observed in the harbour to cause suspicion, any more than there had been upon the voyage home, I cannot say that it is proved to my satisfaction that the injury was caused in that way, and by that stone. But although I would be inclined to concur with the view of the Lord Ordinary upon that matter, it is not necessary to have a strong opinion

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upon it, because the first view I have stated is sufficient to dispose of the case, and is the ground on which I prefer to rest my judgment.

LORD MURE concurred.

LORD PRESIDENT.—As regards the second ground of judgment adopted by the Lord Ordinary, I quite agree with his Lordship, both in his view of the evidence and in his application of the law. Indeed, the principle of law which applies to this case is by no means doubtful. The harbour trustees of Greenock, like the managers of any other harbour, provide accommodation for shipping, and invite the masters and owners of ships to occupy that accommodation, and charge them a price for it. The obligation thence arising is not an obligation to insure against accident, but only an obligation to use reasonable diligence to prevent the occurrence of injuries to vessels. It appears to me that in the present case there is no reason whatever for imputing negligence or any other fault either to the harbour trustees or to any of their officials or servants. The dredging of this harbour, which was necessary to deepen it to the requisite extent before it could be occupied by vessels of the size which now resort there, were carried on apparently in the most thorough, complete, and perfect manner, and it is impossible for us to read the evidence applicable to the history of the case without being satisfied that the operation was both skilful and complete at the time. After the dredging had been finished, the bottom of the harbour was examined by means of divers, to see whether any stones were still remaining there, or had been brought out of the place by the dredging operation; and that examination having been carefully made, every obstruction was removed that was found still to remain there. How this stone came there nobody can explain. I am satisfied it was not there when the harbour was completed for the reception of vessels. No doubt it is there at the time when the injury is said to have been sustained by the "Albatross," but I do not think that is sufficient to infer liability against the harbour trustees. I think, on the contrary, it lies on the pursuer in such an action as this to prove, as matter of substantive fact, that there is negligence upon the part either of the harbour trustees or of some one in their employment, and in that I think the pursuers have entirely failed.

With regard to the other ground of defence, which has also been adopted by the Lord Ordinary as a ground of judgment, I think there is much more reason for hesitation; but upon the whole I am disposed to agree with the Lord Ordinary upon that point also, and come to the conclusion that the pursuers have failed to prove that the injury to the keel of the "Albatross" was sustained within the harbour of Greenock. I do not sympathise exactly with the view stated by my brother Lord Deas, that supposing that stone to be there, and the vessel to come down and rest upon that stone on her keel, the injury would not be likely to be produced. I rather think, upon the other hand, that nothing would be more likely to produce such an injury. But then I am not at all satisfied that the keel of that vessel and the stone there came in contact at all. I do not think that has been established; and therefore, upon the whole matter, I am inclined to affirm the judgment of the Lord Ordinary as it stands.

THE COURT adhered to the Lord Ordinary's interlocutor, and refused the reclaiming note, with additional expenses.

MASON & SMITH, S.S.C.—WILLIAM ARCHIBALD, S.S.C.—Agents.

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VOLUME III.

Points decided in the House of Lords are printed in *Italics*.
See separate Indices for Cases decided in the Registration Appeal Court, p. 1239, and in the Court of Justiciary, p. 1240.

ADVOCATE.

Held that a counsel in the conduct of a cause is entitled to use his own discretion even against the instructions of his client, and that an allegation by a client that he has sustained loss in consequence is not relevant to support a claim of damages against the counsel. Batchelor v. Pattison and Mackersy, June 30, 1876, p. 914.

AGENT AND CLIENT. *Ad valorem Fees.*

1. *Held* that any person (not prohibited by the Stamp Act of 1870) may charge the same *ad valorem* and other fees for preparing conveyances as members of any of the incorporated societies of law-agents are entitled to charge. Aitken v. Kirk, March 15, 1876, p. 595.

Conduct of Cause.

2. Although, generally, an agent is bound to follow the instructions of his client, when the conduct of a cause is in the hands of counsel the agent is bound to act according to the directions of counsel, and will not be answerable to his client for what he does *bona fide* in obedience to such directions. Batchelor v. Pattison and Mackersy, June 30, 1876, p. 914.

See *Fraud—Superior and Vassal*, 3.

AGENT AND PRINCIPAL. *Joint Stock Company—Powers of Manager.*

1. The principal agent or manager of a joint stock shipping company, to whom was committed the whole management of the company's trading business at home and abroad, and who guaranteed the freight earned by the company's ships, but whose appointment did not confer an express power of drawing or accepting bills on behalf of the company, appointed a sub-agent at a port to attend to the company's business there, and, among other duties, to collect the freights payable at the port. It was the practice of the manager to draw bills upon the sub-agent in anticipation of freight to be earned by the company's ships. The bills, after being accepted by the sub-agent, were discounted by the manager, and retired at maturity by the sub-agent out of freight collected in the interval. The amount was debited to the company in accounts rendered by the sub-agent to the manager. The bills were not entered in the books kept for the company by the manager in such a way as to shew the true nature of the transaction, but this could have been discovered from the accounts rendered by the sub-agent to the manager, which were placed before the auditor of the company.

The manager ceased to hold that office while two of the bills were current, and shortly after became bankrupt. The company having refused

AGENT AND PRINCIPAL—*Continued.*

to allow the sub-agent credit for the amount of the bills, he sued the company for the amount. *Held* that the manager had not authority from the company to receive and discharge payments in anticipation of freight; that the pursuer had failed to prove by the books or otherwise that the directors were aware or ought to have been aware of the course of dealing; or that in fact the proceeds of the bills had been received by the company; and that the pursuer had therefore failed to establish liability against the company. Ross, Skolfield, and Co. v. State Line Steamship Co., Nov. 17, 1875, p. 134.

Shipbroker—Commission.

2. *Held* that a shipbroker was not entitled to commission upon the sale of a ship, in respect that, though the seller had been introduced to the purchaser by the broker, the sale which ultimately took place was not in consequence of the broker's introduction. White v. Munro, &c., July 11, 1876, p. 1011.

See *Right in Security*, 1—*Sale*, 2—*Ship*, 2.

APPEAL TO THE HOUSE OF LORDS.

There is no appeal to the House of Lords from judgments of the Court of Justiciary. Mackintosh v. The Lord Advocate, March 23, 1876, H. L., p. 34.

ARRESTMENT. *Malice and want of probable cause.*

1. *Opinions*, that where arrestments have been used against the private funds of an executor upon the dependence of an action against him as executor for payment of an executry debt, the executor is entitled to damages without proving malice or want of probable cause, in respect that the arrestments are entirely without warrant. Wilson v. Mackie, Oct. 22, 1875, p. 18.

Arrestment on dependence—Expenses.

2. Arrestment is not competent on the dependence of an action of reduction in which the only pecuniary conclusion is for the expenses of process. Stafford v. M'Laurin, Nov. 20, 1875, p. 148.

Future Debt—Inhibition—Husband and Wife.

3. Where a wife had used inhibition and arrestment on the dependence of an action of separation and aliment, and had afterwards used arrestments in execution of a decree of separation and aliment, *held* that after payment by the husband of all debts secured by the diligence, except sums to become due for future aliment, he was entitled to have the arrestments and inhibition recalled. Symington v. Symington, Dec. 3, 1875, p. 205.

Personal Diligence Act, 1838, 1 *and* 2 *Vict. c.* 114, *sec.* 16.

4. Where a pursuer seeks to use arrestments in security of a future debt upon the dependence of an action he should proceed by bill setting forth that the debtor is *vergens ad inopiam*, or other ground for the diligence, so as to enable the defender to answer the allegation. Symington v. Symington, Dec. 3, 1875, p. 205.

Arrestment in Security.

5. It is not competent to use diligence in security of a future debt unless upon the ground that the debtor is *vergens ad inopiam*, or on similar grounds. Symington v. Symington, Dec. 3, 1875, p. 205.

ASSIGNATION. See *Insurance*, 3—*Partnership*, 3—*Right in Security*, 2.

BALLOT ACT, 1872. *Municipal Election—Voter's Mark.*

1. *Held* that, in an election under the Ballot Act, 1872, a single stroke marked by a voter opposite the name of a candicate on a ballot paper was not equivalent to a cross as required by the Act, and was a mark by which the voter might be identified. Robertson v. Adamson, July 5, 1876, p. 978.

2. *Held* (1), in accordance with the decision in Haswell v. Stewart, May 23, 1874, *ante*, vol. i. 925, that crosses on a ballot paper to the right-hand side

BALLOT ACT, 1872—*Continued.*

of the candidates' names, but not within the spaces marked off for them, were in compliance with the provisions of the Ballot Act; (2), in accordance with the same decision, that crosses to the left-hand side of the candidates' names were not in compliance with the provisions of the Ballot Act; (3), that certain marks in the proper spaces, which, though not crosses, involved the use of more than a single stroke, were sufficiently in compliance with the Ballot Act, and were admissible. Robertson v. Adamson, July 5, 1876, p. 978.

Election of Police Commissioners—Treating.

3. Treating of voters by candidates at an election of police commissioners is not a relevant ground for setting aside the election. M'Donald v. Robertson, May 17, 1876, p. 645.

BANK. *Crossed Cheque—Forgery.*

In an action by the Clydesdale Bank against the Royal Bank for payment of £4800, the pursuers made the following averments:—A forged cheque for £4800 drawn in the name of a customer of the Clydesdale Bank, payable to D P or bearer, and crossed, bearing also a forged indorsation in name of D P, was cashed by a clerk of D P at the Royal Bank, of which D P was a customer. The proceeds were employed by the clerk in paying a balance due by D P on the Stock Exchange. The Royal Bank having, on the same day, presented the cheque at the Clearing House had the amount credited to their account with the Clydesdale Bank. Ten days afterwards the Clydesdale Bank discovered that the signatures of the drawer and indorser to the cheque were forged, and intimated that they would hold the Royal Bank responsible. *Held* that, according to the pursuer's averments, the Royal Bank had only acted as the agent of D P, and was not liable. Clydesdale Bank v. Royal Bank, March 11, 1876, p. 586.

BANKRUPTCY. *Sequestration—Awarding and Recall.*

1. Procedure followed where petitions for sequestration of the estates of the same debtor had been presented in the Bill-Chamber and in a Sheriff Court. Kellock v. Anderson, &c., Dec. 14, 1875, p. 239.

Trustee—Reparation.

2. An undischarged bankrupt recovered in an action a sum of damages for slander uttered subsequent to his sequestration. *Held* that under the 103d section of the Bankruptcy Act the sum vested in the trustee in the sequestration. Jackson v. M'Kechnie, Nov. 13, 1875, p. 130.

Claim—Foreign.

3. *The estates of a firm, which had offices and carried on business both in England and Scotland, were sequestrated in Scotland. An English company claimed to be ranked in the sequestration for* £65,000, *as the price paid to the bankrupts under a contract of sale which they alleged to be fraudulent, and at the same time commenced proceedings against the trustee and certain other persons in the Court of Chancery in England with a view to set aside the contract and to obtain a judgment for the* £65,000. *The trustee rejected the claim as unfounded, and the claimants appealed, and contended that the sequestration proceedings should be sisted pending the issue of the Chancery suit, or otherwise that a dividend or dividends should be set aside to meet the amount of the claim in case it should be sustained.* Held (aff. *judgment of the First Division*) *that there were no grounds for interfering with the course of the sequestration, and that a proof of the averments on which the claim was based had been properly allowed.* Phosphate Sewage Company v. Molleson, June 20, 1876, H. L., p. 77.

Cautioner—Bill of Exchange—Ranking.

4. A guaranteed payment of debts due by B to C. C, by discounting B's bills, obtained full payment of B's debt; but in consequence of B and C afterwards becoming bankrupt, the bank with whom the bills had been discounted ranked on C's estate for the full amount of the bills and obtained payment of a dividend. *Held* that as C's estate had not lost any

BANKRUPTCY—*Continued.*

part of B's debt except the dividend repaid to the bank, his trustee could not claim more under the guarantee, and that A having become bankrupt, C's trustee could be ranked on A's estate for that amount only. Anderson v. Mackinnon, March 17, 1876, p. 608.

Double Ranking—Bill of Exchange.

5. A accepted bills for accommodation of B, who discounted them at a bank. A and B having become bankrupt the bank ranked on both estates for the full amount of the bills. A's trustee claimed to retain a debt due by him to B's estate as a security for the dividend on the bills paid by him on B's account to the bank on the ground that he was entitled to be reimbursed for his loss by B. *Held* that the bank having been already ranked on B's estate for the full amount of the bills, A's trustee could not also be ranked for the same debt, and therefore was not entitled to retain the sums due to B's estate either in security or in satisfaction. Anderson v. Mackinnon, March 17, 1876, p. 608.

Double Ranking—Bill of Exchange—Cautioner.

6. A cautioner was called on to pay a debt on failure of the principal debtor. In an accounting between the estates of the principal debtor and of the creditor who had both become bankrupt the cautioner maintained that the debtor's estate was entitled to credit for sums lost through accommodation bills discounted for behoof of the creditor. *Held* that as the discounting banks had already been ranked for the bills on the creditor's estate there could not be a second ranking. Anderson v. Mackinnon, March 17, 1876, p. 608.

Security—Bankruptcy Act, 1856.

7. The holder of a bill accepted by the bankrupt along with six other co-acceptors, and of a letter of guarantee of the debt granted by another person, received payment from the bankrupt after his sequestration on delivery of these documents. In an action for repayment by the trustee some months afterwards, *held* that an offer by the trustee to return the documents did not necessarily replace the defender in the situation in which he formerly stood so as to entitle the trustee to decree, but that inquiry must be made into the solvency of the co-acceptors and the guarantor at the date of the payment, and at the date of the offer, in order to discover whether the documents were of the same value at the latter date as at the former. Pearson v. Ferguson, Davidson, and Co., June 9, 1876, p. 800.

See *Right in Security*, 1—*Sale*, 3.

BANKRUPTCY, FRAUDULENT. See Justiciary Index, *Indictment*, p. 1241.

BILL. *Onerosity.*

In an action by the drawer of a bill against the acceptor, the plea of non-onerosity is not *per se* a good defence. Law v. Humphrey, July 20, 1876, p. 1192.

See *Bankruptcy*, 4, 5, 6, 7.

BONA FIDES. See *Executor.*

BONA FIDE CONSUMPTION. See *Lease*, 8.

BURGH. *Burgh Election—Statute—Casus Improvisus.*

1. In a question as to the compulsory retirement in 1875 of a town-councillor who had held office for two years only in a burgh where the number of councillors was eighteen, *held* (1) that the retirement annually of six councillors was imperative, although the number of those bound to retire in respect of their being longest in office was less than six, and that the deficiency fell to be made up from the class next longest in office; (2) that the Municipal Elections Act of 1870, in providing for town-councils fixing the order in which councillors should retire only in cases where councillors had been elected on the same day, without being voted for, or "by an equality of votes," had by implication recognised the rule of retirement

BURGH—*Continued.*

founded on disparity of votes prescribed by the Royal Burghs Reform Act (3 and 4 Will. IV. c. 76), for the elections of 1834 and 1835 as applicable to subsequent elections; (3) that a vacancy caused by the death or resignation of a councillor who was not one bound to retire at the next annual election could not be reckoned among the vacancies required by the statute. Thomson, &c. v. Magistrates of Rutherglen, &c., Feb. 17, 1876, p. 451.

Sheriff—Act 20 and 21 Vict. c. 70, sec. 1—Competency of Appeal.

2. *Held* that a deliverrnce of a Sheriff upon a petition for the extension of the boundaries of a burgh under the statute 20 and 21 Vict. c. 70, finding that neither the boundaries described in the petition nor any others which might be within its scope satisfied the requirements of the statute, and therefore refusing the petition, was not subject to review. Dubs, &c. v. Police Commissioners of Crosshill, June 1, 1876, p. 758.

See *Ballot Act—Police.*

CARRIER. *Notice—Judicial Inspection.*

Where a consignee of goods, which have been damaged in transit, breaks bulk without notice to the carrier, or judicial inspection, he does not thereby bar his claim for damages, although the want of such precaution to preserve evidence may be an element in the proof. Johnston and Sons v. Dove, Dec. 2, 1875, p. 202.

See *Proof*, 2—*Railway*, 2, 4—*Ship*, 4.

CAUTIONER. See *Bankruptcy*, 4, 6.

CHURCH. *Designation of Addition to Churchyard—Presbytery—Jurisdiction—Ecclesiastical Buildings Act*, 1868, 31 *and* 32 *Vict. c.* 96, *secs.* 3, 14, *and* 20—*Compulsory Sale—Notice.*

1. The designation of an addition to a churchyard by the Presbytery, and the regulation of procedure thereanent, are not subject to the review of the Court of Session, who will only interfere if there be shewn to have been some violation of the ordinary rules of procedure common to all Courts whereby injustice has resulted.

Circumstances in which *held*, in accordance with the above, that an heritor whose land had been compulsorily taken as an addition to a churchyard, and who had not taken an appeal to the Sheriff from the Presbytery's deliverance within the days allowed by the Act 31 and 32 Vict. c. 96, was not entitled to have the proceedings set aside on the ground of want of notice. Walker, &c. v. Presbytery of Arbroath, March 1, 1876, p. 498.

Decree of Removing by Church Court.

2. Although a Presbytery has an exceptional power to enforce a decree of removing, it is usual and competent for them in designating a piece of ground for an addition to a churchyard to ordain the tenant to remove. Walker, &c. v. Presbytery of Arbroath, March 1, 1876, p. 498.

Manse—Presbytery—Expenses—Ecclesiastical Buildings Act, 1868, *secs.* 3 *and* 4.

3. A minister petitioned the Presbytery to visit his manse with a view to repairs. The Presbytery employed an architect, and pronounced findings in accordance with his report. The heritors appealed to the Sheriff under sec. 3 of the Ecclesiastical Buildings Act, 1868, and the case was ultimately disposed of on further appeal to the Lord Ordinary on Teinds. The Presbytery did not appear in the appeal, but decerned against the heritors for the amount of their architect's account, and, not receiving payment, raised an action for payment of the account, as duly incurred by them. *Held* that they were entitled to decree.

Observed—That the Presbytery ought not to have pronounced decree for their expenses after the case had been appealed to the Sheriff. Presbytery of Deer v. Heritors of Pitsligo, July 5, 1876, p. 975.

CHURCH—*Continued.*

Allocation of Area—Quoad Sacra Parish—Stat. 7 and 8 Vict. cap. 44, secs. 8 and 9.

4. The lands of certain heritors in the parish of J. were, in 1855, under the provisions of the Act of 7 and 8 Vict. sections 8 and 9, disjoined from the parish of J. *quoad sacra*, and, along with certain portions of other parishes, erected into a *quoad sacra* parish. In 1874 the parish church of J., the area of which had been for a long period divided among all the heritors of the parish according to an extrajudicial agreement, was excambed for a new church. In an application by the heritors to have the area of the new church divided by the Sheriff, *held* that heritors whose lands were entirely within the *quoad sacra* parish were not entitled to share in an allocation of the area of the new church according to their valued rent, but the question of their right to a family seat in the new church reserved. Duke of Roxburghe, &c., June 1, 1876, p. 728.

Parish Quoad Sacra—Marriage—Proclamation of Banns.

5. Held *that the proclamation of banns was one of the functions and duties of the office of minister of a church erected into a parish church under the Act 7 and 8 Vict. c. 44, for the district attached thereto as a parish* quoad sacra. Hutton, &c. v. Harper, &c., March 9, 1876, H. L., p. 9.

Parish Quoad Sacra.

6. In an application for disjunction and erection *quoad sacra* of a church and district situated wholly within a *quoad sacra* parish, intimation ordered both in the original and the *quoad sacra* parish churches. Whitelaw, &c., Nov. 8, 1875, p. 85.

COLLABORATEUR. See *Reparation*, 1.

COMMISSION, BROKER'S. See *Agent and Principal*, 2.

COMPANY. See *Partnership.*

COMPENSATION. See *Contract—Lease*, 9, 10.

CONTRACT. *Compensation—Damages—Petition for Sale.*

A storekeeper received a quantity of corn from a merchant to be stored. There was no written contract. After re-delivering the greater part, the storekeeper retained the remainder, and presented a petition to the Sheriff for warrant to sell it, and apply the proceeds towards payment of warehouse rent and storage charges for the corn, which the merchant refused to pay. The merchant stated as a counter claim damage to a greater amount done to the corn re-delivered, owing to the neglect of the storekeeper. The counter claim for damage having been restricted to the amount of the petitioner's claim, *held* that it might competently be stated as a set off, both claims being rested on stipulations of the same implied contract, and objection that it was an attempt to set off an illiquid against a liquid claim *repelled.*

Held that the petition for warrant to sell the respondents' goods and to appropriate the proceeds was, as regarded the plea of compensation, in the same position as a petitory action for payment of money. Gibson and Stewart v. Brown and Co., Jan. 13, 1876, p. 328.

See *Lease—Proof*, 1—*Sale.*

CRIME. See Justiciary Index, p. 1240.

CURATOR BONIS. See *Foreign*, 2—*Judicial Factor.*

DILIGENCE. *Personal Diligence—Charge—Competency of second charge—Suspension.*

1. A suspension of a charge was brought on the ground of irregularity in the messenger's execution. The chargers pleaded that the suspension was incompetent without a reduction of the messenger's execution. Thereafter the chargers, by letter, abandoned the charge, but insisted in the plea of incompetency in the suspension, and craved that the note should be refused, with expenses. The Court refused the suspension in so far as regarded the grounds and warrants of the charge, and, *quoad ultra*, sisted procedure pending an action of reduction of the messenger's execution at

DILIGENCE—*Continued.*

the instance of the suspender. The chargers then gave a second charge upon the same grounds and warrants. In a second suspension *held* that the first charge having been abandoned as a charge, and being only insisted in so far as the question of expenses in the first suspension was concerned, the second charge was competent. Clark v. Hamilton and Lee, Nov. 27, 1875, p. 166.

Reincarceration.

2. *Held* that reincarceration of a debtor on the same diligence is legal, and that it lies upon the debtor to shew an oppressive use of such diligence to entitle him to the equitable interference of the Court. Forgie v. Stewart and M'Donald, July 20, 1876, p. 1149.

See *Arrestment—Poinding the ground.*

DIVISION AND SALE. *Property, pro indiviso.*

In an action of division and sale of a heritable property, *held* that, though not physically incapable of division, the estate was incapable of division with due regard to the rights and interests of parties, inasmuch as division would reduce for the time the market value of each party's share, and that a *pro indiviso* proprietor was therefore entitled to insist on a sale of the whole estate and division of the price.

Observed (*per cur.*) that in the case of sale of a *pro indiviso* property under the orders of the Court a power to the *pro indiviso* proprietors to bid at the sale might be reserved in the articles of roup. Thom, *et al.* v. Macbeth, *et al.*, Nov. 26, 1875, p. 161.

DOGS ACT, 1871. *Statute* 34 *and* 35 *Vict. cap.* 56 (*Dogs Act*, 1871), *sec.* 2.

Held that section 2 of the "Dogs Act, 1871," was not restricted in its application to dogs dangerous to human beings. Henderson v. M'Kenzie, March 18, 1876, p. 623.

DOMICILE. See *Foreign*, 1.

DONATION. See *Parent and Child*, 1.

ELECTION. See *Ballot Act—Burgh.*

ENTAIL. *Trust—Institute.*

1. A testator conveyed his whole property to trustees, directing them to continue the trust during the life of his widow, and for at least ten years after his own death, and "after the death of my said wife, and while the trust shall continue to subsist," to pay an annuity to "the heir who would then be entitled to succeed to my lands [of A] under the destination after contained." The trustees were directed to entail the lands of A, and the destination was to the heirs whomsoever of the testator's body, whom failing, to J. R. and the heirs of his body, whom failing, to other substitutes. The testator further directed that, considering that J. R. was heir of entail presumptive to the lands of C, now in possession of the testator's wife, and that it was his intention that the estate of A should be held by a series of heirs different from those entitled to the estate of C, his trustees should insert in the deed of entail of A a condition to secure that, in the event of the succession to A opening to an heir who should be at the time proprietor of C, the right of such heir under the deed of entail to be executed should lapse as if he were naturally dead. J. R. succeeded to C by the death of the testator's wife, two years after the death of the testator. *Held* that he was thereby disqualified from claiming the annuity, and that it was payable to his eldest son as the heir entitled to succeed to A. Robertson v. Robertson, Dec. 17, 1875, p. 274.

Constitution of Improvement Debt.

2. By a deed of entail it was provided that the heir of entail in possession should be a creditor of the succeeding heirs for three-fourths of any sums expended in improvements of a certain kind, but it was declared that the executors of the person making such should have no right to repayment unless "he shall, by some probative writing under his hand, have expressly

ENTAIL—*Continued.*

declared or signified his intention that a share of the improvement expenditure should form a charge against the succeeding heirs of entail."

Circumstances in which *held* that a deceased heir under the entail had by his settlement effectually signified his intention that his trustees should be creditors for an improvement debt which he was in the course of constituting. Earl of Dalhousie's Trustees v. Earl of Dalhousie, June 27, 1876, p. 882.

Disentail — Reduction of Disentail — Entail Acts 11 *and* 12 *Vict. c.* 36, *sec.* 1, *and* 16 *and* 17 *Vict. c.* 94, *sec.* 24.

3. An heir of entail in possession of lands held by trustees under an entail dated after 1st August 1848, and born before the date of the tailzie, presented a petition for authority to acquire in fee-simple the entailed lands, and, with the consent of his uncle and two cousins as the three next heirs, obtained from the Lord Ordinary a decree authorising the petitioner to acquire the lands in fee-simple, and ordaining the trustees to convey them to him in fee-simple. After completing his title to the lands in fee-simple the proprietor borrowed money over the estate, and granted a bond and disposition in security to a creditor.

In an action of reduction brought by his son, born after these proceedings, *held* (1) that the petition to acquire in fee-simple was presented without the consents required by law, in respect that the proprietor being heir under a new entail, and born before the date of the entail, could only disentail with consent of an heir-apparent who had attained the age of twenty-five, and therefore that the decree granting warrant to acquire in fee-simple, and the conveyance of the trustees following thereon, fell to be reduced; but (2) that the bond and disposition in security was protected by 16 and 17 Vict. c. 94, sec. 24. Viscount Fincastle v. Earl of Dunmore, Jan. 14, 1876, p. 345.

Equivalents to consent to Disentail—Statutes 11 *and* 12 *Vict. c.* 36 *sec.* 3; 16 *and* 17 *Vict. c.* 94, *sec* 19; 38 *and* 39 *Vict. c.* 61, *sec.* 5.

4. An heir of entail in possession presented a petition for disentail. He obtained the consent of the two nearest heirs, but not of the third nearest. A remit was made by the Lord Ordinary to ascertain the value of the expectancy of the third heir, but before the report had been presented an heir nearer than any of the three was born. *Held* that as the equivalents to consent had not been completed, the birth of a nearer heir put an end to the application. Shand, March 4, 1876, p. 544.

Disentail—Election.

5. An heir in possession of an entailed estate succeeded to another estate under an entail which required him to denude of one of them. *Held* that before making his election he could not make up a title to, or disentail, the second estate. Home v. Home, March 15, 1876, p. 591.

Statute 11 *and* 12 *Vict. cap* 36 (*Entail Amendment* (*Scotland*) *Act*, 1848), *sec.* 3—*Date of Entail—Mortis causa deed.*

6. In a question between the seller and purchaser of lands which had been disentailed, *held* that an entail created by a *mortis causa* deed dated prior to 1st August 1848, which did not come into operation until the death of the granter after that date, was to be regarded as an entail dated prior to 1st August 1848. Riddell v. Lord Polwarth, June 24, 1876, p. 879.

Disentail—Fee and Liferent—Fiduciary Fee—Entail Amendment Act, 1848 (11 *and* 12 *Vict. c.* 36), *sec.* 3.

7. In a marriage-contract the lady's father entailed an estate by procuratory of resignation in favour of himself in liferent, and after his death the spouses and the longest liver of them, also in liferent, but under certain restrictions and limitations, and the heir-male, whom failing, the heir-female of the marriage in fee. There being no heir-male of the marriage, after the death of her father and husband the lady and her eldest daughter jointly presented a petition for authority to disentail under the 3d section of the Entail Amendment Act. *Held* (1) that it was necessary to determine which of

ENTAIL—*Continued.*

the petitioners, if either, was heir in possession within the meaning of the Act; (2) on a construction of the deed, that the interest of the spouses was restricted to a liferent allenarly; (3) that the spouses had a fiduciary fee till the dissolution of the marriage by the husband's death, when the heir of the marriage was ascertained; (4) that on the dissolution of the marriage, the eldest daughter, being ascertained to be the heir of the marriage, became heir of entail in possession; and authority *granted* to her to disentail upon producing the necessary consents. Maule, June 14, 1876, p. 831.

ERROR. See *Issue—Sale.*

EXECUTOR. *Expenses.*

1. Circumstances in which an executor defending an action was found personally liable in expenses, reserving his relief against the free executry estate, if any. Law v. Humphrey, July 20, 1876, p. 1192.

Bona Fides.

2. *Observations* on the defence of *bona fide* payment to beneficiaries, as stated by an executor against creditors, who have not given notice of their claims within six months. Beith v. Mackenzie, Nov. 30, 1875, p. 185.

EXPENSES. *A. S. Dec.* 19, 1835.

1. A Lord Ordinary ordered a minute to be lodged with regard to a branch of a case, and to a certain extent based his judgment upon matters contained in it. The Court adhered, but not upon the same grounds. The Auditor disallowed the expenses of the minute to the successful party. *Held* that he was entitled to his full expenses. Smith, Laing, & Co. v. Maitland &c., Jan. 7, 1876, p. 281.

Fees to Counsel.

2. Circumstances in which *held* that the Auditor might allow fees to counsel to be charged as between party and party though they had not been sent to counsel until after the judgment had been given. Batchelor v. Pattison, and Mackersey's Executor, July 15, 1876, p. 1086.

Withdrawal of Appeal.

3. In a case where an appeal was not timeously withdrawn, £5, 5s. of expenses allowed to the respondent. Johnston v. Rae, &c., June 24, 1876, p. 879.

Public Trust—Personal Liability for Expenses.

4. Question of personal liability of statutory trustees for expenses of an action unsuccessfully defended by them in the event of the funds of the trust being unsufficient *reserved.* Young, &c. v. Nith Commissioners, July 6, 1876, p. 991.

Appeal—Sheriff.

5. In an appeal from a Sheriff Court, remit made to the Sheriff to proceed with the case, with power to decide the question of expenses in the Court of Session when the case should be decided on its merits. Robertson v. Cockburn, Oct. 22, 1875, p. 21.

Company—Liquidator.

6. Expense of answers to petition for winding up disallowed, the only objection being to the person proposed as liquidator. Hume v. Directors of Highland Peat Fuel Company, June 27, 1876, p. 881.

See *Church*, 3—*Husband and Wife*, 4, 5, 6—*Executor*, 1—Justiciary Cases, p. 1240.

FEE AND LIFERENT.

A testator conveyed heritage to his son in liferent, for his liferent use allenarly, and to his heirs whomsoever in fee. The son survived his father, and, after executing a disposition of the subjects to testamentary trustees, died without issue. In an action of declarator by his heir of line, *held* that the son's right was one of liferent only, and that the pursuer had right to the subject. Cumstie v. Cumstie's Trustees, June 30, 1876, p. 921.

See *Entail*, 7—*Succession*, 5, 8.

FISHINGS. *Salmon-Fishings—Crown grant.*

A grant of salmon-fishings having been followed by possession so far as the fishings were available for the time, and the Crown having had no adverse possession, *held* that the Crown could not, *cum effectu*, make a grant to a different party of part of the fishings within the bounds of the original grant, although that part had not hitherto been fished, and had only now become available for being so. Baroness Gray v. Richardson and Others, July 14, 1876, p. 1031.

See *Trust*, 4—Justiciary Cases, p. 1240.

FOREIGN. *Domicile—Succession—Testament.*

1. In the construction of a testamentary deed the presumption that the testator intended his deed to be interpreted in accordance with the law of his domicile may be overcome by evidence of a contrary intention derived from the deed and the circumstances.

A woman of Scotch origin, wife of a domiciled Englishman, conveyed to trustees (a majority residing in Scotland to be a quorum) a fund, which she was entitled to dispose of under the settlement of a Scotch testator, secured over heritage in Scotland. She directed her trustees to realise the security after her husband's death, and divide the proceeds among her children. The trust-deed was prepared in Scotch form by a Scotch conveyancer, and executed in Scotland. *Held* that the deed must be interpreted according to the law of Scotland, that being evidently the intention of the testatrix. Mitchell and Baxter v. Davies, Dec. 3, 1875, p. 208.

Curator Bonis—Foreign Lunatic—Recall of Appointment.

2. A *curator bonis* was appointed to a lunatic domiciled in England in order to grant discharges of her aliment to a judicial factor on a Scotch estate. Thereafter the brother of the lunatic obtained a commission of lunacy in the Court of Chancery in England, under which committees of the person and estate were appointed to the lunatic. Upon the application of the committees of the person and estate the Court recognised their title, and recalled the curator's appointment. Sawyer, &c. v. Sloan, Dec. 17, 1875, p. 271.

Contract—Locus Solutionis.

3. A Scotch firm of shipbuilders entered into a contract, executed in Paris, to build certain steam packets for a French firm. At the same time and place a member of the Scotch firm gave a letter to a member of the French firm engaging to pay him a certain percentage on the contract price. *Held* that the letter constituted a Scotch contract. Valery v. Scott, July 4, 1876, p. 965.

See *Bankruptcy*, 3.

FRANCHISE. See *Ballot Act, and Index of Registration Appeal Court Cases, p.* 1239.

FRAUD. *Agent and Client.*

1. B. authorised his law-agents, S. and S., to make certain loans, and, *inter alia*, one of £1000 to T., and placed the requisite funds in the hands of S. and S. T. agreed to grant heritable security for the £1000 (which was not, however, done), and he paid interest for two years, for which receipts were granted by S. and S. as agents for B. Thereafter S. and S., to conceal their embezzlement of upwards of £1000 in their hands belonging to A., another client, by a fraudulent representation that A. was now creditor in the loan of £1000, induced T. to execute a bond and disposition in security for that amount in favour of A., which was duly recorded. In an action of reduction of the bond at the instance of T., *held* that although A. was no party to the fraud he was not entitled to take benefit by the fraud of S. and S., and the bond accordingly reduced. Traill v. Smith's Trustees, &c. June 3, 1876, p. 770.

Joint Stock Company.

2. *Circumstances in which*, held (aff. *judgment of the First Division*) *that a joint stock company which had purchased a concession of a guano island had failed to instruct fraud on the part of the sellers (who had no beneficial*

FRAUD—*Continued.*

interest in the sale) to the effect of entitling the company to set aside the contract and claim the purchase-money. Phosphate Sewage Company v. Molleson, June 20, 1876, H. L., p. 77.

GABLE. See *Property*, 1, 2.

GAME. See *Lease*, 7, and Justiciary Cases, *Trespass*, p. 1243.

HARBOUR. *Usage—Notice—Bye-laws.*

1. A practice had existed for four years at a harbour by which steamships coming to load coals had a preference over sailing vessels in getting the use of the cranes. The owners of the harbour altered this practice (which was not fixed by the bye-laws of the harbour) without notice, putting all vessels on an equality according to their arrival. In an action of damages by the owner of a steamship for detention, *held* that the owners of the harbour were entitled, as a matter of management, to alter the practice, and that without notice. Moon v. Caledonian Railway Co. June 9, 1876, p. 806.

Right to Beach Boats.

2. *Terms of a Harbour Act, authorising the proprietor to levy dues,* held *by implication to impose upon the proprietor a corresponding obligation to provide accommodation for the fishermen laying up their boats.* Aiton v. Stephen, &c. Feb. 28, 1876, H. L., p. 4.

See *Reparation*, 3.

HARBOURS, PIERS, AND DOCKS CLAUSES ACT (10 Vict. c. 27), secs. 81 and 82. See Justiciary Index, p. 1240.

HERITABLE AND MOVEABLE. *Lease—Heir and Executor.*

Held *that when the tenant of minerals under a lease of ordinary duration erects upon the land fixed machinery for the purpose of working the minerals, such fixtures become* partes soli, *and pass with the subjects to the possession of the tenant's heir succeeding to the lease, in whom also the power of severance is vested during his tenancy.* Brand's Trustees v. Brand's Trustees, March 16, 1876, H. L., p. 16.

HUSBAND AND WIFE. *Declarator of Nullity of Marriage—Impotence of Wife.*

1. Circumstances in which the Court pronounced decree of nullity of marriage on the ground of impotence on the part of the woman, who was fifty-four years of age at the date of the marriage. C v. M, May 24, 1876, p. 693.

Impediment to Marriages, removal of—Cohabitation and Habit and Repute.

2. *In a question of legitimacy* held *that the presumption of marriage arising from cohabitation with habit and repute was not rebutted by proof that the cohabitation had followed upon a marriage* in facie ecclesiæ, *which was invalid by reason of a temporary legal impediment to marriage.* De Thoren v. Wall, March 16, 1876, H. L., p. 28.

Diligence—Future Debt—Inhibition—Arrestment.

3. Where a wife had used inhibition and arrestment on the dependence of an action of separation and aliment, and had afterwards used arrestments in execution of a decree of separation and aliment, *held* that after payment by the husband of all debts secured by the diligence, except sums to become due for future aliment, he was entitled to have the arrestments and inhibition recalled. Symington v. Symington, Dec. 3, 1875, p. 205.

Expenses.

4. In the above case *held* that the wife was entitled to her expenses incurred in opposing the petition for recall (taxed as between party and party). Symington v. Symington, Dec. 3, 1875, p. 205.

Divorce—Expenses.

5. It is a question for the discretion of the Court whether a wife who has unsuccessfully defended an action of divorce should be allowed her expenses in the Inner-House, and if she has reclaimed without probable grounds of success they will be refused. Kirk v. Kirk, Nov. 12, 1875, p. 128.

Divorce—Expenses—Co-defenders.

6. The expenses of a husband who was successful in an action of divorce against his wife were allowed against three co-defenders, who had lodged defences but made no further appearance, conjunctly and severally, till the order for

FISHINGS. *Salmon-Fishings—Crown gr*
A grant of salmon-fishings having ' against each. Kirk v.
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possession, *held* that the Crow
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July 14, 1876, p. 1031.
See *Trust*, 4—Justiciary C l·

FOREIGN. *Domicile—Suc·*
1. In the construction o'
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A woman of een committed to an industrial school
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over herit· nspector to plead that the proceedings before the
after her ular, and that the warrant had been illegally granted.
The tru . Brown, Dec. 2, 1875, p. 188.
execut
to th *Arrestment*, 3.
Mi *Ship—Concealment—Change of Ship's Nationality—Merchant*
Cur· ping Act, 1873—*Board of Trade Inspection.*
2. A vessel was transferred by means of a fictitious sale from the British to the Belgian flag, for the purpose of avoiding the inspection provided by the "Merchant Shipping Act, 1873." The vessel was subsequently insured. In an action upon the policy, the vessel having been lost, *held* that failure to mention the change of nationality to the underwriters, some of whom had a year before insured the vessel as a British ship, was a concealment of a material fact which would have influenced a prudent underwriter in determining whether to accept or decline the risk, and therefore voided the policy, although the defenders did not maintain that the vessel was unseaworthy when she sailed upon the voyage for which she was insured. Hutchinson and Co. v. Aberdeen Sea Insurance Co., May 23, 1876, p. 682.
Marine Insurance—Foreign Average Statement—Contributory Value.
2. A policy of insurance effected on cargo, consisting of two lots of iron, valued therein respectively at £610 and £215, and on £25 cash advanced to account of freight, contained the following clause:—"General average payable according to foreign statement, if so made up." On the voyage the ship was damaged, and the master granted a bond of bottomry and *respondentia* over ship and cargo for repairs and other expenses. At the port of destination a general average statement was made up, in which £1293 was fixed as the contributory value of the cargo. The ship and freight being unable to pay their share of the bond, the balance fell to be paid, under German law, by the owners of cargo "on the principles of general average," and a second statement was made up embodying the first. *Held* that the policy-holders were entitled to recover the whole amount paid by them (being under £850) from the underwriters, and not only the amount effeiring to £850 out of £1293, in respect that the liability of the cargo, as shewn in the final statement, was for the general balance due under the bond after applying the proceeds of the sale of the ship and the freight. Robinows and Marjoribanks v. Ewing's Trustees, July 20, 1876, p. 1134.
Warranty—False statement—Assignation—Assignatus utitur jure auctoris.
3. A policy of life assurance contained a stipulation that in case it should afterwards appear "that any untrue averment was contained in the declaration by the assured as to his age or state of health, the policy should be void." *Held* that false statements by the assured in the declaration were a relevant ground of reduction of the policy in the hands of an onerous assignee. Scottish Widows' Fund v. Buist, &c., July 14, 1876, p. 1078.

Breach of Interdi *-Landlord and Tenant.*

of a patent for the accommodation of the miners in his
he Court ov stream formerly suitable for primary uses.
respond surface water and water from washing-
d inte the stream, other arrangements being
moval of excreta and refuse from the
by the inhabitants, would have pre-
hing the stream. In an action for
instance of an inferior heritor who
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drains had been proved, and
suer would be entitled to
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Trial

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or breach of interdict.
Lord Ordinary without a
, July 5, 1876, p. 974.

d that a person could not claim damages for
from proceeding with a building which it was
no right to erect, although the interdict was recalled
per remedy in the circumstances. Jack v. Begg, Oct.

See *Road*, 1.

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ISSUE. *Reduction—Error.*

A father and mother aged respectively seventy-eight and
brought an action against a daughter and her husband
vocable disposition granted by the pursuers six months
subject to the pursuers' liferents, and certain burdens, the
able estate, and a liferent of heritage, were conferred upon the
consideration of her, in time coming, assisting the mother in the
ment of a hotel. The pursuers averred that the deed was executed
essential error on their part, they believing that the deed was a
testamentary deed making alterations upon a prior settlement in accordance
with instructions given by them to their law-agent, while, in fact, it was
irrevocable and not in accordance with these instructions; and further, that
the error had been induced by the defenders in instructing the law-agent,
and by the law-agent, or by one or other of them; and further, that the
error had been fraudulently induced by these parties. *Held* that besides
an issue of fraud the pursuers were entitled to the issue "whether the pur-
suers in granting the disposition were under essential error as to the sub-
stance and effect of the said deed," without the addition of the words
"induced by the defenders," as contended for by the defenders. M'Laurin
v. Stafford, Dec. 17, 1875, p. 265.

JOINT ADVENTURE. See *Partnership*, 2.

JOINT STOCK COMPANY. See *Fraud*, 2—*Partnership*.

JUDICIAL FACTOR, CURATOR BONIS, &c. *Investment on Security of Rates.*

1. Investments by a *curator bonis* secured respectively (1) on rates leviable under the Aberdeen County and Municipal Buildings Act, 1866, and the Sheriff Court Houses Act, 1860, or (2) on rates leviable under the Aberdeenshire Road Act, 1865, *approved of*. Grainger's Curator, Feb. 23, 1876, p. 479.

Special Powers—Insanity—Aliment—Nobile Officium.

2. An application by the *curator bonis* of a person *incapax*, for authority to pay out of the surplus income of the ward's estate an alimentary allowance to the only brother and heir-at-law of the ward, who was in destitute circumstances, *refused*, on the ground that this was a matter in which the Court would not interfere with the discretion of the curator. Dunbar, March 7, 1876, p. 554.

Powers—Sanctum of the Court to a purchase of heritage by a curator bonis.

3. Circumstances in which the Court approved of a purchase of heritage by the

HUSBAND AND WIFE—*Continued.*

proof, and thereafter in the proportion of one-third against each. Kirk v. Kirk, Nov. 12, 1875, p. 128.

Consistorial Cause.

7. *Opinions* that the instructions to Commissaries of 1563 as to the finality of decrees in the Commissary Courts after the expiry of a year and day did not obtain with respect to decrees of the Court of Session in causes the jurisdiction in which had been transferred from the Commissaries to the Court of Session. Lockyer v. Ferryman, &c., June 28, 1876, p. 882.

See *Res Judicata.*

INCOME TAX. See *Revenue.*

INDICTMENT. See Index of Justiciary Cases, p. 1240.

INDUSTRIAL SCHOOLS ACT. *Industrial Schools Act*, 1866 (29 *and* 30 *Vict. c.* 118), *secs.* 14, 35, 38.

A boy, chargeable to a parish, having been committed to an industrial school under a warrant *ex facie* regular, the Lord Advocate raised an action against the inspector for the expenses of his maintenance. *Held* that it was not a relevant defence for the inspector to plead that the proceedings before the magistrate were irregular, and that the warrant had been illegally granted. Lord Advocate v. Brown, Dec. 2, 1875, p. 188.

INHIBITION. See *Arrestment*, 3.

INSURANCE. *Ship—Concealment—Change of Ship's Nationality—Merchant Shipping Act*, 1873—*Board of Trade Inspection.*

1. A vessel was transferred by means of a fictitious sale from the British to the Belgian flag, for the purpose of avoiding the inspection provided by the "Merchant Shipping Act, 1873." The vessel was subsequently insured. In an action upon the policy, the vessel having been lost, *held* that failure to mention the change of nationality to the underwriters, some of whom had a year before insured the vessel as a British ship, was a concealment of a material fact which would have influenced a prudent underwriter in determining whether to accept or decline the risk, and therefore voided the policy, although the defenders did not maintain that the vessel was unseaworthy when she sailed upon the voyage for which she was insured. Hutchinson and Co. v. Aberdeen Sea Insurance Co., May 23, 1876, p. 682.

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3. A policy of life assurance contained a stipulation that in case it should afterwards appear "that any untrue averment was contained in the declaration by the assured as to his age or state of health, the policy should be void." *Held* that false statements by the assured in the declaration were a relevant ground of reduction of the policy in the hands of an onerous assignee. Scottish Widows' Fund v. Buist, &c., July 14, 1876, p. 1078.

INTERDICT. *Breach of Interdict—Patent.*

1. The holder of a patent obtained interdict against a person to prevent infringement, the Court overruling an objection to the validity of the patent. Thereupon the respondent immediately assumed a partner. Another note of suspension and interdict was presented by the holder of the patent against the new firm. *Held* that the complainer's proper remedy was a complaint for breach of interdict against the respondent in the former process, and not a new note of suspension and interdict. Dudgeon v. Thomson and Donaldson, March 17, 1876, p. 604.

Breach of Interdict—Jury Trial or Proof.

2. The holder of a patent having obtained an interdict against B infringing the same subsequently presented a petition and complaint against B, and C, his partner, for breach of interdict. *Held* that the case should be tried before the Lord Ordinary without a jury. Dudgeon v. Thomson and Donaldson, July 5, 1876, p. 974.

Damages.

3. *Held* that a person could not claim damages for being prevented by interdict from proceeding with a building which it was ultimately found that he had no right to erect, although the interdict was recalled as not being the proper remedy in the circumstances. Jack v. Begg, Oct. 26, 1875, p. 35.

See *Road*, 1.

ISSUE. *Reduction—Error.*

A father and mother aged respectively seventy-eight and seventy-five years brought an action against a daughter and her husband to reduce an irrevocable disposition granted by the pursuers six months before, whereby, subject to the pursuers' liferents, and certain burdens, the parents' moveable estate, and a liferent of heritage, were conferred upon the daughter in consideration of her, in time coming, assisting the mother in the management of a hotel. The pursuers averred that the deed was executed under essential error on their part, they believing that the deed was a revocable testamentary deed making alterations upon a prior settlement in accordance with instructions given by them to their law-agent, while, in fact, it was irrevocable and not in accordance with these instructions; and further, that the error had been induced by the defenders in instructing the law-agent, and by the law-agent, or by one or other of them; and further, that the error had been fraudulently induced by these parties. *Held* that besides an issue of fraud the pursuers were entitled to the issue "whether the pursuers in granting the disposition were under essential error as to the substance and effect of the said deed," without the addition of the words "induced by the defenders," as contended for by the defenders. M'Laurin v. Stafford, Dec. 17, 1875, p. 265.

JOINT ADVENTURE. See *Partnership*, 2.

JOINT STOCK COMPANY. See *Fraud*, 2—*Partnership*.

JUDICIAL FACTOR, CURATOR BONIS, &c. *Investment on Security of Rates.*

1. Investments by a *curator bonis* secured respectively (1) on rates leviable under the Aberdeen County and Municipal Buildings Act, 1866, and the Sheriff Court Houses Act, 1860, or (2) on rates leviable under the Aberdeenshire Road Act, 1865, *approved of*. Grainger's Curator, Feb. 23, 1876, p. 479.

Special Powers—Insanity—Aliment—Nobile Officium.

2. An application by the *curator bonis* of a person *incapax*, for authority to pay out of the surplus income of the ward's estate an alimentary allowance to the only brother and heir-at-law of the ward, who was in destitute circumstances, *refused*, on the ground that this was a matter in which the Court would not interfere with the discretion of the curator. Dunbar, March 7, 1876, p. 554.

Powers—Sanction of the Court to a purchase of heritage by a curator bonis.

3. Circumstances in which the Court approved of a purchase of heritage by the

JUDICIAL FACTOR, CURATOR BONIS, &c.—*Continued.*

curator bonis of a lunatic made without a previous application to the Court. Gilray, March 18, 1876, p. 619.

Foreign Lunatic—Recall of Appointment.

4. A *curator bonis* was appointed to a lunatic domiciled in England in order to grant discharges of her aliment to a judicial factor on a Scotch estate. Thereafter the brother of the lunatic obtained a commission of lunacy in the Court of Chancery in England, under which committees of the person and estate were appointed to the lunatic. Upon the application of the committees of the person and estate the Court recognised their title and recalled the curator's appointment. Sawyer, &c. v. Sloan, Dec. 17, 1875, p. 271.

See *Pupil.*

JUDICIAL INSPECTION. See *Carrier.*

JURISDICTION. See *Church*, 1—*Lease*, 1—*Police*, 2, 3—*Sheriff*, 1, 3, 4.

LANDLORD AND TENANT. See *Lease.*

LEASE. *Jurisdiction—Sheriff.*

1. An action to compel a person to implement a lease, by entering into possession and paying the rent, may competently proceed in the Sheriff Court, although the Sheriff may have to decide upon the constitution of the lease, in consequence of the defender's denial of its existence. Robertson v. Cockburn, Oct. 22, 1875, p. 21.

Proof of Lease—Writ or Oath.

2. The proprietor of a house and garden in a town obtained a Sheriff Court decree ordaining the tenant to remove at the Whitsunday removing term 1875, being the expiry of seven months for which he alleged the premises had been let.

In a suspension brought by the tenant he alleged—1. a verbal agreement for a lease of five years followed by possession and *rei interventus;* and 2. an interim agreement for a yearly tenancy. *Held* that the suspender could only prove the averment as to a five years' lease by writ or oath, but that the averment as to a yearly tenancy could be proved *prout de jure*, and the landlord, in respect of his averments as to a seven months' tenancy, appointed to lead in the proof. Gibson v. Adams, &c., Nov. 20, 1875, p. 144.

Proof of Lease—Singular Successor.

3. Writings held sufficient to prove a lease for a term of years in a question with a singular successor of the granter. Wilson v. Mann, March 2, 1876, p. 527.

Accessory—Road.

4. *Circumstances in which it was held that the tenant of a farm had failed to shew that he had a right, either by express contract or by implied grant, to use a private road passing through other grounds belonging to the landlord.* Duncan v. Scott, June 20, 1876, H. L., p. 69.

Dwelling-House—Hypothec—Obligation to Furnish—Sheriff.

5. A summary petition to the Sheriff by the landlord of a house in a town to have the tenant ordained to plenish the house with sufficient furniture to secure the current year's rent, or to find caution for the same, and, failing the tenant obtempering the order, for a warrant to eject the tenant, and let the house, is competent. Wright v. Wightman, Oct. 30, 1875, p. 68.

Reparation—Game—Rabbits—Game Tenant—Relief.

6. The game tenant of a farm held bound to relieve the landlord of damages found due by him to the agricultural tenant for injury to his crops by rabbits, without any clause in the game lease to that effect. Kidd v. Byrne. Byrne v. Johnson, Dec. 16, 1875, p. 255.

Reparation—Damages—Game—Rabbits.

7. The lease of a farm reserved to the landlord the whole game and rabbits, and bound the tenant to preserve the game of all kinds, including rabbits, "to the utmost of his power." It also contained a stipulation that "the

LEASE—*Continued.*

tenant shall have no claim whatever for any damage he may sustain from game, hares, and rabbits, during the lease, this being held to have been calculated upon and allowed for by him in offering for the farm." In an action of damages by the tenant for injury alleged to have been done to his crops by an excessive increase of rabbits, *held* (1) that the tenant's claim was not excluded by the clause in the lease above quoted; but (2) that, having regard to the terms of the lease, the tenant had not proved such an increase of rabbits as to entitle him to damages. Cadzow v. Lockhart, May 19, 1876, p. 666.

Minerals—Refusal to remove—Violent Profits—Reparation—Damages.

8. It was agreed between the landlord and tenant of a colliery that in the event of the tenant's death during the currency of the lease the landlord should be entitled to resume possession of the colliery, "if he should at any time be dissatisfied with the working thereof by the representatives" of the tenant. The tenant having died, the landlord, twelve months thereafter, intimated by letter to his representatives that he was dissatisfied with their working of the colliery, and had resolved to resume possession thereof in terms of the agreement. The tenant's representatives refused to cede possession, and unsuccessfully defended an action raised against them by the landlord to enforce removal. *Held* (1) that the landlord's remedy against the defenders was not a claim for violent profits but for damages for breach of contract in not removing in terms of the agreement, and (2) that in the circumstances he was entitled to damages. Houldsworth v. Brand's Trustees, Jan. 8, 1876, p. 304.

Meliorations—Compensation.

9. An agricultural tenant died during the fifth year of a nineteen years' lease. The *curator bonis* of his heir, who was a lunatic, declined to take up the lease, and the landlord refused to accept the executors as tenants. The landlord obtained decree in the Sheriff Court against the executors for the expense of repairing fences and buildings which the tenant was bound to keep up. The executors in a suspension stated as a set off *pro tanto* against the landlord's claim the value of unexhausted manures and improvements by which the landlord had been *lucratus* in consequence of the premature termination of the lease, for which they also raised an action. *Held* that the tenant's meliorations could not found a claim against the landlord, and therefore could not be pleaded in compensation. Scott's Executors v. Hepburn, June 14, 1876, p. 816.

Mutual Obligation—Compensation—Retention—Liquid and Illiquid—Rescission of Contract.

10. Circumstances in which a tenant was entitled, without raising a separate action, to set off against the landlord's claim for rent a claim of damages for a persistent violation of the lease on the part of the landlord, and opinions expressed that the tenant was entitled to rescind the lease. Davie v. Stark, July 18, 1876, p. 1114.

See *Heritable and Moveable—Nuisance—Railway*, 1.

MANDATE. *Writ—Erasure.*

Held (1) *that mandates, bearing to be granted for a meeting of a parochial board to be held on 2d August, "or any subsequent date to which such meeting may be adjourned, for the election of an inspector of poor in room of," &c., were validly tendered, and ought to have been admitted at a meeting of the board held for that purpose on September 5th, although no meeting had been held on the 2d August;* (2) *that mandates bearing to be for a meeting to be held on August 16th were valid, although the figure "6" was printed on an erasure, from which the figure "5" had been removed.* Muir v. Thompson, Feb. 28, 1876, H. L., p. 1.

MARRIAGE. See *Husband and Wife—Church*, 5.

MARRIAGE-CONTRACT. See *Succession*, 5.

MASTER AND SERVANT. *Reparation.*

1. When a master orders a labourer to do a piece of work, out of the line of his ordinary employment, which could with safety be done only by a skilled workman, the master is responsible should any accident happen to the workman. Robertson v. Brown, May 17, 1876, p. 652.

Reparation—Culpa—Collaborateur.

2. *Held* that where a coalmaster had devolved the entire charge of a coal-pit upon a competent manager and competent subordinates he could not be made liable in damages for the death of a miner employed in the pit, alleged to have been caused by their fault. Sneddon v. Mossend Iron Co., June 23, 1876, p. 868.

Master's responsibility for Servant's delict—Relevancy.

3. A pursuer averred that the defenders W. and T., being in the service of the other defender H., and acting with his authority, or at least for his behoof, did on a turnpike road shoot at and kill the pursuer's dog, and wound the pursuer. *Held* that there was no relevant averment inferring liability against H., and action against him *dismissed.* Wardrope v. Duke of Hamilton, June 24, 1876, p. 876.

See *Reparation*, 1.

MEMBER OF PARLIAMENT. See Index of Registration Appeal Cases, p. 1239.

MINERALS. *Superior and Vassal—Servitude.*

1. *B acquired in feu from A three contiguous parcels of lands. In the titles to the different parcels A reserved respectively:—*

(1) "*The coals and coal heughs to be won and disposed upon at our pleasure.*"

(2) "*The whole coal, stone quarries, and all other metals and minerals, with power to search for, work, and carry away the same.*"

(3) "*The coal, with full power to dig for, work, win, and carry away the same.*"

A was proprietor of the land surrounding B's, and leased the whole coal-field thereunder, including the coals under B's lands, to a coal company who drove a mine, with its entrance in A's lands, cross-cutting coal and other strata in B's lands, to A's lands beyond, and thereby conveyed the minerals wrought under these last-mentioned lands to the surface.

Held *that A and his lessees were not entitled to use the mine under B's lands for conveying minerals wrought under A's lands, except in so far as the mine passed through coal wastes under B's lands, or other reserved minerals.* Blair v. Ramsay, &c., May 22, 1876, H. L., p. 41, aff. judgment of Court of Session Oct. 22, 1875, Court of Session Cases, p. 25.

Water—Mining Operations.

2. In an action brought by the tenants of a coal mine against the tenant of an adjoining mine belonging to the same proprietor for damage caused by water flowing into the pursuers' mine from the defender's workings, it was proved that the water consisted—(1) of the natural drainage of the defender's mine; and (2) of water collected on and diverted from the surface in consequence of the dislocation of drains and the subsidence of portions of the surface through the defender's mining operations. It was also proved that the pursuers had, with the landlord's permission, worked into and removed a natural barrier of coal between the mines, which would have prevented the flow of water complained of. *Held* that the pursuers had been in fault in destroying the barrier between the mines, and therefore that they were not entitled to recover damages from the defender. Wilsons v. Waddell, Jan. 8, 1876, p. 288.

See *Lease*, 8—*Superior and Vassal*, 4.

MINOR. See *Pupil.*

NEGLIGENCE. See *Reparation*, 1, 2, 3, 4.

NOBILE OFFICIUM. See *Judicial Factor—Pupil.*

NUISANCE. *Pollution—Stream—Landlord and Tenant.*

A proprietor erected a village for the accommodation of the miners in his employment on the banks of a stream formerly suitable for primary uses. Drains were provided to carry off surface water and water from washing-houses through filtering beds into the stream, other arrangements being made by the proprietor for the removal of excreta and refuse from the miners' cottages, which, if attended to by the inhabitants, would have prevented such polluting matters from reaching the stream. In an action for interdict against the proprietor at the instance of an inferior heritor who alleged that the water from the drains polluted the stream the defender pleaded (1) that the stream was the natural channel of the drainage of his lands, and (2) that there had been no pollution. *Held*, on consideration of a proof, that pollution of the stream by the drains had been proved, and that, unless the pollution was stopped, the pursuer would be entitled to have his rights protected by interdict against the defender. Caledonian Railway Co. v. Baird and Co., June 14, 1876, p. 839.

See *Reparation*, 2.

OATH, REFERENCE TO. See *Proof*, 3, 4.

PARENT AND CHILD. *Legitim—Donation.*

1. A advanced the sum of £1000, being nearly the whole of his moveable estate, to one of his sons, who, at his father's request, wrote upon one sheet of paper three I O U's (the sums in which together amounted to £1000), one being in favour of each of A's other children, except a son whom he desired to exclude from all share in his succession. The paper containing the I O U's was then handed in turn to two of the creditors in the obligations (the third was deaf and dumb) and finally to the father, by whom it was retained till his death, which occurred nine months after the transaction. *Held*, in a claim for *legitim* by the excluded son against his father's trustees, that the whole circumstances, and, particularly, the retention of the obligatory documents by the father, shewed that the transaction was simulate, and that the fund formed part of the personal estate of the father at the time of his death. Buchanan v. Buchanan, March 7, 1876, p. 556.

Proof—Filiation.

2. Circumstances in which *held* that the paternity of an illegitimate child had been proved. Dunn v. Chalmers, Dec. 10, 1875, p. 236.

Illegitimate Child—Proof—Presumption.

3. The defender in an action of filiation admitted intercourse with the pursuer 311 days before the birth of the child, and the pursuer did not allege any subsequent intercourse. *Held*, notwithstanding some evidence which tended to shew that the period of gestation was exceptionally long, that the pursuer had failed to overcome the presumption against so long a period of gestation, and the defender assoilzied. Henderson v. Somers, July 7, 1876, p. 997.

Legitimacy—Proof of Paternity.

4. A man who marries a woman whom he knows to be pregnant, raises a presumption of fact that he is the father of her child, which it is not easy to rebut.

Held, upon this and other grounds, that a man had failed to prove that he was not the father of a child to which his wife gave birth six weeks after the date of the marriage. Gardner v. Gardner, May 30, 1876, p. 695.

PARISH. See *Church—School.*

PARTNERSHIP. *Private Partnerships.*

Existence of Partnership.

1. Two parties to a written contract of copartnery brought an action against the father of the third party, and the third party, for declarator that the father was a partner, alleging that immediately after the contract was

PARTNERSHIP—*Continued.*

signed they had discovered that the father was really the partner, and that he had been then accepted by them, and had acted as partner. *Held* that the action was not relevant. Clippens Shale Oil Co. v. Scott, May 17, 1876, p. 651.

Joint Adventure.

2. Circumstances in which *held* that one of two parties to a joint adventure in minerals was entitled to bring the joint adventure to an end. Miller v. Walker, Dec. 10, 1875, p. 242.

See *Right in Security.*

Joint Stock Companies.

Companies Clauses Consolidation (Scotland) Act, 1845—*Transfer of Shares—Bankruptcy.*

3. A shareholder in a railway company executed a transfer, and after a year became bankrupt, the shares still standing in his name. Thereafter the transferee recorded the transfer in the company's register of transfers. *Held* that he was preferable to the trustee in the sequestration, who had not completed his title under the 19th section of the Companies Clauses Consolidation (Scotland) Act, 1845. Morrison v. Harrison, &c., Feb. 3, 1876, p. 406.

Winding up under supervision of the Court—Companies Act, 1862, *secs.* 147, 148, *and* 151.

4. Procedure in a petition, presented five days before the rising of the Court, for continuing the voluntary winding up of a company subject to the supervision of the Court. Christie, &c., March 18, 1876, p. 623.

Liquidator—Statute 25 *and* 26 *Vict. c.* 89 (*Companies Act*, 1862), *sec.* 138.

5. *Held* that the liquidator of a Scotch joint stock company, appointed under the Companies Acts of 1862 and 1867, who had gone to reside in England in the course of the liquidation, was entitled to obtain decree under secs. 121 and 138 of the Companies Act, 1862, against contributories who had failed to make payment of calls. Robertson, Oct. 20, 1875, p. 17.

Voluntary Winding up—Extraordinary Resolution—Companies Act, 1862, *secs.* 51 *and* 129.

6. A company, by circular, gave notice to its shareholders that an extraordinary meeting would be held "to consider, and, if approved of, to sanction the voluntary winding up of the company." The notice also contained this statement—"The directors enclose a balance-sheet of the company's affairs, prepared by the auditor to this date. From the result of that balance it will be apparent that it is hopeless to carry on the company with any prospect of success." The meeting passed a resolution in terms of sec. 129, sub-sec. (3) of the Companies Act, 1862, and appointed a liquidator. No meeting was called to confirm this resolution. In an application by the liquidator to have a creditor restrained from doing diligence against the company, *held* that the resolution was invalid, in respect that the notice did not shew that it was intended to propose an extraordinary resolution under sub-sec. (3), but merely a resolution under sub-sec. (2), which would have required confirmation at a subsequent meeting. Wilson v. M'Genn and Co., Feb. 19, 1876, p. 474.

Companies Act, 1862, *secs.* 129 *and* 51—*Voluntary Winding Up—Liquidation—Notice—Special Resolution.*

7. A notice was given of a meeting of a company "for the purpose of considering the present position of the company, and to consider and resolve whether, under existing circumstances, the company should be wound up, and, if so resolved upon, to decide in what manner this should be done." At the meeting a resolution was carried to wind up the company voluntarily. *Held* that the notice was sufficient. Sdeuard v. Gardner, March 10, 1876, p. 577.

PARTNERSHIP—*Continued.*

Statute 25 *and* 26 *Vict. c.* 89 (*Companies Act*, 1862—*Voluntary Winding Up—Powers of the Court to stay proceedings at instance of Creditors against a Company in Liquidation.*

8. *Held* that the 138th section of the Companies Act, 1862, did not give the Court power to stay proceedings by creditors against a company which was being wound up voluntarily. Sdeuard v. Gardner, March 10, 1876, p. 577.

See *Agent and Principal*, 1—*Fraud*, 2.

PATENT.

In the specification of their patent, patentees described their invention as consisting "in new or improved simple and most efficient modes of and arrangements of mechanism, for actuating the set or sets of 'compound' or 'multiple' shuttle boxes of looms," and after describing in detail the various parts of a shuttle box moving and holding mechanism, and a pattern mechanism, and mechanism for connecting the two, they claimed,—"First, the construction and arrangements of the parts of pattern mechanism and shuttle box moving and holding mechanism as herein distinguished generally for actuating the shuttle boxes of power-looms, all substantially in the new or improved manner herein described and shewn in the accompaning drawings, or any mere modification thereof." They also claimed,—Second, third, and fourth, particular portions or movements in the general mechanism described in the first claim. Held *(in* rev. *judgment of First Division)* (1) *that in a claim for a mere combination it is not necessary to explain what is the novelty and what the merit of the invention, otherwise than by a description of the combination as a whole, nor to specify what of the combined parts are old and what are new;* (2) *that the claim to certain subordinate parts excludes the possibility of a claim to any other subordinate parts as novel, without any special disclaimer; and* (3) *that the first claim in the specification was* ex facie *a valid and sufficient claim for a mere combination, the second, third, and fourth claims in claiming certain subordinate parts as novel by implication disclaiming the rest.*

Observed (per *Lord Chancellor)*—"*If there is a patent for a combination the combination is itself* ex necessitate *the novelty; and the combination is also the merit, if it be a merit, which remains to be proved by evidence. So also with regard to the discrimination between what is new and what is old. If it is clear that the claim is for a combination, and nothing but a combination, there is no infringement unless the whole combination is used, and it is in that way immaterial whether any or which of the parts are new.*"

Observations (per cur.) *on the cases of Foxwell v. Bostock*, 4 *De Gex, Jones, and Smith*, 298, *and Lister v. Leather*, 8 *El. and Black.* 1004. Harrisons v. Anderston Foundry Co. June 20, 1876, H. L., p. 55.

See *Interdict*, 1, 2.

POINDING THE GROUND.

A creditor holding a recorded *ex facie* absolute disposition to lands belonging to his debtor is not entitled to use the diligence of poinding of the ground. Scottish Heritable Security Co. v. Allan, Campbell, and Co. Jan. 14, 1876, p. 333.

POLICE. *Police and Improvement Act*, 1862 (25 *and* 26 *Vict. c.* 101), *sec.* 130.

1. The 130th section of the General Police and Improvement Act, 1862, does not impose on owners of common stairs, &c. the duty of supplying gas or other illuminating substance. Stewart v. Edwards, Dec. 8, 1875, Justiciary Cases, p. 14.

Police and Improvement Acts, 1850 *and* 1868, 13 *and* 14 *Vict. c.* 33, 31 *and* 32 *Vict. c.* 102—*Police Commissioners.*

2. The Police and Improvement Act, 1850, enacts that "any householder" of the burgh shall be eligible to be elected a commissioner. The Police Act,

POLICE—*Continued.*

1868, defines the word "householder" to be "a male occupier of lands or premises of the yearly value of £4 and upwards as appearing on the valuation-roll." The valuation-roll of a burgh contained an entry of "David Swan junior and Company" as occupiers of premises of the annual value of £220. At 31st December a change took place in the partnership, the new firm taking the name of David Swan and Sons. At an election of police commissioners in June 1875, a person, who was a partner of the new firm, and held a written authority from the new firm to vote, was elected a commissioner. In an action brought by a defeated candidate to reduce the election, on the ground that the defender had not the qualification, as neither his name, nor the name of his firm, appeared in the valuation-roll, *held* (1) that the Court had jurisdiction to entertain the objection; but (2) that the objection was not valid, as the candidate had a substantial qualification. M'Donald v. Robertson, May 17, 1876, p. 645.

Jurisdiction—13 *and* 14 *Vict. c.* 33, *sec.* 31, *Police and Improvement Act*, 1850—*Election—Scrutiny.*

3. An objection by a candidate, claiming to have been elected at an election of police commissioners, that a number of persons had voted who had not paid their assessments, and were therefore, under section 34 of 13 and 14 Vict. c. 33, not entitled to vote, can only be inquired into by a committee of the commissioners upon a complaint brought under section 31 of 13 and 14 Vict. c. 33. M'Donald v. Robertson, May 17, 1876, p. 645.

Election of Police Commissioners—Treating.

4. *Held* that treating of voters by candidates at an election of police commissioners was not a relevant ground for setting aside the election. M'Donald v. Robertson, May 17, 1876, p. 645.

Appeal—Police and Improvement Act, 1850 (13 *and* 14 *Vict. c.* 33), *secs.* 286, 310—*Nuisances Removal Act*, 1856 (19 *and* 20 *Vict. c.* 103), *sec.* 64.

5. Police Commissioners served notice upon a house proprietor under the 64th section of the Nuisances Removal Act, requiring him to pave a street. The proprietor having paid no attention to the notice, the commissioners paved the street themselves, and raised an action in the Sheriff Court against the proprietor under the same section for recovery of the expense. The defender averred that the street was not of the description which under the statute he was bound to pave. The commissioners maintained that the defender not having appealed against the notice to the Sheriff under the 286th section of the Police and Improvement Act, 1850, he had acquiesced, and the matter was concluded. *Held* that the 286th section related solely to matters "the cost attending which was directed to be provided for by way of private or district assessment," and had no application to proceedings under the 64th section of the Nuisances Removal Act, and the relative 310th section of the Police and Improvement Act directing expenses to be recovered as a debt, and therefore that the defender was not precluded from defending the action on the merits. Dundee Police Commissioners v. Mitchell, June 2, 1876, p. 762.

Police and Improvement Act, 1862, *sec.* 35.

6. In 1875 the burgh of Kirriemuir adopted the General Police Act of 1862, the 35th section of which provides that, if the Act is adopted, "any general or local Police Act within such burgh shall be repealed, excepting in so far as it may relate to matters not provided for in this Act." *Held* that the clause did not apply to provisions in the Forfarshire Roads Act, passed in 1874, imposing the burden of maintaining existing foot pavements of streets in the burgh upon the police commissioners. Kirriemuir Police Commissioners v. Reid's Trustees, July 7, 1876, p. 993.

Police and Improvement (Scotland) Act, 1862, 25 *and* 26 *Vict. c.* 101, *sec.* 132.

7. The Police and Improvement (Scotland) Act, 1862, sec. 132, enacts that, in burghs adopting the Act, "the dust," "ashes," "rubbish," &c., "within the burgh shall be and hereby are vested in the police commissioners," and

POLICE—*Continued.*
that they shall cause the same to be collected from the "streets, houses, and premises" in the burgh. *Held* that the enactment did not apply to ashes produced in the furnaces of a manufactory. Pullar and Sons v. Perth Police Commissioners, July 20, 1876, p. 1176.
See *Reparation*, 4.

POOR. *Settlement—Relief—Desertion by a Husband.*
1. In questions of parochial relief the rule that the desertion by a husband of his wife and children is during the period of desertion equivalent to his death applies in all such cases. The rule applied in a case where a deserting husband who had a birth settlement in Scotland had (if he was alive) during the desertion lost a residential settlement by non-residence. Greig v. Simpson and Craig, May 16, 1876, p. 642.
Sheriff—Jurisdiction—Collection of Assessment—8 and 9 Vict. c. 83, sec. 88.
2. *Held* that in an action brought in the Sheriff Court by a parochial board for recovery of poor-rates, the function of the Sheriff is not ministerial to interpone judicial authority for recovery of the assessment but judicial, and that it is competent for the Sheriff to entertain and decide questions as to the legality of the assessment. M'Tavish v. Commissioners of Caledonian Canal, Feb. 3, 1876, p. 412.
See *Industrial Schools Act.*

POORS-ROLL.
A wife and her husband, pursuers of an action of reduction of a deed on the ground of inadequate consideration, circumvention, and forgery, applied for admission to the benefit of the poors-roll. It appeared that they had one child living in family with them who earned 6s. a-week, while the husband's wages were £1 a-week. *Held*, in consideration of the nature of the allegations in the summons, and after a report of *probabilis causa*, that they were entitled to be admitted. M'Gill, &c. v. Bell's Trustees, Feb. 5, 1876, p. 427.

PRESCRIPTION. See *Trust*, 4.

PRESUMPTION OF LIFE. See *Succession*, 8.

PROCESS. *Summons.*
Competency—Value of the Cause—Stat. 50 Geo. III. c. 112 (Judicature Act, 1810), sec. 28.
1. The owners of a vessel sued fifty underwriters under a policy of assurance on their vessel for £60, 13s. 1d. "according to the several proportions for which the policy was underwritten by them, viz. £1, 4s. 3½d. each." *Held* that the action was competent in the Court of Session, as the sum which the pursuers sued for exceeded £25. Nelson, Donkin, and Co. v. Browne, &c., June 10, 1876, p. 810.
Contract—Lease.
2. A Sheriff Court summons concluding generally against a tenant for implement of a contract of lease *held* insufficient, but *allowed* to be amended by the insertion of the words "by entering into possession of the premises and paying the rent when due." Robertson v. Cockburn, Oct. 22, 1875, p. 21.
Lis alibi pendens. *Defences.*
3. The Lord Ordinary pronounced an interlocutor finding that a summons was informal, dismissing the action, finding the defender entitled to expenses, and remitting his account to the Auditor for taxation. Before the account was taxed a second summons was signeted, executed, and called at the instance of the same pursuer against the same defender, with the same conclusions. *Held* that the plea of *lis alibi pendens* fell to be sustained. Kennedy v. Macdonald, June 12, 1875, p. 813.
Decree by Default.
Court of Session Act, 1868, sec. 26—Decree by default—Res judicata.
4. A decree of absolvitor upon the pursuer's failure to deliver printed proofs

PROCESS—*Continued.*

of the record in terms of sec. 26 of the Court of Session Act, 1868, is a decree *in foro*, and, so long as it subsists, will exclude a new action upon the same grounds. Forrest v. Dunlop, Oct. 15, 1875, p. 15.

Reponing—Decree by default.

5. The reponing of a party against whom decree by default has gone out is a matter for the discretion of the Court. Circumstances in which a defender was reponed upon payment of the previous expenses incurred by the pursuer. Anderson v. Garson, Dec. 16, 1875, p. 254.

Attendance of Counsel.

6. The Division Roll will be called in regular order, and the fact of counsel being engaged in a proof will not be taken as an excuse for not appearing in the Division. Wilson v. Mann, March 2, 1876, p. 527.

Appeal—Print.

7. An appellant found liable in £2, 2s. of expenses, in respect that the appeal was imperfectly printed. Roxburgh and Co. v. Barlas, Jan. 8, 1876, p. 288.

Review.

Reclaiming Note—Statute 48 *Geo. III. c.* 151, *sec.* 16.

8. Where the days for reclaiming against a Lord Ordinary's interlocutor had expired, without a reclaiming note being lodged, the party moved the Lord Ordinary for leave to reclaim under the Act of 1808, sec. 16. The Lord Ordinary pronounced an interlocutor refusing the motion, against which the party reclaimed. *Held*, in the circumstances, that the Lord Ordinary had exercised a sound discretion in refusing leave to reclaim.

But *question*, whether it was competent to bring the Lord Ordinary's judgment in the matter under review. Magistrates of Leith v. Lennon, Nov. 23, 1875, p. 152.

Reclaiming Note—Law Agents Act, 1873, *sec.* 7.

9. Sec. 7 of the Law Agents Act provides "that a petition by a person to be admitted as a law-agent may be presented to any Judge of the Court officiating as a Lord Ordinary, and the proceedings under the same may take place and be conducted before the same or any other Judge according to the judicial arrangements in the Court for the time being, and a single Judge shall be entitled to act as the Court with reference to all petitions for admission as a law-agent under this Act." *Held* that a reclaiming note against the judgment of the Lord Ordinary was competent. Robertson, July 18, 1876, p. 1104.

Reclaiming—Court of Session Act, 1868 (31 *and* 32 *Vict. c.* 100), *sec.* 28—*A. S.* 10*th March* 1870, *secs.* 1, 2.

10. *Held* that an interlocutor renewing an order for proof was an allowance of proof, and might be reclaimed against without leave within six days. Clark v. M'Allister, June 6, 1876, p. 780.

Suspension—Court of Session Act, 1850 (13 *and* 14 *Vict. c.* 36), *secs.* 9, 32.

11. *Held* that sec. 32 of the Court of Session Act, 1850, did not override sec. 9, and was not applicable to suspensions covered by sec. 9, viz. cases in which answers have been lodged, and that in such cases the record fell to be made up in the Outer-House as in an ordinary action. Scott's Executors v. Hepburn, June 14, 1876, p. 816.

Appeal—Expenses.

12. Circumstances in which £5, 5s. of expenses were allowed the respondent in an appeal, in respect that the appeal had not been timeously withdrawn. Johnston v. Rae, June 24, 1876, p. 879.

Pupil. *Special Case.*

13. *Held* that the Court could not entertain a special case presented by certain persons for their own interest, and also as tutors for pupil children having an adverse interest. Park v. Park, June 15, 1876, p. 850.

Jury Trial or Proof.

Petition for Service—Appeal for Jury Trial.

14. When a petitioner for service appeals for jury trial from the Sheriff of

PROCESS—*Continued.*

Chancery under the 41st section of the Titles to Land Act, 1868, the Court will consider whether the case is suitable for jury trial, but the appellant has a right to jury trial unless cause is shewn to the contrary. It is not a sufficient reason for refusing jury trial that the evidence in the case mainly consists of a large mass of correspondence and other documentary evidence as to pedigree. Mackintosh v. Ross, Dec. 7, 1875, p. 232.

Jury Trial—Proof.

15. In an action brought by an insurance company to reduce a policy of life assurance on the ground of false statements by the insured, *held* that it was expedient that the case should be tried by a Lord Ordinary without a jury. Scottish Widows' Fund v. Buist, &c., July 14, 1876, p. 1078.

Jury Trial.

16. Where a case of damages was withdrawn from a jury by a joint minute for the parties agreeing that the jury should assess the damages, leaving the question of legal liability to the Court on the record and notes of evidence, but the Judge's notes bore that at the request of the parties he had asked the jury their opinion on a particular question of fact in the case, *held* that the Court was not bound by the jury's expression of opinion on that point. Adams v. Glasgow and South-Western Railway Co., Dec. 7, 1875, p. 215.

Jury Trial.

17. *Pro forma* jury trial to enable an appeal to be taken to the House of Lords against the disallowance of a bill of exceptions on the subject of which the Court had already expressed an opinion. Harrisons v. Anderston Foundry Co., Jan. 20, 1876, p. 386.

See *Appeal—Expenses—Interdict—Proof—Pupil—Res Judicata—Sheriff.*

PROOF. *Contract—Parole.*

1. When a contract has been embodied in a formal deed it is not competent to modify its terms by parole evidence that the intention of the parties was different from that set forth in the deed. Steuart's Trustees v. Hart, Dec. 22, 1875, p. 192.

Implied Admission—Carrier.

2. In an action against a railway company for non-delivery of goods, *held* that a denial by the company that they received the goods was not an implied admission that they did not deliver them to the consignee. Cruickshank, Fraser, and Co. v. Caledonian Railway Co., Feb. 25, 1876, p. 484.

Reference to Oath—Retractation of Reference.

3. It is competent for the Court to allow a minute of reference to oath to be withdrawn, but it is a question for the discretion of the Court, and leave will be refused, not only in cases where the party has made the reference from improper motives, but also where, in consequence of the reference (through delay or otherwise), the opposite party has been put to a disadvantage. Dick v. Hutton, Feb. 17, 1876, p. 448.

Reference to Oath—Evidence Act, 1853, sec. 5.

4. Where a pursuer had been examined as a witness for himself, and had been cross-examined on the merits of the cause by the defender, the Court refused to sustain a reference to the pursuer's oath. Macleay v. Campbell, July 8, 1876, p. 999.

Custom.

5. Proof of what generally happens is not necessarily proof of custom. Brown v. M'Connel, June 7, 1876, p. 788.

Witness—Adultery—Criminating Questions—37 and 38 Vict. c. 64, sec. 2.

6. The provision of the Evidence Further Amendment Act, 1874, that "no witness shall be liable to be asked or bound to answer any question tending to shew that he has been guilty of adultery," is solely for the protection of the witness, and if he is willing to answer such a question the defender in an action for divorce has no right to object to its being put or answered.

Observations by the Lord President on the duty of the Judge in such cases. Kirkwood v. Kirkwood, Dec. 9, 1875, p. 235.

See *Lease*, 2, 3—*Parent and Child*, 2, 3, 4.

PROPERTY. *Gable.*

1. The customary rule according to which the owner of one of several adjoining lots of ground feued or sold for building a continuous street is entitled to erect his gable to the extent of one-half its thickness upon the adjoining lot without consent of the proprietor, and to be reimbursed half the cost of the gable by that proprietor when he comes to use the gable, proceeds on implied contract inferred from a feuing plan or other circumstances, and where there are no facts from which an implied contract can be inferred (as in rural or villa subjects), no such rule exists, and the builder of a tenement must build it entirely upon his own ground. Begg, &c. v. Jack, Oct. 26, 1875, p. 35.

Mutual Gable.

2. A proprietor of a piece of ground in the suburbs of Edinburgh, without consent of the conterminous proprietor, and pending unsuccessful negotiations as to the terms on which consent should be given, took down an old mutual garden wall between the subjects, and erected on the site a gable of four stories. *Held*, in an action of declarator and removal against him at the instance of the conterminous proprietor, that the defender's operations were illegal, but that the Court had the power to impose equitable conditions on which the gable should be allowed to stand, and that in the circumstances the use of the gable by the pursuer, when he came to build on his own ground, without payment, would be a sufficient indemnification for the use which had been taken without agreement of his ground. Begg, &c. v. Jack, Oct. 26, 1875, p. 35.

Servitude—Shop Sign—Implied Grant.

3. A proprietor of a tenement of houses, consisting of a shop story and three upper stories above the shop, when in the personal occupation of the shop story erected wooden panels above the window and door of the shop to receive his name and sign, which panels extended beyond the middle of the joists of the floor separating the shop story from the one above it. These panels were afterwards used for the same purpose by successive tenants of the shop. The tenant of the shop purchased the shop story and took a disposition of the subject "as presently occupied" by himself. The upper stories were purchased by another person. *Held* that there was no implied grant in favour of the disponee of the shop of the right to use the panels beyond the middle of the joists. Alexander v. Butchart, Nov. 24, 1875, p. 156.

Superior and Vassal—Conditions in Feu—Mutuality of Obligations between Co-Feuars—Jus quæsitum tertio.

4. A feu-contract of an area of ground in a suburban district contained an obligation on the vassal that the villas or other buildings to be erected thereon should be built with stone and lime. This obligation was embodied in the titles of two disponees to whom adjoining stances on the feu were conveyed. *Held* that the proprietor of one stance had a title and interest to insist upon the removal of a brick stable erected upon the other stance, although a man of skill, to whom the Court remitted, reported that the injury to the complainer's property would practically be the same if the building were of stone. Beattie v. Ures, March 18, 1876, p. 634.

Runrig and Rundale—Kavels.

5. Circumstances in which *held*—1st, That the title of two parties, each to one-half of an estate held in kavels by way of runrig or rundale, was not *pro indiviso* but separate and exclusive property, and continued to be so after the kavels were massed together and the whole divided into two continuous portions by decreet-arbitral; 2d, That the title to the salmon and other fishings *ex adverso* of what had been the respective kavels of the two proprietors was separate and exclusive, and not *pro indiviso* subsequent to the date of the decreet-arbitral, but opinions equally divided as to whether the title to the fishings had ever been otherwise than separate and exclusive.

Observations (*per* Lord Deas) explanatory of the law and practice of dividing an estate by way of runrig or rundale into two halves, called the

PROPERTY—*Continued.*
sunny half and the shady half. Baroness Gray v. Richardson and Others, July 14, 1876, p. 1031.
See *Division and Sale—Fishings—Minerals—Nuisance—Servitude—Superior and Vassal.*

PUBLIC BURDEN. *Clause of Relief—Superior and Vassal—Landlord and Tenant.*
1. A feu-charter dated in 1814 contained the following clause:—"During the existence of the present feu-right all public and parochial burdens or taxes imposed or to be imposed shall be paid by the superior and vassal as if the former was proprietor and landlord and as if the latter was tenant under him." *Held*, in an action by the vassal for relief of all poor-rates payable in respect of property, that the superior was only bound to relieve the vassal of poor-rates on the annual value of the feu-duty. Smith, Laing, and Co. v. Maitland, &c., Jan. 7, 1876, p. 281.

Clause of Relief—School-Rates—35 and 36 Vict. c. 62, Education (Scotland) Act, 1872, secs. 43 and 44.
2. In a disposition the granter bound himself to free and relieve the disponee of, *inter alia*, "all schoolmaster's salary and road-money payable for the lands and others hereby disponed, from henceforth and in all time coming." *Held* that the obligation to relieve of schoolmaster's salary did not apply to school-rates imposed under the Education (Scotland) Act, 1872. Steuart v. Earl of Seafield, March 1, 1876, p. 518.

Clause of Relief—Road-Money.
3. *Held* by Lord Young that the general assessment imposed under the Banffshire Roads Act, 1866, was covered by the obligation to relieve of "road-money." Steuart v. Earl of Seafield, March 1, 1876, p. 518.

PUBLIC HEALTH. See *Police—Nuisance.*

PUPIL. *Authority to Feu.*
1. Circumstances in which the Court granted authority to a father, as administrator-in-law of his pupil son, to feu part of the son's estate. Lord Clinton, Oct. 20, 1875, p. 62.

Special Case.
2. *Held* that the Court could not entertain a special case presented by certain persons for their own interest, and also as tutors for pupil children having an adverse interest. Park v. Park, June 15, 1876, p. 850.

RAILWAY. *Lease—Right of Tenant to Compensation—Possession.*
1. Notice by a railway company of their intention to take under their statutory powers a portion of a farm was served upon the agents of the proprietor about one o'clock on the day on which the landlord signed a lease of the farm (previously signed by the tenant) with entry at the ensuing term. There was no evidence as to the hour at which the landlord signed the lease. *Held* that a claim by the tenant against the railway company for compensation for loss of tenant's profits was excluded, upon the ground that he had failed to prove that there was a completed personal contract of lease between him and his landlord at the time when the notice to take was served, and that it was therefore unnecessary to determine whether possession under the lease was necessary to entitle the tenant to compensation. North British Railway Company v. Lindsay, Nov. 30, 1875, p. 168.

Railway and Canal Traffic Act, 1854 (17 and 18 Vict. c. 31), sec. 7—"Just and Reasonable Condition"—Detention of Perishable Goods.
2. A railway company gave consignors of fish the option of having their goods carried at a rate lower than the ordinary rate for fish, upon condition of the consignor undertaking by special contract to relieve the company of all liability for delay, except upon proof that the detention "arose from the wilful fault or negligence of the company's servants." In an action at the

RAILWAY—*Continued.*
instance of the consignor of fish at the lower rate, in which he claimed damages for detention of the fish, *held* that the special contract was just and reasonable within the meaning of the Railway and Canal Traffic Act, 1854, and had the effect of throwing upon the pursuer the burden of proving fault on the part of the company; but, upon the evidence, that fault had been proved against the company. M'Connachie v. Great North of Scotland Railway Co., Nov. 6, 1875, p. 79.

Contract of Haulage.

3. When a railway company undertakes to haul along their line waggons belonging to private traders, the extent of their obligation is to use reasonable care and diligence. Watson v. North British Railway Co., March 13, 1876, p. 637.

Railway Clauses (Scotland) Act, 1845 (8 *and* 9 *Vict. c.* 33), *sec.* 90—*Tolls—Lien.*

4. *Held* that the word "tolls" as used in the 90th section of the Railway Clauses (Scotland) Act, 1845, was to be construed as meaning tolls proper, or payments for the use of the line by persons using their own carriages, and therefore that the remedies given by that section were not available for the recovery of charges for goods carried by the railway company as common carriers. Highland Railway Co. v. Jackson, June 16, 1876, p. 850.

See *Carrier—Partnership*, 3—*Reparation*, 1.

REDUCTION. See *Issue—Sale*, 1.

REGISTRATION ACT. 17 *and* 18 *Vict. cap.* 80, *sec.* 55—*Burnt Registers.*
Procedure followed in restoring parish registers which had been destroyed. Dundas, Dec. 17, 1875, p. 273.

RELIEF. See *Lease*, 6—*Public Burden.*

REPARATION. *Culpa—Collaborateur—Railway.*

1. *Held* (1) that a railway company were liable for injuries caused by the fault of a station-master in their employment to a fireman on the train of another railway company using their line under running powers; and (2) that the claim was not barred by contributory negligence on the part of the engine-driver on the train and of another fellow-workman of the fireman. Adams v. Glasgow and South-Western Railway Company, Dec. 7, 1875, p. 215.

Culpa—Opus Manufactum—Nuisance.

2. A company of ironmasters in the course of their trade accumulated on their premises an enormous bing of refuse from an ironstone pit, composed of combustible materials, which, from some unexplained cause, took fire. In an action by a neighbouring farmer against the ironmasters to recover damages for injuries caused by noxious vapours emitted from the burning bing, *held* (1) that the defenders by forming such an *opus manufactum* had rendered themselves liable for the consequences without proof of specific fault; and (2) that fault had been proved. Chalmers v. Dixon, Feb. 18, 1876, p. 461.

Culpa—Harbour Trustees—Ship.

3. After a vessel had left its moorings in a tidal harbour the keel and bottom were found to have sustained injuries. A stone was found fixed in the mud at the spot where the vessel had rested. *Held* that assuming the stone had caused the injuries the harbour trustees were not liable in damages, as they had taken all reasonable means to make the harbour safe, and no fault or negligence of themselves or their servants had been established. Thomson, &c. v. Greenock Harbour Trustees, July 20, 1876, p. 1194.

Liability of Police Commissioners for Negligence of Contractor employed by them.

4. A person raised an action of damages against the police commissioners of a burgh for injuries sustained by him from having fallen over a heap of rub-

REPARATION—*Continued.*

bish left upon the street after night-fall and not fenced or lighted. The defence was that the commissioners, under the powers conferred upon them by the Police Act, had contracted with a person for the cleaning of the streets and removal of refuse, and accordingly that, if there was negligence on the part of any one, it was the contractor who was liable, and not the commissioners. *Held*, upon the terms of the contract, that the commissioners retained a complete control over the execution of the operations contracted for, and were not relieved from the obligation incumbent on them to remove the rubbish or to put it in a state free of danger to the lieges. Stephen v. Thurso Police Commissioners, March 3, 1876, p. 535.

Probable Cause—Relevancy.

5. A pursuer will not be allowed an issue of malice and want of probable cause when the Court are satisfied from the pursuer's own statements that the defender had probable cause. Craig v. Peebles, Feb. 16, 1875, p. 441.

Public Prosecutor—Probable Cause.

6. A Justice of Peace Court convicted a person, who held a public house certificate, of selling spirits without a certificate, in respect of his continuing to sell spirits within the licenced premises eight days after they had been rendered uninhabitable by fire. The conviction was afterwards suspended by the Court of Justiciary on the ground that the Justices had mistaken the law. In an action of damages raised by the suspender against the procurator-fiscal on the ground that he had presented the complaint maliciously and without probable cause, *held* that the above facts, as disclosed in the pursuer's statement, shewed that the case was a fair one for trial, and negatived the pursuer's averment of want of probable cause, and that the defender was entitled to absolvitor. Craig v. Peebles, Feb. 16, 1876, p. 441.

See *Arrestment*, 1—*Bankruptcy*, 2—*Carrier—Interdict*, 3—*Lease*, 6, 7, 8, 10—*Master and Servant—Railway*, 2, 3—*Ship*, 5.

RES JUDICATA. *Canon Law—Consistorial Cause.*

1. The rule of the canon law that decrees against marriage do not pass *in rem judicatam* was not adopted by, and forms no part of, the law of Scotland. Lockyer v. Ferryman, &c., June 28, 1876, p. 882.

Summons.

2. A raised an action of declarator of marriage, and in the summons, as originally framed, laid his case on *de præsenti* acknowledgment. Afterwards, in revising the condescendence, he added an averment of promise *subsequente copula*. In the course of the action an interlocutor was pronounced expressly allowing him an opportunity of proving the alleged *copula*, but he adduced no evidence. Decree of absolvitor was pronounced. A, after an interval of thirty years, raised another action of declarator of marriage against the representatives of the former defender, who had died, and specially averred *copula* in his condescendence. *Held* that this action was barred *exceptione rei judicatæ*, the grounds of action having been disposed of in the former case. Lockyer v. Ferryman, &c., June 28, 1876, p. 882.

RETENTION. See *Lease*, 10.

REVENUE. *Property and Income Tax Act*, 1842, 5 *and* 6 *Vict. c.* 35, *schedule B—Deer Forest—Assessment.*

1. The lessee of a deer forest is liable to be assessed under schedule B of the Property and Income Tax Act, in respect of occupancy, to the extent of the rent actually paid, and not merely to the extent of the rent which the land would yield if let for pastoral or agricultural purposes. Middleton v. Lord Advocate, March 16, 1876, p. 599.

Statute 5 *and* 6 *Vict. c.* 35 (*Property and Income Tax Act*, 1842), *sec.* 100, *sch. D.*

2. The Glasgow Corporation Gas Act, 1869, authorised the corporation to acquire certain gas-works, and to manufacture and sell gas to the inhabitants. The Act provided that the surplus revenue, after payment of annuities and

REVENUE—*Continued.*
interest of debt, should be applied to a sinking fund to reduce the debt, and to the general purposes of the corporation. *Held* that the corporation was liable to be assessed for income-tax under schedule D upon such surplus revenue. Glasgow Gas Commissioners v. Inland Revenue, June 20, 1876, p. 857.

REVOCATION, IMPLIED. See *Succession*, 13.

RIGHT IN SECURITY. *Bankruptcy—Trust-Deed—Agent and Principal.*
1. A granted a trust-deed for behoof of all acceding creditors in favour of R, and afterwards entered into an arrangement to pay a composition in four instalments, he being allowed to carry on his business, but subject to the supervision of B until the first instalment should be paid. The first two instalments were paid, but when A failed to pay the third B took possession of his shop and goods, and sold off everything for behoof of the creditors in the trust-deed. A had in the period after granting the trust-deed purchased and paid for some goods from C, but at the date when B took possession he was owing C the price of certain other goods, a portion of which were then in his shop. C, after obtaining decree against A for the price of the goods, sued B also for the price as really the principal in the transaction. *Held* that A not having been divested, and the trust-deed having been a mere security for payment of the composition, B was not in any sense a principal in the transaction, and that A alone was liable for the price of the goods. Miller v. Downie, March 4, 1876, p. 548.

Assignation.
2. The creditor in a bond and disposition in security granted an assignation, *inter alia*, of the heritable subjects disponed in the bond, but did not expressly assign the bond itself or the debt; the assignation, however, bore to be "in real security of" the sum in the bond. The assignation contained an assignation of writs conform to inventory, in which inventory the bond was included. The bond was not delivered to the assignee, but a copy was. Three years after the date of the assignation the estates of the creditor were sequestrated, and his trustee completed his title to the bond by recording a notarial instrument two years after the assignee had been infeft in the subjects. In a competition between the assignee and the trustee, *held* that the assignation was valid and effectual to convey the debt as well as the security. M'Cutcheon v. M'William, March 8, 1876, p. 565.

Statute 37 *and* 38 *Vict. cap.* 94, *sec.* 25—*Sasine—Recording.*
3. Where the holder of a security over certain heritable subjects, originally burgage but feued out by the magistrates, had, prior to the Conveyancing Act, 1874, recorded his infeftment in the Burgh Register, and his title was therefore objected to, *opinion* (*per* Lord Curriehill) that the provisions of the 25th section applied, and that the title was a good one. M'Cutcheon v. M'William, March 8, 1876, p. 565.

See *Fraud*, 1—*Pointing the Ground.*

RIVER. See *Nuisance.*

ROAD. *Possessory Judgment—Interdict—Sheriff.*
1. In 1815 district road trustees shut up a public road, and the proprietor of the solum enclosed, planted, and cultivated it, but the public continued to use it as a public footpath by forcing through the fences and walking on the cultivated ground. In cross petitions in the Sheriff Court for interdict at the instance respectively of the proprietor and some members of the public, the latter of whom challenged the legality of the proceedings of the trustees in shutting up the road, *held* that, although the public had proved possession of the footpath for seven years prior to the date of the petitions, that possession was not sufficient to entitle them to a possessory judgment, in respect that the proceedings of the road trustees, as shewn by their

ROAD—*Continued.*

minutes, were *prima facie* evidence that the possession of the public was unlawful. M'Kerron, &c. v. Gordon, Feb. 15, 1876, p. 429.

Public Footpath—Obstructions—Gates—Sheriff.

2. *Held* (1) that the proprietor of lands through which a public footpath ran, or his tenant with his leave, was, as in the case of servitude roads, entitled, for grazing purposes, to put swing wicket gates across the footpath, provided that the gates were not of an obstructive character; (2) that this right being one *meræ facultatis* could not be lost *non utendo;* (3) that it was within the jurisdiction of the Sheriff to grant interdict against interference with such gates recently erected, although for the seven preceding years, and from time immemorial, the public had enjoyed the use of the footpath without gates. Sutherland v. Thomson, Feb. 29, 1876, p. 485.

See *Lease*, 4—*Public Burden*, 3.

RUNRIG. See *Property*, 5.

SALE. *Contract—Reduction—Essential Error.*

1. A proprietor sold part of his ground for £75, believing it to be burdened with the cumulo feu-duty of £9, 15s. The purchaser knew that the portion effeiring to it was only 3s., and was aware of the seller's mistake. The disposition was revised by the seller's agent. The purchaser took possession and laid out several hundred pounds on the property. In an action by the seller for reduction of the disposition, and restitution, or alternatively for decree that the purchaser was bound to relieve the seller of the feu-duty of £9, 15s., and that that sum should be declared to be a real burden on the part sold, and that warrant should be granted to record decree to that effect in the Register of Sasines, the Lord Ordinary decerned in terms of the second alternative conclusions. *Held* that it was incompetent so to reform the contract, but decree of reduction and restitution granted on condition that the pursuer reimbursed the defender for his outlay on permanent additions to or improvements of the subjects. Steuart's Trustees v. Hart, Dec. 2, 1875, p. 192.

Principal and Agent—Usage of Trade—Proof—Parole.

2. Terms of letters *held* not to import a concluded contract of sale. *Held* incompetent to examine the brokers who had acted (by letter) for the parties as to whether the contract had been concluded by them or not, the correspondence falling to be construed by the Court. Towill and Co. v. The British Agricultural Association, Nov. 12, 1875, p. 117.

Suspensive Condition—Delivery—Bankrupt.

3. A quantity of flax was sold at a certain price, "draft at four months from this date." The goods were forwarded by railway on the evening of a Friday, and were delivered at the buyer's warehouse next morning, when they were received into stock and partly used by the buyer's manager without his knowledge. On the same day, Saturday, a letter of advice, invoice, and bill were posted by the sellers, and received by the buyer at his private residence after business hours. The buyer on calling at his works on Monday morning, for the first time learned that the goods had arrived, but before he had given any instructions regarding them he received a letter from his banker restricting his credit to an extent which obliged him to stop payment. The buyer then directed the goods to be put aside, and did not accept the bill. In a question between the sellers and the trustee for the buyer's creditors, *held* (1) that the acceptance of the bill was a suspensive condition of the sale, and that, until it was implemented, delivery of the goods did not pass the property; (2) that the sellers had not waived their right to insist upon the condition by forwarding the goods before receiving the acceptance; and, therefore (3), that the sellers were entitled to restitution of the goods. Brandt and Co. v. Dickson, Jan. 18, 1876, p. 375.

Disposition—Warrandice.

4. *Held*, upon the terms of the dispositive clause of a disposition, which con-

SALE—*Continued.*

tained a clause of absolute warrandice, that in regard to one of the subjects mentioned in the dispositive clause the seller had only undertaken to place the purchaser in his place, and had neither disponed or warranted the subjects. Leith Heritages Co. v. Edinburgh and Leith Glass Co., June 7, 1876, p. 789.

Warrandice.

5. *Opinions*, That, in considering a claim of damages for breach of warrandice, the Court is entitled to look beyond the technicalities of conveyancing language, and to refuse the claim if it shall appear that the bargain, as the parties understood and intended it, was fulfilled. Leith Heritages Co. v. Edinburgh and Leith Glass Co., June 7, 1876, p. 789.

Advertisement—Feu-Duty—Warrandice.

6. A villa was advertised for sale. After a description of the subjects, the advertisement contained the following words, "Feu-duty, £9," and concluded, "For further particulars apply to A B, in whose hands are the title-deeds and articles of roup." An intending purchaser, without applying to the agent named, addressed to the seller a written offer for the villa "as advertised," which was accepted. The titles shewed that the payment of £9 formed part of *cumulo* prestations amounting to £46, 19s., which affected a larger area of which the subjects formed part, and which had never been allocated. *Held* that the purchaser could not compel the seller to procure an allocation of the burdens or to insert in the disposition to be granted a clause warranting the purchaser against liability for a larger sum than £9 a-year, but was bound to accept a disposition in ordinary form. Nisbet v. Smith, June 6, 1876, p. 781.

See *Contract.*

SCHOOL. *Review—Board of Education—Education Act*, 1872, *sec.* 28.

1. A school board resolved that it was necessary to provide additional school accommodation, and this resolution was confirmed by the Board of Education. Thereafter the school board resolved that in consequence of sufficient interim accommodation having been provided the carrying out of the former resolution should be delayed. The school board having subsequently refused to comply with a requisition of the Board of Education to carry out their original resolution, the Court, on a petition and complaint at the instance of the Lord Advocate under sec. 36 of the Education Act, 1872, ordained the school board to comply with the requisition. Lord Advocate v. Stow School Board, Feb. 19, 1876, p. 469.

Burgh School—Education Act, 1872, *sec.* 46.

2. *Held* that the annual sum payable by the town-council of a burgh out of the common good to the school board, under section 46 of the Education Act, 1872, was a fair average of what the burgh school had actually cost the burgh, and that in computing this average retiring allowances to teachers and expenditure upon the school buildings were to be taken into account. School Board of Dunbar v. Magistrates and Town-Council of Dunbar, March 18, 1876, p. 631.

Dismissal of Schoolmaster—Malice—Education Act, 1872, *sec.* 60, *sub-sec.* 2.

3. The Court of Session has power to inquire into alleged deviations from the statutory procedure in the dismissal of a schoolmaster appointed prior to the Education Act, 1872, but not to review the judgment of the school board on the merits. Averments of malice against the school board in forming their judgment upon the inspector's report are irrelevant as a ground of reduction of their judgment. Macfarlane v. Mochrum School Board and Others, Nov. 9, 1875, p. 88.

Dismissal of Schoolmaster—Education Act, 1872, *sec.* 55—*Notice.*

4. *Held* that although in terms of the Education Act, 1872, a schoolmaster held office only during the pleasure of the school board, he was entitled to reasonable notice before dismissal, or to a money payment in lieu thereof. Morrison v. Abernethy School Board, July 3, 1876, p. 945.

SCHOOL—*Continued.*

Education Act, 1872, *secs.* 37 *and* 38—*Transfer of School to School Board—Endowed School.*

5. *Held* that the provisions of the Education Act, 1872, which prevent a school board acquiring by purchase or lease a school "erected or acquired, and maintained, or partly maintained, with funds derived from contributions or donations (whether by the members of a particular church or religious body or not) for the purpose, or authorised by the contributors or donors to be applied for the purpose of promoting education," apply only to "subscription" schools, and did not render illegal the lease to a school board of a school erected and maintained by an ancient endowment. M'Culloch, &c. v. Kirk-Session and Heritors of Dalry, July 20, 1876, p. 1182.

Trust—Mortification—School Board—Cy Pres.

6. Terms of an agreement between the trustees under an old mortification for "the erection of a free grammar school," and the school board of the parish sanctioned by the Court as carrying out as far as possible the founder's intentions. M'Culloch, &c. v. Kirk-Session and Heritors of Dalry, July 20, 1876, p. 1182.

SERVITUDE. *Implied Grant—Ish and Entry.*

1. The proprietor of a piece of urban ground sold a portion of it, the occupants of which had always enjoyed an access through the remaining portion, which the proprietor retained. In a question with the purchaser, *held* that there was an implied grant of the right of access. Walton Brothers v. Magistrates of Glasgow, July 20, 1876, p. 1130.

Confusio.

2. *Opinion* (*per* Lord President) that when two properties, standing on separate titles, and one having a servitude of passage over the other, are united in the person of one proprietor, the servitude is not in all circumstances extinguished *confusione* to the effect of making it necessary to constitute the servitude *de novo* when the proprietor alienates the original dominant tenement. Walton Brothers v. Magistrates of Glasgow, July 20, 1876, p. 1130.

Access.

3. Circumstances in which *held* that an obligation to construct an access to certain subjects in a town "in a proper and sufficient manner, so as to admit of a carriage or cart to pass thereon," was not implemented by leaving a passage nine feet wide, the passage so left being an access to dwelling-houses having doors in the passage as well as to the subjects behind, and a minimum width of twelve feet fixed. Cooper and M'Leod v. Edinburgh Improvement Trustees, &c., July 18, 1876, p. 1106.

Real Burden.

4. The front portion of certain house property was sold, the seller retaining the back portion. The disposition, which was duly recorded in the Register of Sasines, contained an obligation upon the purchaser forthwith to construct at his own expense a sufficient access from the street to the back portion, but the position and width of the stipulated access were not defined. The purchaser resold the subjects without having constructed a sufficient access, stipulating that his disponee should not be entitled to inspect the titles, and not giving him notice of the obligation in question. *Held* in an action by the proprietor of the back portion against the original purchaser of the front portion and his disponee that an effectual servitude of passage had been constituted. Cooper and M'Leod v. Edinburgh Improvement Trustees, &c., July 18, 1876, p. 1106.

See *Minerals*, 1—*Property*, 3.

SHERIFF. *Lease—Jurisdiction.*

1. An action to compel a person to implement a lease, by entering into possession and paying the rent, may competently proceed in the Sheriff Court, although the Sheriff may have to decide upon the constitution of the lease,

SHERIFF—*Continued.*

in consequence of the defender's denial of its existence. Robertson v. Cockburn, Oct. 22, 1875, p. 21.

Process—Proof—Act of Sederunt 10th July 1839, *sec.* 83.

2. After a proof in an action of filiation had been closed, and judgment given for the defender by a Sheriff-substitute, the pursuer appealed to the Sheriff, and also lodged in process a petition for the examination of the pursuer's sister, which examination was allowed by the Sheriff. *Held* that the additional witness ought not, in the circumstances, to have been examined. Mabon v. Cairns, Oct. 29, 1875, p. 47.

Process—Jurisdiction—Small Debt Act (1 *Vict. c.* 41).

3. *Held* that it is competent for the Sheriff in the Small Debt Court to entertain an action by an inspector of poor for recovery of payments of aliment to a pauper not exceeding £12, notwithstanding that it may be necessary to determine incidentally the question of the pauper's settlement. Nixon v. Caldwell, June 1, 1876, Justiciary Cases, p. 31.

Jurisdiction—Poor, collection of assessment for—8 *and* 9 *Vict. c.* 83, *sec.* 88.

4. *Held*, in an action brought in the Sheriff Court by a parochial board for recovery of poor-rates, that the function of the Sheriff is not ministerial to interpone judicial authority for recovery of the assessment but judicial, and that it is competent for the Sheriff to entertain and decide questions as to the legality of the assessment. M'Tavish v. Commissioners of Caledonian Canal, Feb. 3, 1876, p. 412.

See *Burgh*, 2—*Lease*, 2, 5—*Process*, 2—*Road.*

SHIP. *Charter-party—Demurrage—Lay-days.*

1. A charter-party stipulated that the vessel should "proceed to a loading berth in Leith docks, as ordered, and there load in ten working days, as customary, a full and complete cargo of steam coals." On 16th April the master intimated to the charterers that the ship, then lying at a loading berth, was ready to receive her cargo. The charterers had, however, entered her in the dockmaster's books for a crane berth, for which the vessel had to wait her turn till 3d May. In an action for demurrage, *held* that under the charter-party the charterers had the choice of a loading berth, but that the lay-days commenced to run from 17th April, when the loading might have been commenced. Dall' Orso v. Mason and Co., Feb. 4, 1876, p. 419.

Powers of Master—Liability of Owners for Repairs—Bottomry—Maritime Risk—Agent and Principal.

2. *Held* that persons who acted as owners of a ship, although not registered as such, by assuming the control of her, and appointing the captain, were liable for advances made on their credit to the captain for necessary repairs at a foreign port, and that this liability was not affected by the captain having granted, as an additional security, a bond which the majority of the Court were of opinion was not a valid bottomry bond. Miller and Co. v. Potter, Wilson, and Co., Nov. 9, 1875, p. 105.

Powers of Managing Owners—Liability for Furnishings.

3. When a vessel is in a home port, and the owners easily accessible, the managing part-owner cannot, without specific authority, bind his co-owners for extensive structural alterations. Steele and Co. v. Dixon, &c., July 8, 1876, p. 1003.

Carriage of Goods—Delivery—Risk.

4. Where goods are shipped for delivery at a certain port the general rule is that delivery of each bale is complete as soon as it passes over the ship's side into the hands of the harbour porters employed for the consignee. British Shipowners' Co. (Limited) v. Grimond, July 4, 1876, p. 968.

Collision—Merchant Shipping Act, 1854, *sec.* 388—*Reparation—Compulsory Pilotage.*

5. *To entitle the owners of a ship, under the charge of a licensed pilot, where such pilotage is compulsory, to the benefit of the provision of the statute*

SHIP—*Continued.*

which exempts them from liability when a collision has occurred by the fault of the pilot, it is sufficient for them to prove that the accident was occasioned by his fault, unless the facts proved raise a presumption of contributory fault on the part of the shipowners, which requires to be rebutted.

Circumstances in which held (*aff. judgment of the Second Division*) *that a collision had been caused by the fault of the pilot, and that there was no contributory fault on the part of the owners.* Clyde Navigation Trustees v. Barclay, Curle, and Co., May 23, 1876, H. L., p. 44.

See *Carrier—Insurance*, 1, 2—*Reparation*, 3.

SHIPBROKER'S COMMISSION. See *Agent and Principal*, 2.

SPECIAL CASE. See *Pupil*, 2.

STATUTE. *Edinburgh Street Tramways Acts*, 1871 *and* 1874, 34 *and* 35 *Vict. cap. lxxxix., sec.* 44, *and* 37 *and* 38 *Vict. cap. lxviii., sec.* 4.

A tramway company was bound by an agreement, embodied in its Act of incorporation, not to charge passengers more than 1d. per mile or fraction of a mile (minimum charge for each passenger being 2d.) They afterwards obtained an Act by which they were relieved of their obligation to lay certain lines, and were allowed instead to run omnibuses over these routes. This Act allowed them to charge "a sum not exceeding 2d. per mile for first-class passengers on omnibus routes and any tramway routes worked in connection therewith." *Held* that the second Act did not alter the rates chargeable for tramway passengers who did not use the omnibus routes. Edinburgh Street Tramways Co. v. Torbain, May 18, 1876, p. 655.

STATUTES.

1696, c. 25. See *Trust.*
17 and 18 Vict., c. 80. See *Registration Act.*
29 and 30 Vict., c. 118. See *Industrial Schools Act.*
33 and 34 Vict., c. 92, Municipal Elections (Scotland) Acts. See *Burgh.*
34 and 35 Vict., c. 56. See *Dogs Act.*
35 and 36 Vict., c. 62, Education Act. See *School.*
37 and 38 Vict., c. 34, Evidence Act, 1874. See *Proof.*
37 and 38 Vict., c. 94, sec. 25. See *Right in Security*, 3.

SUCCESSION. *Mortis Causa Settlement—Extrinsic Evidence.*

1. In the construction of a will *observed*,—

1. That it was an important element of interpretation that the words of conveyance employed were not at the date of the will habile to convey heritage in Scotland, though they afterwards became so by a change in the law several years before the testator's death.

2. That instructions to prepare a *mortis causa* deed are not admissible in construing the deed as evidence of the testator's intention.

3. That deeds and holograph writings made subsequently are admissible as evidence. Farquhar v. Farquhar's Executors, Nov. 3, 1875, p. 71.

Vesting—Trust—Beneficial Fee.

2. In a trust-settlement the trustees were directed to lay out the residue of the truster's estate (which amounted to £60,000) in the purchase of lands, and when the whole residue, or within £300 thereof, was so invested, to deliver a disposition of the lands to the truster's brother (who predeceased her) in liferent, and his son and the heirs whatsoever of his body in fee, whom failing, certain other persons, the trustees being declared to be "the sole and exclusive judges of the lands which, and the period when these should be purchased, free from the control of any of the heirs who may be interested therein." The trustees having invested all the residue except £20,000 in the purchase of lands, the truster's nephew raised an action against the trustees for declarator that he was entitled to payment of the £20,000 as his absolute property. *Held* (1) that the pursuer's rights as a beneficiary vested in him *a morte testatoris*; and (2) that, as the directions to the trustees to purchase lands were framed for the purpose of settling them on

SUCCESSION—*Continued.*

the pursuer as an unlimited fiar, and were not such as to confer a right on third parties, the pursuer was entitled to require payment of the £20,000 in cash. Spens v. Monypenny's Trustees, Oct. 29, 1875, p. 50.

Vesting.

3. A testator directed his trustees to pay to his widow out of the free income of his estate an annuity of £150, and to divide the surplus annual income of his whole estate equally among his three sons *nominatim*, the lawful issue of any deceasing being entitled to their parent's share. He further directed his trustees to divide the residue equally among his three sons "or the survivors of them, at such times and in such manner" as his trustees might think proper. *Held* that the residue vested in the sons at the testator's death. Henderson's Trustees v. Henderson, Jan. 8, 1876, p. 320.

Implied Direction to Convey.

4. The testator further directed his trustees on the death of his widow "to hold for and pay over to" his eldest son, whom failing, to his lawful children, equally among them, the free rents of a special heritable subject. After a similar provision for each of his two younger sons the testator directed that in the event of any of his sons dying and leaving issue the trustees should "hold and apply the free annual rents of the property hereby directed to be conveyed to such of my said sons for behoof of such child or children" until the youngest attained the age of twenty-one, when the property should be conveyed to or divided among such children equally. *Held* that there was an implied direction to convey the three properties to the testator's three sons respectively in fee, and that their right vested at the testator's death. Henderson's Trustees v. Henderson, Jan. 8, 1876, p. 320.

Marriage-Contract.

5. Trustees found bound to denude in favour of the primary creditors upon liferentrix renouncing her interest. Grant v. Grant's Trustees, Jan. 4, 1876, p. 280.

Vesting—Nearest of Kin.

6. Two spouses made a mutual disposition of their whole estate by postnuptial contract, directing that the survivor should have the liferent of the whole, and that after his or her death the estate should pass to trustees, who were directed to divide it into two equal portions, and to pay or convey one to any persons to be appointed in writing by the husband, and "failing his executing such, to his nearest in kin equally." The husband predeceased, having made no appointment of legatees. Upon the death of the wife, *held* that the fee of the husband's half of the estate destined to his next of kin was intended to be given to those who should be his next of kin at the date of his death, and that upon his death without having exercised the power of appointment their interest vested. Ferrier v. Angus, Jan. 21, 1876, p. 396.

Vesting.

7. A testator, after directing payment of two annuities, and providing a liferent of the remainder of his estate to his wife, if she survived him, directed his trustees that the residue of his estate should, upon the death of his wife, or upon the death of the longest liver of the two annuitants, "whichever of these events shall last happen, but not earlier, be divided equally, share and share alike, among the children of my said two sisters, and if any child or children shall have died, either before the date of these presents or before the said period of division, then their issue shall, equally among them, succeed to their parent's share: Declaring that in the case of females, whether children or the issue of children, the provision in their favour shall be exclusive of the *jus mariti* or right of administration of any husbands whom they may have married or may marry, and as well in that case as in that of any of the other beneficiaries of the fee, even males, their provision shall be either paid to themselves upon their own receipt, or secured for their behoof by my said trustees and their aforesaids in such way as they

SUCCESSION—*Continued.*

in their sole discretion may think most fit for the interest of the beneficiaries." The testator's wife predeceased him. *Held* that the residue did not vest till the death of the last survivor of the annuitants. Sloane v. Finlayson, May 20, 1876, p. 678.

Contingent Vesting—Fee and Liferent—Defeasible Fee—Resolutive Condition—Presumption of Life.

8. In 1816 a testator disponed heritage to his son, if in life, and the heirs of his body, whom failing, to the testator's daughters in liferent, and after the decease of the survivor of them, to his grandson (a bastard) and the heirs of his body, whom failing by predecease without issue, to the testator's nephew and his heirs in fee. It appeared from a proof that in 1802 the testator received information that his son, a sailor, then fourteen years of age, had been drowned abroad, and that nothing had occurred to throw doubt on the correctness of this information. The testator was survived by his daughters, his grandson, and his nephew. The grandson executed a conveyance of the heritage, but predeceased the liferenters without leaving issue. In an action of declarator brought by the representatives of his disponee, *held* (1) that the son (who would have been ninety years old if alive) was dead without issue; (2) that on the testator's death the fee vested in his nephew, subject to defeasance in the event of its appearing that the son survived the testator or left issue, and also in the event of the grandson surviving all the liferenters; and (3) that as the grandson predeceased the last survivor of the liferenters the fee never vested in him, and he had no power to convey. M'Lay v. Borland, July 19, 1876, p. 1124.

Conditio si sine liberis decesserit.

9. A testator bequeathed his whole estate to his father (who predeceased him), whom failing, to the testator's whole brothers and sisters *nominatim*. *Held* (1) that the *conditio si sine liberis* did not apply in favour of the issue of a brother who predeceased the testator; (2) that there was no partial intestacy, and that the surviving brothers and sisters were entitled to the whole fund. Blair's Executors, &c. v. Taylor, &c., Jan. 18, 1876, p. 362.

10. Circumstances in which the *conditio si sine liberis* was applied to a bequest by a person to the children of his brothers uterine in respect of the terms of the testament. Nicol v. Nicol's Executor, &c., Jan. 18, 1876, decided July 13, 1875, p. 374.

11. A truster bequeathed the liferent of her estate to her grandson A, with power to the trustees to make payments to him out of capital, and on his death the fee of the estate, or of so much as should remain, to A's issue, whom failing, to one of her nephews W, whom failing, to his two children *nominatim*, "and to the survivor of them, and failing both, to my own nearest heirs and assignees whomsoever." A died without issue. W and his children predeceased A, but W's children were survived by issue. *Held*, in a competition between W's grandchildren and the representatives of the next of kin of the truster, that the *conditio si sine liberis* did not apply. Gillespie v. Mercer, &c., March 8, 1876, p. 561.

Vesting.

12. A testator by holograph will expressed his wish that his whole estate should be liferented by his wife, and that at her death his moveable property should be equally divided between his younger children, "or, if dead, their nearest lawful heirs, share and share alike," and nominated trustees to carry out his intentions. *Held* that the younger children's shares vested at the testator's death. Jackson, &c. v. M'Millan, &c., March 18, 1876, p. 627.

Mutual Deed—Implied Revocation, terms of—Investment—Parole Proof.

13. Two sisters executed a mutual deed and settlement, giving their whole property each to the other in liferent, and to certain beneficiaries in fee, but reserving power to each to alter during their respective lives. Thereafter their whole funds were reinvested under the superintendence of two friends, and the new investments were taken in terms such as to confer an absolute title of property on the survivor. The surviving sister having left

SUCCESSION—*Continued.*

a new settlement, conveying her whole means to trustees, in a competition between the beneficiaries under the mutual settlement and those under the later settlement, as to the property of the predeceasing sister, *held* (1) that it was competent to prove by parole evidence that the sisters had given no authority to change the terms of the investments; and (2) upon proof that no such authority had been given, that the predeceasing sister's property still remained under the operation of the mutual settlement. Renton's Trustees v. Alison, July 20, 1876, p. 1142.

See *Fee and Liferent—Foreign*, 1—*Heritable and Moveable.*

SUPERIOR AND VASSAL. *Obligation—Relief—Public Burden—Landlord and Tenant.*

1. A feu-charter dated in 1814 contained the following clause:—"During the existence of the present feu-right all public and parochial burdens or taxes imposed or to be imposed shall be paid by the superior and vassal as if the former was proprietor and landlord and as if the latter was tenant under him." *Held*, in an action by the vassal for relief of all poor-rates payable in respect of property, that the superior was only bound to relieve the vassal of poor-rates on the annual value of the feu-duty.

Observations (*per* Lord President and Lord Deas) as to the competency of looking behind a feu-charter at other and prior documents with a view to construing the charter. Smith, Laing, and Co. v. Maitland, &c., Jan. 7, 1876, p. 281.

Reddendo—Conversion of Victual Feu-Duty—Bear or Barley.

2. The reddendo of certain lands in the county of Fife, held under a charter of date 1622, was a victual feu-duty of "three chalders bear, guid and sufficient stuff." After proof that the vassals had been in use for upwards of a century to pay this victual feu-duty converted in whole or in part at the rate of the barley fiars, at first, of Midlothian, and latterly of Fife, *held* that the term "bear" occurring in deeds of the date of the original charter of 1622 applied equally to bear and barley, and that the usage of payment determined that the victual feu-duty was to be paid in barley, or converted at the Fife fiars prices for barley. Ferguson's Trustees v. Magistrates of Kinghorn, Jan. 27, 1876, p. 401.

Agent and Client—Statute 37 *and* 38 *Vict. c.* 94 (*Conveyancing Scotland Act* 1874), *sec.* 4.

3. When a casualty becomes due the superior's agent is not entitled to record at the vassal's expense in the superior's chartulary the disposition by the recording of which the vassal obtained an entry. Magistrates of Edinburgh v. Whitehead, &c., May 18, 1876, p. 663.

Feu-Contract—Conditions—Minerals.

4. A feu-contract, in which the superior reserved the minerals, and bound himself to pay any damage caused to buildings by working them, contained a stipulation that the vassal should not erect any other building than cottages, to be used as dwelling-houses, with suitable office-houses. The vassal having built a house of two stories, *held* that the superior had sufficient interest to enforce implement of the condition, and the vassal ordained to take down the house, in so far as it exceeded one square storey and attics. Naismith v. Cairnduff, June 21, 1876, p. 863.

Conditions—Plan.

5. A feu-contract provided that the buildings to be erected should consist of cottages, with suitable offices, "which cottages shall not exceed four in number, and shall be built on the sites shewn on the plan, and shall front to the north, and shall each of them be in point of size and accommodation as well as architectural character, at least equal to either of the two cottages which have been already erected." *Held*, in a question between the superior and vassal, that the feu-contract was not to be construed as restricting the vassal to the precise limits of the building sites shewn on the plan. Naismith v. Cairnduff, June 21, 1876, p. 863.

See *Minerals*, 1—*Property*, 4—*Public Burden.*

TEINDS. *Augmentation—Value of Glebe Feu-Duties.*

1. In an application by a minister for augmentation of stipend, *held* that the revenue derived from portions of the glebe feued under the Glebe Lands (Scotland) Act, 1866, was not to be taken into account in determining whether or not an augmentation should be granted. Minister v. Heritors of Kilmalcolm, Oct. 25, 1875, p. 32.

Augmentation—Decimæ inclusæ.

2. In an augmentation the minister condescended upon free teind arising from several different parcels of lands. Only one of the heritors objected to the condescendence, and on the ground that he held his lands under a title *cum decimis inclusis*, and craved that the process should be sisted that the minister might bring a declarator to try the validity of the objector's *decimæ inclusæ* right. *Held* that as there was free teind apart from that of the objecting heritor the minister was entitled to an augmentation, and that the objection of the individual heritor would fall to be disposed of in the locality. Minister of Borthwick v. Dundas, Jan. 17, 1876, p. 361.

TESTAMENT. See *Foreign*, 1.

TITLE TO SUE. *Proving of the Tenor.*

Where a pursuer was unable to recover deeds constituting his title to sue, *held* that it was necessary for him to bring an action of proving of the tenor before the action could proceed. Shaw v. Shaw's Trustees, June 13, 1876, p. 813.

TRAMWAYS. See *Statute.*

TRUST. *Charitable Bequest.*

1. A testator left £500 to the kirk-session of a parish, the interest of which he directed to be applied to the relief of such poor persons, natives of the parish, as the kirk-session should consider to be proper objects of such aid, but who had never received relief from the poor-funds, "declaring that the minister and elders constituting the kirk-session" "shall be perpetual patrons of the said sum, and shall have the sole power of naming the said individuals." *Held* that the kirk-session was entitled to depute the duty of selecting the objects of the charity to the minister. Turbyne v. Kirk-Session of Leuchars, Oct. 15, 1875, p. 10.

Indefinite Payments.

2. Where a trustee, holding two different funds for the same beneficiary, makes indefinite payments to the beneficiary, without fixing at the time from which fund the payments come, the incidence and legal effect of the payments are not to be determined by the arbitrary choice of the trustee, but the payments must be equitably apportioned between the two funds according to legal rules, if the trustee has a balance in his hands from both, or, if not, they must be held to have been made from that fund in which he had a balance in hand at the time. Beith v. Mackenzie, Nov. 30, 1875, p. 185.

Power to Feu—Trusts (Scotland) Act, 1867, *sec.* 3.

3. A truster, who died in 1825, left the residue of his estate to be applied for behoof of a grammar school, and directed his trustees to let a park belonging to the trust-estate annually or on lease for a period not exceeding seven years, "declaring that my said park shall never be sold or disposed of." In a petition by the trustees for authority to feu the park, *held* that the Court could not grant authority to feu, as that was contrary to the truster's intention as expressed in the trust-deed. Anderson, &c., May 13, 1876, p. 639.

Prescription—Mortification—Act 1696, *c.* 25.

4. By deed of mortification the granter assigned certain sums to the town-council of a burgh to be invested and the proceeds applied towards the maintenance of a professor in a university. The funds were invested in land, which were managed for many years by the master of mortifications, an officer of the corporation, in whose name the title was taken. Afterwards

TRUST—*Continued.*

the town-council appointed a portion of the lands, including a strip of land on the sea-coast, to be exposed for sale by public roup. The subjects were sold for payment of a feu-duty, and to a person who afterwards declared that he had purchased on behalf of the treasurer of the town, and the latter was infeft upon charter in his favour for behoof of the magistrates, council, and community. Soon afterwards the town-council, upon a representation that they were proprietors of the ground, obtained from the Crown a grant of the salmon-fishings *ex adverso* of the strip of land. In an action of declarator brought more than forty years afterwards by the university, with concurrence of two professors interested in the mortification, *held* (1) that the town-council still held the lands in trust for the mortification, and that they could plead no prescriptive right against the trust; (2) that, having acquired the fishings in the character of proprietors of the trust-property, they were bound to communicate the benefit to the trust, and hold them for behoof of the trust; (3) that the consent and concurrence of the two professors gave the university a sufficient title and interest to sue for arrears.

Observations (*per* Lord Deas) on Trust Act, 1696, c. 25. University of Aberdeen v. Magistrates of Aberdeen, July 18, 1876, p. 1087.

See *Entail*, 1—*Expenses*, 4—*School*, 6—*Succession*.

WARRANDICE. See *Sale*, 4, 5, 6.

WRIT. *Subscription.*

1. *Held* that it did not invalidate the subscription of the maker of a deed that he was assisted by having his hand held about the wrist, the hand not having been led in the formation of the letters. Noble v. Noble, Nov. 5, 1875, p. 74.

Notarial Execution—Docquet.

2. *Held* that the 41st section of the Conveyancing Act, 1874, does not prescribe the use of the form in schedule (I), but merely suggests it as a good form, and that therefore a notarial docquet which was otherwise sufficient was not rendered invalid by its disconformity to the schedule. Atchison's Trustees v. Atchison, Jan. 21, 1876, p. 388.

Attesting Witnesses.

3. The Conveyancing and Land Transfer (Scotland) Act, 1874, sec. 39, enacts that "no deed, instrument, or writing subscribed by the granter or maker thereof, and bearing to be attested by two witnesses subscribing, and whether relating to land or not, shall be deemed invalid or denied effect according to its legal import because of any informality of execution." *Held* that the clause did not apply to a case where the signatures of witnesses bearing to attest the subscription of the granter of a deed were adhibited before the subscription of the granter, and where the witnesses neither saw the granter sign nor heard him acknowledge his subscription. Smyth v. Smyth, March 9, 1876, p. 573.

Authentication—Conveyancing and Land Transfer (Scotland) Act, sec. 39.

4. *Held* that a writing consisting of more than one sheet, and bearing the name of the alleged granter by way of subscription on the last page only, along with the names of two attesting witnesses, may be proved by evidence *prout de jure* to be a "deed, instrument, or writing subscribed by the granter or maker" within the meaning of the 39th section of the Conveyancing Act, 1874. M'Laren v. Menzies, July 20, 1876, p. 1151.

See *Mandate*.

CASES DECIDED IN THE REGISTRATION APPEAL COURT.

DEFEASIBLE TITLE. See *Valuation-Roll.*

POOR-RATES. *Notice by Collector of non-payment*—31 *and* 32 *Vict. c.* 48, *secs.* 6 *and* 18.

A voter's name was struck off the roll for non-payment of poor-rate, in terms of sec. 6 of the Reform Act, 1868. No notice had been given him in the form of schedule C, referred to in sec. 18 of the Act, nor had any "demand-note" been served upon him in terms of that section, except that he had received on 5th February the usual notice of assessment to the effect he had been assessed in a certain sum, and that it was payable on 16th February. *Held* that the notice of assessment was sufficient to satisfy the requirement of the 18th section of the statute, and that the name had been rightly struck off the roll. Mackenzie v. King, Nov. 1, 1875, p. 8.

SUCCESSIVE QUALIFICATIONS. *Burgh Franchise.*

1. *Held* that occupancy, as tenant, of one house in a burgh, combined with occupancy, in immediate succession, as owner, of another house in the same burgh, gave a qualification for the burgh franchise when the combined occupancy extended over the requisite period. Hannah v. Dodds, Nov. 1, 1875, p. 7.

County Franchise.

2. *Held* that the successive ownership of different premises, and merely civil possession during the requisite period, did not afford a qualification for a vote in a county. Learmont v. Young, Nov. 1, 1875, p. 5.

VALUATION-ROLL. *County Franchise*—17 *and* 18 *Vict. c.* 91, *sec.* 34.

Ailsa Craig was let for £30 a-year to two joint tenants, with a cottage thereon, which was worth £7, 10s. a-year, together with the right to kill wild fowls, wild goats, and rabbits, under certain restrictions as to quantity and seasons. There was reserved to the landlord full right, without any qualification and without compensation, "to shoot, kill, and carry away fowls, goats, and rabbits" from the Craig. Ailsa Craig was totally incapable of agricultural occupation. It was entered in the valuation-roll as land, value £30 a-year, and the tenants were each entered as voters on the assessor's list as "joint tenant, land, Ailsa Rock." *Held* that the valuation-roll was conclusive; and objections,—that the accessory right not being heritable, its value must be deducted, and that the landlord's reserved right was such as to give him control over the value, and therefore over the qualification to vote,—*repelled.* Girvan v. Campbell, Nov. 1, 1875, p. 1.

CASES DECIDED IN THE COURT OF JUSTICIARY.

ADMINISTRATION OF JUSTICE. *Trespass—Question of Civil Right.*

In a criminal prosecution before a Justice of Peace Court, for fishing for salmon without leave of the proprietor, the accused admitted having fished for salmon on the day and at the place libelled, but maintained that as a member of the community of Perth he had a right to fish at the place libelled, and in support of his contention produced a copy, admitted to be correct, of a royal charter in favour of the citizens of Perth, and offered to prove that possession had followed upon the charter of the right to fish for salmon at the place libelled from the date of the charter to the present period. The Justices convicted the accused. *Held*, that a question of civil right being involved, the Justices should have either sisted procedure or dismissed the complaint,—and the conviction *quashed*. Barlas v. Chalmers, April 4, 1876, p. 26.

APPEAL.

There is no appeal to the House of Lords from judgments of the Court of Justiciary. Mackintosh v. Lord Advocate, March 23, 1876, H. L., p. 24.

BAIL. *Furtum grave—Statute* 1701, *c.* 6.

1. *Held* that the crime of stealing from the person "a gold or other metal watch," aggravated by two previous convictions of theft was a capital crime, and therefore not bailable, under the Act 1701, c. 6, on the mere demand of the accused. Wilson v. Lord Advocate, Oct. 20, 1875, p. 1.

Furtum grave

2. Petition to be admitted to bail refused, in respect that the crime charged was a *furtum grave*, and therefore capital, and that the Lord Advocate had refused his consent to bail being accepted. Wilson v. Lord Advocate, Oct. 20, 1875, p. 1.

Crime—Breach of Trust or Theft.

3. A prisoner was committed on a charge of breach of trust or alternatively of theft, based upon the allegation that he had been employed by a person to uplift money and apply it to a particular purpose, and that he had not so applied it, but had appropriated it to his own use. Bail having been refused by the Crown, the prisoner applied to the Court to be admitted to bail, on the ground that the petition on which the warrant of commitment had been granted did not set forth facts which constituted theft, but only breach of trust, and that the charge of theft had been added simply to deprive him of the benefit of being admitted to bail. *Held* that the facts alleged might either fall within the category of breach of trust or theft, according to the circumstances, and petition refused. Wormald v. Lord Advocate, Dec. 3, 1875, p. 13.

EXPENSES.

Observations (*per* Lord Deas) on awarding and modifying expenses in appeals to the Court of Justiciary. M'Intyre v. Linton, July 21, 1876, p. 41.

FISHINGS. See *Administration of Justice—Summary Prosecutions Appeals Act.*

HARBOURS, DOCKS, AND PIERS CLAUSES ACT (10 *Vict. c.* 27), *secs.* 81 *and* 82.

In virtue of their powers under the Harbours, Docks, and Piers Clauses Act, 1847, which is incorporated in the Greenock Port and Harbours Act, 1866, the Greenock Harbour Trustees appointed and licensed a sufficient number of persons as weighers within the limits of the port and harbour of Greenock. By the 82d section of the first-mentioned Act it is provided that where a sufficient number of meters and weighers have been appointed by the trustees, masters of vessels and owners of goods discharged at the port shall

HARBOURS, DOCKS, AND PIERS CLAUSES ACT—*Continued.*
not employ any person other than a weigher or meter licensed by "the trustees, or appointed by the Commissioners of Customs to weigh or measure the same," and if in such case any person other than a meter or weigher, licensed by the trustees or appointed by the Commissioners of Customs, shall weigh or measure any such goods as aforesaid, such person, as well as the person by whom he shall be employed, shall incur a penalty. *Held* that the object of the provision was to exclude the employment for hire of unlicensed weighers, but not to prevent merchants and others weighing their own cargoes by the hands of their own clerks. Nicol v. M'Callum, June 30, 1876, p. 34.

INDICTMENT. *Relevancy—Fraud—Insolvency—Putting away Goods to defraud Creditors.*
1. *Held* that an indictment which charged in the major premise "fraud, particularly the wickedly, fraudulently, and feloniously putting away, carrying off, or secreting by an insolvent *or other* debtor, of his funds or effects, with intent to defraud his creditors," was not relevant, by reason of the interjection of the words "or other" between "insolvent" and "debtor." Clendinnen v. Rodger, Dec. 2, 1875, p. 3.

Theft—Relevancy.
2. In an indictment charging alternatively theft and breach of trust, it was stated in that part of the minor which related to the charge of theft that the panel, being a law-agent, and having been entrusted by a client to uplift a sum belonging to him, deposited in bank, for the special purpose of investing the same in heritable security, did then steal and theftuously away take the said sum. *Held* that this was a relevant charge of theft. Lord Advocate v. Wormald, March 27, 1876, p. 24.

Relevancy—Day Trespass Act, 2 and 3 Will. IV. c. 68, sec. 1.
3. The Day Trespass Act, 2 and 3 Will. IV. c. 68, sec. 1, makes it an offence to "commit any trespass by entering or being in the daytime upon any land, without leave of the proprietor, in search or pursuit of game," &c. *Held* that a general conviction proceeding upon a complaint which charged the panel with having in the daytime committed a trespass, "by entering or being without leave of the proprietor in and near to a field on the farm of K" in pursuit of game," could not be sustained. Arthur v. Peebles, June 30, 1876, p. 38.

POLICE. *General Police and Improvement Act, 1862 (25 and 26 Vict. c. 101), sec. 130.*
Held that the 130th section of the General Police and Improvement Act, 1862, which required "owners of common stairs," &c., to make, on the requisition of the Police Commissioners, "provisions for lighting such common stair," &c. "in a suitable manner, and for that purpose to provide and erect all necessary lamps, and alter, repair, and renew the same," did not impose on the owners the duty of supplying gas or other illuminating substance. Stewart v. Edwards, Dec. 8, 1875, p. 14.

PROCESS. *Suspension—Summary Prosecutions Appeals Act, 1875, 38 and 39 Vict. c. 62, secs. 3 and 9.*
A having been convicted in the Sheriff Court on a summary complaint, applied to the Sheriff, under the Summary Prosecutions Appeals Act, 1875, sec. 3, to state and sign a case for appeal. After the case was prepared by the Sheriff-clerk in terms of the statute, but before it was adjusted and signed by the Sheriff, A lodged a minute withdrawing his application for a case. He afterwards brought a suspension of the Sheriff's judgment. *Held* that he had not appealed in the sense of that and the 9th section of the Act, and that the suspension was not excluded. Kay v. Kelso Local Authority, June 30, 1876, p. 40.

PUBLIC-HOUSE. *Public-House Certificate, breach of—Public-Houses Acts Amendment Act*, 1862, *schedule (A), No.* 2.

1. In an appeal against a conviction for breach of a public-house certificate by selling exciseable liquor to a child "apparently under fourteen years of age," *held* that though there would be no breach of certificate committed by supplying liquor to such child when he is a messenger for an adult, yet the publican is not entitled to assume, without inquiring and satisfying himself, that the child is the messenger of an adult. Donaldson v. Linton, Dec. 8, 1875, p. 16.

Certificate—9 *Geo. IV. c.* 58, *secs.* 19 *and* 21.

2. A tenant of an hotel obtained in February 1876 a transfer of the certificate for the sale of exciseable liquors granted to his predecessor for the year from 15th May 1875 to 15th May 1876, and at a licensing Court held on 11th April 1876, the magistrates granted him a new certificate from 15th May 1876 to 15th May 1877. Upon 4th May 1876 he was convicted of having on Sunday, 23d April, sold exciseable liquors to persons not being lodgers or travellers, and his certificate was adjudged to be void and null from the date of the conviction. *Held* that the forfeiture was not applicable to the transferred certificate, under which the hotel-keeper was then trading, and did not affect the new certificate, which was only to come into force upon 15th May 1876, and that therefore a conviction against him for selling exciseable liquor in July 1876 without a certificate was bad. M'Intyre v. Linton, July 21, 1876, p. 41.

RUNNING LETTERS. *Crime—Criminal Letters.*

A person was apprehended on 30th October, and committed to prison on 6th November 1875, on a charge of theft. On 18th December the prisoner obtained letters of intimation, which were intimated to the Crown on 20th December 1875. On 17th February 1876 the prisoner was served with an indictment citing him before the High Court of Justiciary on 28th March, these dates being respectively the fifty-ninth and ninety-ninth days from the date of the prisoner commencing to run his letters. On the averment that he had been already four months in prison, and that he believed it was not the intention of the Crown to proceed to trial on the 28th March 1876, but to apply for warrant to serve criminal letters on him under 1701, c. 6, and try him at the Dundee Spring Circuit Court, the petitioner craved the Court, before granting warrant for serving criminal letters upon him, to appoint him to appear and shew cause why such warrant should not be granted.

Petition *refused*—and observed that even if the petitioner had made out a case of hardship the Court would not interfere with the issuing of criminal letters, but would only require the Crown to give notice to the petitioner before a warrant of recommitment was applied for with a view to the service of the letters. Simpson v. Lord Advocate, March 4, 1876, p. 22.

SALMON FISHERIES ACT, 1844. See *Summary Prosecutions Appeals Act*, 1875.

SMALL DEBT ACT. *Process—Jurisdiction—Small Debt Act* (1 *Vict. c.* 41).

Held that it is competent for the Sheriff in the Small Debt Court to entertain an action by an inspector of poor for recovery of payments of aliment to a pauper not exceeding £12, notwithstanding that it may be necessary to determine incidentally the question of the pauper's settlement. Nixon v. Caldwell, June 1, 1876, p. 31.

STATUTE. See *Harbours, &c., Act.*

SUMMARY PROSECUTIONS APPEALS ACT, 1875. *Crime—Contravention of Salmon Fisheries Act*, 1844 (7 *and* 8 *Vict. c.* 95).

A fisherman was charged with a contravention of the Salmon Fisheries Act, 1844, sec. 1, by unlawfully and wilfully taking, fishing for, or attempting to take sea-trout by means of set lines. It was stated in defence, that, finding sea-trout upon lines which, as he averred, he had baited and set for flounders in a bay or estuary of the sea frequented by both kinds of fish,

SUMMARY PROSECUTIONS APPEALS ACT, 1875—*Continued.*
he had appropriated them. He was acquitted by the Sheriff after evidence led. In an appeal under the Summary Prosecutions Appeals Act, 1875, at the instance of the prosecutor, *held* that the question whether the respondent had *wilfully taken* the fish, in contravention of the statute, was one of fact for the inferior Judge; that there was no question of law for the Court; and appeal dismissed. Grant v. Wright, May 31, 1876, p. 28.

TRESPASS. *Poaching—Day Trespass Act*, 1832 (2 *and* 3 *Will. IV. c.* 68), *sec.* 1—*Person residing with Tenant.*
1. *Held* that a person who resided with his sister on a farm of which she was tenant, and who assisted her in the management thereof without remuneration except his board, was not, as regarded the said farm, protected from the operation of the Day Trespass Act by reason of the provision in the first section thereof, which allows a person charged with a trespass to prove, by way of defence, any matter which would have been a defence to an action at law for such trespass. Black v. Bradshaw, Dec. 16, 1875, p. 18.
See *Indictment.*
Game—Day Trespass Act, 2 *and* 3 *Will. IV. c.* 68—*Trespass—Rabbits—Tenant's Power of delegating right to kill Rabbits.*
2. The tenant of a farm, who resided at a distance, put his daughter and her husband into the farm to manage it. *Held* that the rabbits not being reserved to the landlord, the tenant was entitled to authorise his son-in-law to kill rabbits, and that the son-in-law was, in virtue of the tenant's authority, exempted from the provisions of the Day Trespass Act. M'Adam v. Laurie, March 1, 1876, p. 20.

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